

**Protecting childhood:
a children's rights approach to the interpretation
of the 1951 Convention relating to the Status of
Refugees**

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Summary

Children make up half of the world's refugees and over 40 per cent of the world's asylum seekers. It would be logical to assume that children would be a visible group within refugee law and refugee discourse, in particular in relation to their qualification as refugees. This has not been the case. In fact, children are largely invisible in historical and contemporary refugee law. Furthermore, there has been very limited interaction between the burgeoning children's rights framework, in particular the Convention on the Rights of the Child (CRC) and the 1951 Convention relating to the Status of Refugees (Refugee Convention). The CRC was adopted nearly 40 years after the Refugee Convention, meaning the Refugee Convention was adopted at a time when there was no international children's rights law framework. This poses a challenge to refugee determinations.

The CRC inspired research and guidance on the topic of child refugees. There was evidence of the two legal regimes cross-pollinating from the 1990s. The CRC was even trickling into case law. Despite these developments, the CRC has had relatively little impact to date on the qualification of child refugees. Developments in refugee law prior to and after the adoption of the CRC indicate that more work is needed to bridge this gap. This thesis explores the possibility of a children's rights approach to the interpretation of the Refugee Convention and within that what such an approach might look like. Developments in the literature, guidance and case law indicate that such an approach is a logical next-step in the evolution of child refugee law.

In order to construct a children's rights approach, the conceptualisations of children outside the legal discipline, within international children's rights law and then within refugee law and refugee discourse are analysed. The approach taken is socio-legal and comparative in nature. The suitability of the Refugee Convention as a framework for the interpretation of child claims is examined. This thesis analyses to what extent the Refugee Convention is capable of dealing with claims from

children based on the existing conceptualisation of children which is underscored by two competing ideologies – the child as a vulnerable object in law to be protected and the child as subject with rights and the capacity to exercise their agency.

This analysis is necessary as there is a significant gap between the two areas of law. The influence each regime has had on the other is analysed. At the core, this thesis examines the CRC and the rights relevant to conceptualising childhood therein and instances where violations of those rights amount to persecution. This thesis makes an original contribution to child refugee discourse as it is the first example of research examining the qualification of child refugees through a children's rights lens, rather than through a refugee law lens. Furthermore, this is the first piece of research to look at the potential for a children's rights approach to the interpretation of the Refugee Convention and detailing what that approach might involve and how it might improve outcomes for child applicants.

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Chapter One Introduction

1. Introduction

In 2014, UNHCR estimated that worldwide there were 14.4 million refugees, 1.8 million asylum-seekers, 32.3 million internally displaced persons protected or assisted by UNHCR and 3.5 million stateless persons, among others of concern.¹ UNHCR also estimated that children made up 51 per cent of the total refugee population. This represented an increase of 10 per cent in the proportion of refugees that were children since 2009.² While children remain less likely to apply for asylum than their adult counterparts, there has been an increase in both the number of child refugees and child asylum seekers, globally.³ In 2014, the proportion of child asylum seekers was still less than the proportion of children in refugee situations worldwide, but the gap has narrowed.⁴ It would be logical to assume, given these numbers, that children would be a highly visible group within refugee law and refugee discourse, in particular in relation to their qualification as refugees. This, however, has not been the case to date.

This thesis analyses the conceptualisation of children within refugee law and refugee discourse. It examines the suitability of the 1951 Convention relating to the Status of Refugees (Refugee Convention) as a framework for the interpretation of child claims. It also analyses to what extent a children's rights approach to the interpretation of the Refugee Convention is possible, while recognising that children's rights violations must not only amount to persecution, but must be characterised by differential impact on the basis of discrimination. This analysis is necessary as there is a significant gap between the two areas

¹ Others of concern include refugees and others who returned to their place of origin. The total number of people of concern to UNHCR in 2014 was estimated to be 54.96 million. See: United Nations High Commission for Refugees *Statistical Yearbook* (2014).

² United Nations High Commission for Refugees *Statistical Yearbook* (2014).

³ *Ibid.* These statistics were not disaggregated by region.

⁴ In 2010, only one third of the total number of persons seeking asylum were children. United Nations High Commission for Refugees *Statistical Yearbook* (2010).

of law, not least of all because the Convention on the Rights of the Child (CRC) was adopted by the General Assembly of the United Nations nearly 40 years after the adoption of the Refugee Convention. The fact that the Refugee Convention was adopted at a time when there was no CRC and international children's rights law was only emerging, poses a challenge to children's rights and refugee discourses and indeed refugee determinations.

Children's rights in international law,⁵ including refugee law,⁶ has, however, experienced noticeable growth since the late 1980s. The rapid growth and the near universal acceptance of the CRC as a formula for protecting childhood were catalysts for this research. The emergence of concerted efforts at cross-pollination between the two areas of law provided the impetus to address the hypothesis that a children's rights approach to the interpretation of the Refugee Convention is both possible and needed. Notwithstanding the progress made in children's discourse in recent decades, the CRC has had relatively little discernible impact to date on child refugee law. Developments in refugee law prior to and after the adoption of the CRC indicate that such an approach is nevertheless a logical next-step in the evolution of child refugee law.

This thesis analyses the influence each regime has had on the other. At the core, it looks at the CRC and the rights relevant to conceptualising childhood therein and examines instances where violations of those rights amount to persecution. In order to analyse the nexus between children's rights and refugee law, a number of subthemes are examined. The first subtheme relates to the conceptualisation of the child within philosophical, sociological and legal discourses to establish which rights and protections apply to children. Chapter Two examines whether or not there is a universal understanding of children outside the rights discourse

⁵ Ann Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 *International Journal of Children's Rights* 233.

⁶ See United Nations High Commissioner for Refugees, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees* HCR/GIP/09/08 22 December 2009. For more examples, see Chapter Five.

and legal discipline. Chapter three examines whether or not there is a universal understanding of children in international human rights law. Both chapters introduce how these understandings apply in the context of refugee law, which is developed in Chapters Five and Six. The aim of this analysis is to establish rights that belong to children and can thus be violated.

The third subtheme relates to the interaction between children's rights law and refugee law and the influence they have had on each other. Chapter Three first traces the historical trajectory of children's rights law, following on from an analysis of the evolution of the concept of 'child' in Chapter Two. Chapter Three establishes the rights in international law that may be violated and looks ahead to their possible relevance in the context of refugee law. This is followed by an analysis in Chapter Four of the historical development of refugee law and instances where children were considered within treaties and administrative arrangements over the years. Chapter Five then looks at the two legal regimes through their objects and purposes and interactions to establish whether or not there is an avenue through which rights violations in the children's rights sphere can be analysed within the refugee sphere. Chapter Six looks at the law in practice by reviewing case law and analysing to what extent outcomes reinforce the modern conceptualisation of childhood. The organisation of this thesis is set out in further detail in Section 1.5.

The overarching purpose of this research is to establish that a children's rights approach to the interpretation of the Refugee Convention is possible and to look at how children's rights are dealt with in refugee law. Therefore, the practical output is a conceptual framework for the children's rights approach in the context of refugee law. The starting point is the submission of applications for refugee protection by or on behalf of children. Cases which deal with the substantive issue of qualifying as a refugee are thus analysed. This thesis looks at the most underdeveloped aspect of refugee law as it applies to children - their

qualification as refugees. I identified this area as undeveloped based on the lack of research on the topic and limited case law available (discussed in Section 1.1).

This thesis does not deal with procedural aspects of seeking refuge. The focus surrounds the ways in which children are conceptualised within refugee law discourse, not how their applications are considered or how they are treated in the process of seeking asylum. Topics such as credibility, interview procedures, guardianship, participation or the voice of the child are excluded from discussions. These topics are not dealt with herein as they have already been dealt with, to a greater extent as compared to the topic at hand, in the refugee and children's rights discourses. That said, while procedural⁷ and care⁸ aspects of child asylum are undoubtedly more developed in the literature, there is still work to do to ensure a fully CRC compliant asylum procedure. Though this is not the focus of the research, it is important to emphasise that without a children's rights approach to the substantive issues, child refugee claims are at risk of being wrongfully disallowed thus impacting upon children's access to other, including procedural, rights.

1.1 Dichotomy: children's rights and refugee law

There has traditionally been a dichotomy between refugee law and children's rights. This dichotomy emerged alongside the development of modern international law. There were concurrent developments in both areas of international law from the 1920s, which dealt with international protection. Children were not, however, referred to in the developing

⁷ See, for example: Mark Evenhuis, 'Child-Proofing Asylum: Separated Children and Refugee Decision Making in Australia' (2013) 25(3) *International Journal of Refugee Law* 535; UN High Commissioner for Refugees (UNHCR), 'The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union', December 2014.

⁸ See, for example: Samantha Arnold, Martine Goeman and Katja Fournier 'The Role of the Guardian in Determining the Best Interest of the Separated Child Seeking Asylum in Europe: A Comparative Analysis of Systems of Guardianship in Belgium, Ireland and the Netherlands' (2014) 16 *European Journal of Migration and Law* 467.

area of refugee law.⁹ Child refugees were dealt with instead in the context of either once-off administrative arrangements such as the *Kindertransport* in the 1930s¹⁰ or in the child-specific and non-binding 1924 Declaration of the Rights of the Child.¹¹ During this time, children were invisible within mainstream refugee discourse. This thesis looks to unpack the reasons for the dichotomy historically and to-date. It looks to examine the reasons for the invisibility of children within early refugee discourse and the relative invisibility of children in contemporary refugee discourse. Today, there is evidence to show the interconnectedness between the two regimes. However, because the children's rights framework did not provide guidance as to the qualification of child refugees and because the Refugee Convention did not explicitly refer to children as potential beneficiaries of refugee protection, a series of bridges were required to narrow the gap between the two. These emerged in the form of guidance, but not until the 1990s.

Despite the indications that the gap is narrowing, the dichotomy persists. Contemporary literature on child refugees largely deals with procedural and social and economic needs unrelated to qualifying as a refugee. Child refugee research tends to view the child within refugee law holistically with qualification only forming a small part of the analysis. This area of research is heavily entrenched in welfare discourse.¹² Most

⁹ With some exceptions, such as the constitution of the International Refugee Organization. Discussed in Chapter Four.

¹⁰ See for example, Anthony Grenville, 'The Kindertransport: An Introduction' in Andrea Hammel and Bea Lewkowicz eds, *The Kindertransport to Britain 1938/39: New Perspectives* (Brill 2012). Discussed in Chapter Four.

¹¹ 1924 Declaration of the Rights of the Child. Discussed in Chapter Three.

¹² See, for example: Jacqueline Bhabha, 'Seeking Asylum Alone: Treatment of separated and trafficked children in need of refugee protection' (2004) *International Migration* 42 (1) 141; Hans Anderson et al (eds), *The Asylum-Seeking Child in Europe* (Centre for European Research at Goteborg University 2005); Sandy Ruxton, *Separated children seeking asylum in Europe: a programme for action* (Save the Children Sweden 1999); Everett Ressler, Neil Boothby, and Daniel J. Steinbock, *Unaccompanied children: Care and protection in wars, natural disasters, and refugee movements* (OUP 1988); Ilse Derluyn and Eric Broekaert 'Unaccompanied refugee children and adolescents: The glaring contrast between a legal and a psychological perspective' (2008) 31 (4) *International Journal of Law and Psychiatry* 319; Israel Bronstein and Paul Montgomery, 'Psychological distress in refugee children: a systematic review' (2011) 14 (1) *Clinical Child and Family Psychology Review* 44; David Tolfree, *Community based care for separated children* (Save the Children

of the available information on the qualification of child refugees comes from United Nations (UN) guidance materials produced by the Committee on the Rights of the Child (Committee) and the UN Refugee Agency (UNHCR). However, most references to ‘child-specific forms of persecution’ are only recent and somewhat limited.¹³

The number and proportion of children seeking asylum is growing and alongside this is growing acceptance that children have agency and can exercise that agency in a variety of ways. This thesis looks to unpack the reasons for the dichotomy and the invisibility of children within refugee discourse by examining the developmental path followed by children’s rights law and refugee law. Points where they converge and diverge are analysed. The purpose of this exercise is to demonstrate the existing relationship between the two regimes and the potential for a children’s rights approach. This thesis seeks to analyse to what extent the increase in the number of child asylum seekers and refugees, the expansion in children’s rights and children’s rights studies and the cross-pollination between the two regimes has impacted upon developments in child refugee law.

1.2 A children’s rights approach

A wave of literature emerged, arising from the seventeenth and eighteenth centuries and later the Civil Rights movement in the US, which brought to light the important role children play in society. The conceptualisation of children emerging from a multitude of disciplines established that they had an evolving capacity to participate, make decisions and otherwise interact with societies around them. Childhood was constructed as a period of growth and maturation where intervention was required to ensure protection from harm, which would interrupt or affect the child’s development. The CRC codified the modern understanding of childhood developed outside the legal discipline. The

Sweden 2003); Linda Piwowarczyk, ‘Our responsibility to unaccompanied and separated children in the United States: A helping hand’ (2005) 15 *Boston University Public Interest Law Journal* 263.

¹³ Discussed in Chapter Five.

CRC established children as rights holders with rights relating to their innate vulnerability, but also relating to their independent actions, behaviours, beliefs and decisions. The CRC and the discourses that preceded its adoption also established that adults have a role in ensuring access to many of their rights. This thesis develops on this conceptualisation and applies it in the context of refugee law with a view to ensuring that the analysis is cognisant of the wider children's rights framework and the childhood status quo that has developed over centuries and codified by the CRC.

1.2.1 Building upon the 'human rights approach'

Michelle Foster in her book, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation*, explored the challenges posed by migration caused by deprivation of social and economic rights where it engaged the Refugee Convention. She analysed the ability of the Refugee Convention to encompass refugee claims based on these violations. Foster suggested that the Refugee Convention is capable of including violations of social and economic rights and highlighted a number of examples to support this. The main finding was that the Refugee Convention 'is capable of accommodating a more complex and nuanced analysis'.¹⁴

Foster attributed the change in tide to Hathaway who in 1991 in his book *The Law of Refugee Status* described persecution as the 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.¹⁵ In this book, Hathaway suggested that the International Bill of Rights (IBR), comprising the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social, Economic and Cultural Rights (ICESCR), form the framework for the

¹⁴ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 1.

¹⁵ James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104-5 in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007) 27.

interpretation of persecution.¹⁶ Foster and many others have contended that it is this interpretation that has opened the door to violations of rights that are related to gender, for example, and children.¹⁷ One example of this expansion into children's rights is the recognition of children as refugees on the basis of female genital mutilation (FGM).¹⁸ It is the assumption that a human rights approach to the interpretation of the Refugee Convention is possible that forms the basis of this thesis. The hypothesis is that alongside a human rights approach, there should also be a children's rights approach.

I had formulated a research plan based around the conceptualisation of the child in asylum determinations. I had hoped to ask in which instances children were recognised as refugees. However, it was after reading Foster, that the thesis took shape around the potential for the construction of a 'children's rights approach to the interpretation of the Refugee Convention' and what that approach might look like, building upon the work of Foster and others in the process.

1.2.1.1 Children as subjects of law and the Refugee Convention

Foster noted that the Refugee Convention was drafted with civil and political rights in mind (see Chapter Four) and as a result they are more prevalent in refugee case law. There is however reluctance across disciplines to attribute rights specifically to children, in particular those rights relating to agency. As a result, social and economic rights are more prevalent in child refugee case law than they are in the context of adult claims. This arises from the discourse around whether children are to be considered as objects or subjects of law. The reluctance to view children as capable of exercising agency in respect of their civil and political rights also points to an inherent difficulty in the application of the Convention in the case of children.

¹⁶ *Supra* note 14.

¹⁷ *Supra* note 14, 16.

¹⁸ FGM is also considered in adult claims and is often considered as a development in the area of gender-based rights. *Ibid.*

The primary challenge in dealing with child claims for protection is the dominant discourse on child agency, which places the child in a position secondary to adults - as an *object* of law. In other words, children are seen as objects of protection from harm by a third party (parent or other adult) rather than independent beings with a role to play in their own future outcomes.

Debates surrounding children as *subjects* of law, or children having agency, are not new. However, they have grown and developed significantly in the last 30 years. The modern origins of these debates are also evident as early as the seventeenth century (discussed in Chapter Two). It was not until the publication of the CRC, however, that the child-as-rights-holder and indeed the child as a participant in – or subject of – their own rights and future emerged in the legal sphere (See Chapter Three). Child agency, and within that considering children as subjects of law, is a rapidly growing area of research and debate (See Chapters Two and Three).

Sir Goodwin-Gill in 1995, reflecting on the CRC and its intersection with refugee law, concluded that children today are subjects of law.¹⁹ However, in its application, human rights law including children's rights is still inconsistent as regards the treatment of children as either object or subject. Adult refugees are more often considered to have experienced a violation of a civil or political rights whereas children are often seen as unable to exercise civil and political rights. This is discussed in Chapters Two and Three and looked at in the context of refugee law in Chapter Six.

The current definition of 'refugee' in international law requires some degree of agency and in many cases requires an individual to be the subject of persecution and thus the subject of protection (discussed in

¹⁹ Sir Guy Goodwin-Gill, 'Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions' (1995) 3 *International Journal of Children's Rights* 405.

Chapter Five). Identifying in which instances children have been considered to be subjects of law is thus part of the analysis of the interpretation of the Refugee Convention considering children's rights. The theme of children being considered as object and/or subject of law, in particular in refugee law, is developed throughout this thesis.

1.3 Invisibility in refugee law

The understanding of children and childhood that developed in children's studies and children's rights does not exist in refugee law in the same way. In fact, children were not explicitly mentioned in the Refugee Convention despite having been a feature in international law since the 1920s. Historically, there was very little overlap between children's rights and refugee law. This is particularly evident in the context of children qualifying as refugees. It was the advent of the CRC and the debates and research that followed that influenced developments in other areas of law, including refugee law. Much of the research on this topic looks at refugee determinations relating to children within a refugee law bubble, with a seemingly obligatory and normative reference to children's rights,²⁰ in particular those contained within the CRC, without extensive analysis. As previously mentioned, comprehensive analysis of CRC-based rights and refugee law typically exist within the context of social and economic rights, unrelated to qualification. These studies tend to look at accessing the asylum procedure or accessing other fundamental rights or children's rights *while* seeking asylum. There is very limited research on the definition of 'refugee' and how that relates to children. Furthermore, there is no research which looks at the CRC as a whole and the rights therein and

²⁰ See, for example the analysis in Sir Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn OUP 2011) 130. The discussions focus on the child within the refuge framework with a brief reference the best interests principle, but that is the extent of the analysis engage in by Goodwin-Gill and McAdam. The same can be said of other seminal works on refugee law where only a brief mention of children are included and within that only a reference to rights within the CRC without analysing the applicability of CRC rights in the context of substantive refugee law. See: James Hathaway, 'The Rights of Refugees under International Law' (CUP 2005).

examines instances where violations of those rights amount to persecution in refugee law.

Children's rights research tends to look at law from a children's rights perspective. Refugee research tends to look at law from a refugee law perspective. This is natural and to be expected. However, due to the fact the CRC emerged almost 40 years later than the Refugee Convention, it is perhaps time that refugee law was looked at from a children's rights perspective and specifically the definition of refugee and how children are conceptualised within it. This is the dominant subtheme²¹ of this thesis and part of the rationale for considering the potential for a children's rights approach. These discussions assist in buttressing the hypothesis that the Refugee Convention is sufficiently flexible to incorporate children's rights violations.

Part of examining the possibility of a children's rights approach is to analyse the conceptualisation of children in international law (discussed in Chapter Three), in the wider discourses on children and childhood (discussed in Chapter Two) and then in the context of refugee law (discussed in Chapters Five and Six). There is, however, very little case law dealing with child refugees available through traditional and internationally or regionally recognised databases such as Refworld²² or the European Database of Asylum Law.²³ Firstly, this is perhaps due to the fact that the intersection of refugee law and children's rights law²⁴ is relatively recent. Secondly, the notion that children are secondary to adult applicants continues to pervade substantive refugee discourse and jurisprudence. Child refugee claims are often subsumed within head-of-household claims.²⁵ Thirdly, very few separated children²⁶ make their

²¹ Referred to as subtheme one above.

²² UN High Commissioner for Refugees, 'Refworld' <www.refworld.org> accessed 12 July 2016.

²³ European Council on Refugees and Exiles, 'European Database of Asylum Law' <www.asylumlawdatabase.eu> accessed 12 July 2016.

²⁴ See Jane Fortin, *Children's Rights and the Developing Law* (n 1) 31-35. Discussed in Chapter Two.

²⁵ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 221. Discussed in Chapter Six.

way to Global North countries to apply for asylum, despite the fact that they represent a significant proportion of refugees and displaced persons around the world.²⁷ Cases arising from separated children are important for this thesis as they represent a single-named-applicant cohort within the child refugee demographic who are not subsumed within adult claims. However, the number of separated children seeking asylum is relatively low. This is discussed in Chapter Six.

The limited case law available poses a significant challenge to this thesis. The fact that children are often subsumed within adult claims also means that sometimes the child-aspect of the claim is lost or considered secondary. There are nevertheless sufficient examples of child cases to draw some conclusions and assist in creating a picture of a potential children's rights approach.

The limited literature dealing with the interpretation of the definition of refugee from a children's rights perspective and the limited child refugee case law places this thesis in a new space. The contribution to the discourse is therefore important, but it also means that there are times where the two areas of law sit awkwardly next to one another. This is particularly true of Chapter Six, which looks at the existing case law and also suggests instances where a breach in a children's right may amount to persecution. There is some degree of hypothesising in Chapter Six.

This research makes a contribution to the discourse as it is the first comprehensive exercise which looks at the possibility of constructing a children's rights approach by looking at developments in children's rights law and applying it in the context of refugee law. It takes a step towards narrowing the gulf between children's studies and children's

²⁶ The Separated Children in Europe Programme define separated children as 'Separated children are under 18 years of age, outside their country of origin and separated from both parents, or their previous legal, or customary primary caregiver'. See: Separated Children in Europe Programme, *SCEP Statement of Good Practice* (4th edn, Save the Children 2010) 3.

²⁷ Jacqueline Bhabha, 'Demography and rights: women, children and access to asylum' (2004) 16 *International Journal of Refugee Law* 227.

rights and refugee discourses. However, I recognise that there are a number of challenges and limitations. I make recommendations for further research to deal with some of the main gaps in Chapter Seven.

1.4 The approach adopted in this thesis

The approach adopted in this thesis is important due to the limited research in this area and the limited interaction between the two legal regimes. Most literature on the interpretation of refugee law adopts a framework based on the five convention grounds: race, nationality, religion, membership of a particular social group and political opinion. This approach is well developed in refugee law. However, this thesis does not follow the five convention grounds approach for two reasons. Firstly, an approach that stems from the Refugee Convention itself is not child-focussed or centred. An approach that stems from the CRC and other relevant rights provides a children's rights perspective to the analysis and perhaps mitigates the risk that the focus will remain on the well-established child-specific forms of persecution and indeed the existing refugee case law pertaining to children.

Secondly, children are often conceived of within the particular social group ground above any other ground. This is established in the literature, the guidance and case law. If, therefore, this thesis adopted the five convention grounds approach, there would be a very long section on the particular social group ground and much less discussion on the other grounds, in particular those grounds which require one to exercise agency (e.g. religion and political opinion). Following the persecution criteria rather than the convention nexus allows us to hone in on the children's rights violations rather than the convention nexus. Instead of structuring the research using the convention grounds, the traditional 'Three Ps approach' to interpreting the CRC is employed.

The Three Ps comprises provision, protection and participation rights. Provision rights include social and economic rights, such as the: right to

life,²⁸ the highest attainable standard of health,²⁹ an adequate standard of living,³⁰ and education.³¹

Protection rights include rights, which relate to protection from child abuse, neglect, exploitation, cruelty and special protection for children in precarious circumstances.³²

Participation rights include the rights to freedom of expression,³³ thought, conscience, religion³⁴ and association.³⁵ In general, participation rights focus on the child's right to have their voice heard and their views considered including in respect of their social, economic, religious, cultural and political life.³⁶

A recent development in children's rights research is to criticise the over-reliance on the CRC and the simplistic tools used to interpret the CRC, such as the Three Ps approach. The argument is that the CRC represented the status quo at the time of drafting and children's rights should be seen as something that is evolving, taking into account more recent developments in international law, guidance, literature from a variety of disciplines and case law. Critics argue that continuing to rely on the CRC equates to complacency. The argument is the same for utilising tools for the interpretation of the CRC.³⁷ Considering these critiques early on in my research made me take a step back to look at the

²⁸ Convention on the Rights of the Child 1989 (CRC), Article 6.

²⁹ CRC, Article 24.

³⁰ CRC, Article 27.

³¹ CRC, Article 28. UNICEF refers to these rights as 'Survival and Development Rights' in 'The Convention on the Rights of the Child Survival and development rights: the basic rights to life, survival and development of one's full potential' <www.unicef.org/crc/files/Survival_Development.pdf> accessed 12 July 2016.

³² UNICEF, 'The Convention on the Rights of the Child Protection rights: keeping safe from harm' <www.unicef.org/crc/files/Protection_list.pdf> accessed 12 July 2016.

³³ CRC, Article 40.

³⁴ CRC, Article 41.

³⁵ CRC, Article 15.

³⁶ UNICEF, 'The Convention on the Rights of the Child Participation rights: having an active voice' <www.unicef.org/crc/files/Participation.pdf> accessed 12 July 2016.

³⁷ Ann Quennerstedt, 'Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the "3 p's"' (2010) 18 International Journal of Children's Rights 619.

way children have been and continue to be conceptualised in a variety of disciplines (see Chapter Two). The purpose of this exercise was to identify characteristics attributed to children and childhood that differentiates them from adults and to then use that conceptualisation as a lens to look at the rights contained within the CRC and children's rights contained in other treaties. The purpose of this wide-net approach was to mitigate the risk of excluding important characteristics of global discourses on childhood – a risk that I would have otherwise exposed myself to if I only looked at the CRC.

Through this exercise I arrived at two important methodological findings. Firstly, that the normative Three Ps approach suited my thesis and would assist me in answering the questions I set out to answer. Secondly, that Article 6 of the CRC, the right to survival and development comprehensively captured the conceptualisation of children as developed in other disciplines, such as sociology, psychology and children's rights.

1.4.1 Arriving at the Three Ps Approach

There are a number of different approaches used to interpret and categorise the CRC rights. One common example is the interest and will theoretical approaches, which are often applied in the social sciences. The interest theory stems from the idea that the responsibility to protect the child lies with a third party or someone other than the child themselves. Fortin³⁸ and Federle³⁹ argued that the interest theory disadvantages children by focusing on their vulnerability and less on their ability to advocate for their own interests. The will theory, on the other hand, suggests that the child has rights when they have capacity to exercise those rights. Although it protects the child's choice, it assumes a greater level of capacity. Fortin suggested that the possible solution to the divide between the interest and will theories was to introduce

³⁸ *Supra* note 24, 16.

³⁹ Katherine Federle, 'Review Essay: Rights, not wrongs' (2009) 17 *International Journal of Children's Rights* 321.

choice⁴⁰ into the interest theory and also the notion of evolving capacities. Although these theories provide interesting insights, they did not sufficiently reflect the rights themes I had already identified. I had identified three categories of rights: positive, protection and autonomous (discussed below). The will and interest theories approach also identified protection rights and autonomous rights, but did not sufficiently separate the protection based rights (protection) from the provision rights (positive). They were subsumed within the welfare construct.

Another way children's rights have been categorised in the literature is in respect of interests that are 'basic' relating to survival, 'developmental' relating to positive development such as education and standard of living and 'autonomy' relating to participation, identity and exercising choice.⁴¹ This approach is similar to the Three Ps approach'.⁴²

The Three Ps approach is the most widely accepted approach to the interpretation of the CRC. It is typically relied upon in the law discipline. I did not choose the Three Ps approach based on a process of elimination. Having read about and the alternative approaches to categorising children's rights recited above, I then looked at the (largely) sociological conceptualisation of childhood that I had arrived at in Chapter Two and found that the rights that were associated with the period of childhood were either positive in nature, protection-based or involved the child exercising their agency (as mentioned above). I intended to proceed using this approach. I discovered, however, that the three categories overlapped significantly. In other words, positive rights, or rights that were to be provided by the State and made available to children, were *provision rights*. Protection rights, or rights that require

⁴⁰ *Supra* note 24.

⁴¹ Jhon Eekelaar, 'The Emergence of Children's Rights' (1986) 6(2) Oxford Journal of Legal Studies 161.

⁴² Timothy Fitzgibbon, 'The United Nations Convention on the Rights of the Child: Are Children Really Protected? A Case Study of China's Implementation' (1998) 20 Loyola of Los Angeles International and Comparative Law Review 2325; Philip Veerman *The Rights of the Child and the changing Image of Childhood* (Martinus Nijhoff Publishers 1992).

intervention from the State to ensure the child had access to positive rights and ensure the child's development was not adversely affected, were *protection rights*. And rights allowing or facilitating the child to exercise their agency were *participation rights*.

Upon making this discovery, I made the decision to use the Three Ps approach as it developed organically through my own analysis of the rights associated with the sociological conceptualisation of children and the period of childhood. I was satisfied that this approach was reinforced as the most commonly used approach in children's rights discourse. It is for this reason, that the will and interest theories and the basic, developmental and autonomy approach to categorising children's rights, for example, are not used.

1.4.2 Article 6: the right to life and development

Another discovery was made in the process of conceptualising childhood from the more interdisciplinary perspective (Chapter Two). Development was at the core of discussions outside children's rights law - in sociological and educational discourses. The focus of writings and theorising from the seventeenth century was the need to provide for and educate children to ensure they were able to develop into active citizens. This view of childhood looks at children as 'adults-in-becoming'.⁴³ From the 1920s on, in children's rights law, after survival was ensured, development was to the fore. The CRC provided for survival and development in the same provision. Article 6 stated

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.*⁴⁴

⁴³ See: Allison James and Adrian James, *Key Concepts in Childhood Studies* (2nd edn, Sage 2012) 58.

⁴⁴ CRC, Article 6.

It could be easy to draw the conclusion that refugee law, or international law more generally, deals only with rights that impact upon the right to survive. However, it is my view that by including both survival and development in one provision in the CRC, Article 6, the drafters clarified that these rights go hand-in-hand and merely ensuring survival rights are not violated does not mean that the child is able to thrive, and as is argued in this thesis, it does not mean that the child is not at risk of persecution.

Including the two rights in the same provision indicates that development *en route* to adulthood is as important as merely surviving. The Committee clarified this point in 2003, stating that the development of the child in the context of Article 6 is ‘a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development’ and that ‘implementation measures should be aimed at achieving the optimal development for all children’.⁴⁵ This is a close reflection of the work produced during the period of Enlightenment by Locke and Rousseau.⁴⁶ It is also a close reflection of the conceptualisation that arose from sociological discourses prior to and in light of the CRC.⁴⁷ The modern conceptualisation of children stems from the understanding of the period of childhood – a period defined as the process of positive development. It is argued herein that given the prominence of development in children’s studies and children’s rights law dating back to the 1920s, that it should also be prominent in the context of refugee law.

Article 6 is relied upon as the benchmark for children’s rights. Violations of rights which relate to the child’s development whether

⁴⁵ General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) para 12.

⁴⁶ See: John Locke, *Some Thoughts Concerning Education* (1693) <<http://www.bartleby.com/37/1/>> accessed 23 August 2014; Jean-Jacques Rousseau, *Emile, or on Education* in Leo Damrosch ed., *The Essential Writings of Jean-Jacques Rousseau* (Vintage 2013) 229-289. Discussed in Chapter Two.

⁴⁷ See: *Supra* note 24; David Archard, *Children: Rights and childhood* (2nd edn, Routledge 2004). Discussed in Chapter Two.

short or long term are central to the refugee question. This thesis proposes that a violation of the child's right to develop, which goes to the core of children and childhood studies, should carry significant weight in the analysis of a refugee claim. It is argued that where a breach in a right that impacts upon the child's positive development, in particular where the impact will be lasting and affect the person into adulthood, and there is a link with a convention ground, that this breach may amount to persecution. Chapter Six analyses case law to support this argument and suggests instances where perhaps rights violations *should* be considered to amount to persecution where there is no legal precedent.

1.4.2.1 Article 6 and refugee law

It is easy to say that Article 6 should weigh heavily on refugee decision making. However, in practice, this development is difficult to trace as Article 6 is not typically cited in case law. There are instances where this right is traceable through other CRC rights or through the sociological understanding of children that has developed over the last number of centuries (as discussed in Chapter Two). The following two examples of child refugee cases illustrate this point.

The first example relates to female genital mutilation (FGM). UNHCR has referred to FGM as a child-specific form of persecution thereby linking it to refugee law.⁴⁸ There is a significant body of case law on FGM and children. In *RRT Case No. 1101038*, the Australian Refugee Review Tribunal found two girls to be refugees on the basis of FGM and the known health risks associated with the procedure, including excessive bleeding, death, illness and birth complications.⁴⁹ It is arguable that the Tribunal saw this procedure as something that would affect the applicants' physical and psychological well being and would not be conducive to 'achieving the optimal development'. The

⁴⁸ *Supra* note 6, 31.

⁴⁹ *RRT Case No. 1101038*, [2011] RRTA 307, Australia: Refugee Review Tribunal, 14 April 2011.

Committee, as mentioned above, argued that these elements are part of a holistic interpretation of Article 6.

The second example is education. The right to education on the surface may not seem to have a direct link with refugee law, yet violations of this right have been considered to amount to persecution. UNHCR identified discriminatory measures which result in ‘serious restrictions’ on a person’s right to ‘normally available educational facilities’ as a potential form of persecution.⁵⁰ In *D. [a minor] v Refugee Appeals Tribunal & Anor*, the Irish High Court heard a case submitted on behalf of a child who would be denied access to education due to his ethnicity. Justice Hogan found that the breach of the right to education did amount to persecution, adding that the denial of education would mean that the applicant would ‘effectively be excluded from any meaningful participation’ in society.⁵¹ The right to education goes to the core of sociological and historical theorising on children and the period of childhood (See Chapter Two) and it is part of the holistic interpretation of Article 6, part of ‘achieving optimal development’, including the child’s mental, moral and social development, as established by the Committee (See above). This case reflects the developments in both children’s rights and sociology.

These cases are revisited in Chapter Six and additional cases are discussed where there is a link with Article 6, including for example the right to a family environment in the case of separated children.⁵² In fact, I argue in Chapter Six that every successful case dealing with child refugees has a link with this right, the right to survival and development. I argue therefore, that Article 6, the right to survival and development, is

⁵⁰ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011) para 54.

⁵¹ *D. [a minor] v Refugee Appeals Tribunal & Anor* [2011] IECH 431 at 23.

⁵² See for example, *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)*. In this case the fact that the applicant minor did not have a safe family environment to return to factored in to the final decision to grant refugee protection on appeal. Discussed in Chapter Six.

the most important children's rights in the context of international law including refugee law, a right that encompasses every other right and derives from ancient and modern sociological understandings of childhood. I further argue that Article 6 should be cited in refugee case law, as it is largely ignored in the available jurisprudence.

Both the Three Ps approach and the prioritisation of Article 6 over other CRC rights allowed me to develop the aspects of childhood identified in Chapter Two without being constrained by a provision-by-provision analysis of the CRC. Rights are dealt with in the Three Ps clusters in the analysis of children's rights⁵³ and children's rights in the context of refugee law.⁵⁴ There are indeed CRC rights which are not relevant to refugee law and there are other rights which may not be dealt with in depth based either on the prioritisation of rights as set out in Chapter Two which establishes the conceptualisation of children to be relied upon throughout the thesis or on the fact that it has not arisen in the context of refugee law. However, some hypothesising takes place in the context of rights identified as relevant to the analysis of children and childhood that are not dealt with in the context of refugee law (See Chapter Three and Chapter Six). The Three Ps approach and Article 6 provide the baseline for the analysis of children's rights and their application in the context of refugee law. Article 6 emerged as another subtheme and is thus examined throughout the thesis.

1.4.3 Geographical scope

This thesis is focused exclusively on the substantive qualification of children as refugees. The scope of the research is limited in two ways. Firstly, the focus is international and thus does not target a specific jurisdiction or region (this is discussed below in Section 1.4 on the methodology). Secondly, the research is limited to the Global North. The Global North and Global South divide is typically defined in reference to development and wealth rather than a strict line separating countries in

⁵³ See Chapter Three.

⁵⁴ See Chapter Six.

the northern and southern hemispheres. The Global North refers merely to wealthier and more developed countries.⁵⁵ However, the term Global North is limited in this thesis to refer only to those countries where there is a functioning and independent (not dependent on UNHCR) asylum determination system. This is limited further to countries where judgments are published and furthermore published, translated or summarised into English. The scope therefore includes: Australia, Canada, European Union Member States including in particular the United Kingdom, New Zealand and the United States. National courts, supra national courts (for example the Court of Justice of the European Union) and international courts (for example the Inter-American Court of Human Rights) all fall within the scope. However, the majority of the case law derives from national courts.

It is important to highlight that the majority of the world's refugees are outside of the aforesaid countries.⁵⁶ The reason for the limited focus relates to the availability of literature and case law. However, further research on the application of the Refugee Convention in countries who bear the primary burden of refugees would be recommend and would add to the discourse considerably. This recommendation is revisited in Chapter Seven.

1.5 Methodology of analysis

In general, the approach adopted in this thesis was one of a socio-legal nature.⁵⁷ Socio-legal research is interdisciplinary legal research that is influenced by other social sciences.⁵⁸ The value of this method is that it can highlight 'issues that neither law nor sociology can articulate or study alone'.⁵⁹ Banakar and Travers noted it offers less methodological

⁵⁵ Jean-Philippe Thérien, 'Beyond the North-South divide: the two tales of world poverty' (1999) 20 (4) *Third World Quarterly* 723.

⁵⁶ United Nations High Commission for Refugees *Statistical Yearbook* (2014).

⁵⁷ See, generally: David Cowan and Daniel Wincott eds, *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2015); Reza Banakar and Max Travers eds., *Law and Social Theory* (2nd edn, A&C Black 2014).

⁵⁸ Ann Denis and Deborah Kalekin-Fishman eds., *The ISA Handbook in Contemporary Sociology* (Sage 2009) 64.

⁵⁹ *Ibid* 71.

constraints compared to other disciplines. It allows greater flexibility, facilitating interdisciplinary research.⁶⁰ The sociological approach allowed me to look at the impact of the law in action and the role it has played and how it has been influenced by public policy, in particular at the global level. However, the focus remains on the legal aspects⁶¹ of a potential children's rights approach to the interpretation of the Refugee Convention. This analysis moves away from the black letter⁶² approach in order to identify trends in case law (which would be the primary objective in a black letter legal analysis) and to attempt to fill gaps in our understanding of children's rights law, how it has impacted and how it *should* impact refugee decisions.

This thesis also looks at the experience of the operation of law in a variety of jurisdictions, in particular those jurisdictions in the Global North with an established system for determining asylum applications. This thesis undertakes to analyse the key elements of children's rights law, specifically around the experiences commonly associated with childhood and positive development, to establish an understanding of the host of rights that require protecting and, in instances where those rights are breached, may amount to persecution in refugee law. This analysis draws on corresponding developments in international human rights law and refugee law. This process aims to assess the parameters and the potential of the Refugee Convention definition in its application in the case of children. The increase in the availability of case law from a variety of jurisdictions and courts online has made the adoption of this approach possible. In considering the interpretation of the Refugee Convention in respect of children, precedent jurisprudence from all over the world, primarily from higher courts, is considered.

⁶⁰ Reza Banakar and Max Travers eds., *Theory and Method in Socio-Legal Research* (Hart 2005) in Ann Denis and Deborah Kalekin-Fishman, *The ISA Handbook in Contemporary Sociology* (Sage 2009) 71.

⁶¹ David Cowan and Daniel Wincott eds, *Exploring the 'Legal' in Socio-Legal Studies* (Palgrave 2015).

⁶² *Ibid*; Michael Murray and Christy Descantis, *Legal Research Methods* (University Casebook Series) (2nd edn, Foundation Press 2006); Mike McConville and Wing Hong Chui eds, *Research Methods for Law* (Edinburgh University Press 2007).

Undertaking this analysis allows me to highlight global trends and allows for contemplations around reform of the law in this case in reference to the full adoption and adherence to a children's rights approach to interpreting the Refugee Convention. A comparative historical approach⁶³ is also relied upon to consider changing attitudes towards children and refugees over time in order to support the narrowing of the gap between the two legal regimes (children's rights and refugee law) and to support the potential for its further narrowing.

In order to identify relevant case law, I used three main databases: 'Refworld', 'European Database of Asylum Law' and 'British and Irish Legal Information Institute'. To select relevant cases, I used the available search functions. In each case, I searched for cases involving 'children', 'child' and 'minor'. This narrowed the field significantly. I then chose cases based on whether or not they dealt with substantive law – specifically cases that looked at the *qualification* of children as refugees and specifically at the rights violations considered to amount to persecution. Cases whose principal question(s) of law were procedural were excluded. Procedural law is the process that a case goes through. Though it does have an impact on the enforcement of substantive law, the cases were excluded. Cases dealing with substantive law that did not deal with *qualification*, in other words did not look at the definition or interpretation of 'persecution' in the case of children, were also excluded. Aspects of the case law used for this thesis were limited to qualification and specifically the nexus between a right that is commonly associated with children (as established in Chapters Two and Three) and persecution. In each case I asked: (1) was the child applicant/appellant recognised/recommended to be recognised as a refugee; (2) which rights violations were cited as falling within/or outside of the term 'persecution' and (3) is it possible to link the right with a children's

⁶³ Mike McConville and Wing Hong Chui eds, *Research Methods for Law* (Edinburgh University Press 2007).

right. Precedent cases were often used and were identified through the databases and secondary sources.

Due to the limited case law which deals specifically with children's *qualification* as refugees, the analysis also involves a doctrinal⁶⁴ and comparative analysis of existing secondary research on children, childhood and children's rights law. The following secondary sources are heavily relied upon for background and contextual information: *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* by Foster;⁶⁵ *The Law of Refugee Status* by Hathaway;⁶⁶ *The Refugee in International Law* by Goodwin-Gill and McAdam;⁶⁷ *Children's Rights and the Developing Law* by Fortin⁶⁸ and *Child Migration and Human Rights in a Golden Age* by Bhabha.⁶⁹

The primary focus of the thesis is the CRC and the Refugee Convention as they are both primary sources of international law in the protection of children. There are 148 States Parties to both the Refugee Convention and 1967 Protocol relating to the Status of Refugees⁷⁰ and it remains the foundational source of refugee law internationally.⁷¹ The CRC has been ratified by more countries (196) than any other Convention,⁷² and is seen as the cornerstone of the children's rights regime.⁷³ However, various

⁶⁴ *Supra* note 61.

⁶⁵ *Supra* note 14.

⁶⁶ James Hathaway, *The Law of Refugee Status* (Butterworths 1991).

⁶⁷ Sir Guy Goodwin-Gill and Jane McAdam, 'The Refugee in International Law' (3rd edn OUP 2007).

⁶⁸ *Supra* note 24.

⁶⁹ *Supra* note 25.

⁷⁰ The 1967 Protocol relating to the Status of Refugees removed the temporal and geographical limitations to the original definition of refugee in the Refugee Convention. This is discussed in Chapter Four. UN High Commissioner for Refugees, 'States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol' <<http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>> accessed 12 July 2016.

⁷¹ See James Hathaway, 'The Rights of Refugees under International Law' (CUP 2005) and Sir Guy Goodwin-Gill and Jane McAdam, 'The Refugee in International Law' (3rd edn OUP 2007).

⁷² All UN recognised countries ratified the Convention on the Rights of the Child except the United States of America <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> accessed 12 July 2016.

⁷³ See *Supra* note 24.

other sources of law and guidance, including leading research in the area are also analysed.

Furthermore, guidance from the Committee on the Rights of the Child and UNHCR is also heavily relied upon as a significant source in bridging the gap between children's rights and refugee law. The relevant General Comments of the Committee were identified by primary research. I read each of the General Comments to find references to child refugees or children in need of external or international protection. I then followed the same primary research approach in the case of the interpretive guidance provided by UNHCR (See Chapter Five for detailed discussions on both).

This thesis thus employs a methodology which includes the analysis of primary (legislation and jurisprudence) and secondary sources (literature and guidance).

In summary, this thesis identifies which violations of children's rights amount to persecution and examines whether or not the Refugee Convention provides a satisfactory framework for the determination of child refugee applications and whether or not a children's rights approach to the interpretation of the Refugee Convention is possible and, in this regard, what the main trends are. Above all, this research aims to conceptualise the child refugee by identifying characteristics associated with declarations of refugee protections. The scope is limited to discussions on children's rights violations in the context of refugee law. Some elements of the refugee decision making process such as internal relocation and safe country practices are excluded from this analysis as this research looks at whether or not a violation of a children's rights is seen as amounting to persecution, not whether or not a decision maker

demonstrates that the children's right that is violated will not be violated in another region and is therefore ultimately not recognised as a refugee. The rights violations and their relationship with persecution is under review.

1.6 Organisation of the thesis

This thesis is organised as follows. Chapter Two looks at the characteristics associated with childhood in the context of child and childhood studies. Firstly, it defines the concepts 'child' and 'childhood' to be relied upon throughout. Secondly, it unpacks the meaning of development which emerged as prominent in childhood discourses from the seventeenth century on. Lastly, Chapter Two seeks to show that the early developments in child and childhood studies, philosophy and rights based discourses continue to be relevant and indicate that children's rights perhaps evolved less than we might have expected. The purpose of this discussion is to not only show that the issues grappled with for centuries persist, but also that there is work to be done in general children and childhood studies, children's rights *and* refugee law. The focus of this thesis is child refugee law and therefore these discussions largely inform subsequent analyses of case law and modern legislation pertaining to child refuge.

Chapter Three expands upon the contemporary conceptualisation of childhood referred to in Chapter Two and identifies additional characteristics which derive from the CRC and other sources of international law. The purpose of these two chapters is to establish a conceptualisation of childhood to be used as a framework for subsequent chapters. The reason these chapters precede discussions on refugee law is to ensure that this thesis is led by children's rights rather than refugee discourse in analysing the possibility and potential content of a children's rights approach to the interpretation of the Refugee convention. The structure follows the Three Ps approach. These two

chapters establish a conceptualisation of children. The purpose of this is to carry these discussions over to the context of refugee law to analyse to what extent breaches in the established rights intersect with refugee law and when those breaches may amount to persecution.

Chapter Four moves on to discussions on the development of refugee law and it looks at its historical evolution. It looks in particular at the extent children were considered during the drafting and in the publication of refugee law and initiatives over the years. This analysis informs discussions on the children's rights approach in Chapter Five. The purpose of this chapter is to also provide background information on general refugee law and its development to inform subsequent and more detailed discussions on its relationship with children's rights throughout the thesis. Chapter Four draws out where children were considered in the historical development of refugee law.

Chapter Five seeks to establish whether or not a children's rights approach to the interpretation of the Refugee Convention is possible. This chapter shows that there is a precedent for one human rights regime influencing another, generally, and international children's rights law influencing refugee law, specifically. This is done by looking at general rules of treaty interpretation. The object and purpose of both the CRC and the Refugee Convention are analysed to identify if there is scope for cross-treaty interpretation. Guidance from the Committee on the Rights of the Child and UNHCR are principal sources in the justification for the potential for a children's rights approach. Chapter Five also looks at some key terminology relating to the interpretation of the Refugee Convention concerning children. The definition of 'refugee', the interpretation of persecution and the convention grounds in their application in children's cases are examined.

Chapters Two through Five assist in creating a blueprint of the children's rights approach to the interpretation of the Refugee Convention through analysis of childhood studies, children's rights law and the historical

trajectory of children in refugee law. This blueprint stems from the perspective of children's rights law, rather than refugee law. Chapter Six therefore looks to analyse how refugee law has dealt with children through case law. The purpose of this chapter is to identify trends in the recognition of child applicants of beneficiaries of refugee protection. These decisions indicate which rights when violated may amount to persecution. The structure follows the Three P's approach.

Chapter Seven reflects on the developments in children's rights law and refugee law in respect of children and seeks to answer the thesis questions against the backdrop of the children's rights approach blueprint. Chapter Seven therefore reflects on which violations of children's rights amount to persecution; whether or not the Refugee Convention provides a satisfactory framework for the determination of child refugee applications and whether or not a children's rights approach to the interpretation of the Refugee Convention is possible and, in this regard, what the main trends are.

Chapter 2 Children and Childhood: Key Terminology

2. Introduction

The two key concepts most relevant to discussions on the qualification of child refugees are ‘child’ and ‘childhood’. These concepts derive from sociological discourses and are then regulated by law. A socio-legal analysis of children’s rights law thus involves an in-depth look at how the law is applied and interacts with society. In addition, and due in part to the late publication of the CRC (relative to other human rights instruments), the sociological constructions of ‘child’ and ‘childhood’ have had a significant impact on the development of international children’s rights law. In fact, childhood studies and children’s rights debates had become quite sophisticated prior to the publication of the CRC. Although the CRC has recently been criticised for representing the status quo of over 20 years ago (See Chapter Three), it nevertheless benefited from the debates, research, law and policy concerning children up to the late 1980s. The impact of sociological and historical debates on children and childhood, including in the very specific discipline of ‘childhood studies’, can still be seen in the implementation and interpretation of children’s rights law, human rights law *and* refugee law. Although it is not possible to say that societies’ views of the role of children in society have not developed, it is possible to show that the debates, theories and constructions of childhood that existed from the *Ante Christum Natum*¹ era onwards are still relevant and observable in the application and interpretation of law, including refugee law.

A conceptualisation of childhood which builds upon historical theorising around children and their role in society is established in this chapter. The continued impact theorists, philosophers and academics from the period of Enlightenment have had on modern international law, including refugee law is discussed. I refer not just to impact in this chapter, however. The origins and the deeply engrained perception of

¹ I refer to Plato (B.C.) and his *Tabula rasa*, see Section 2.2.

children as second class citizens in terms of civil and political rights and their position on a pedestal in terms of social and economic rights are also discussed. It is also demonstrated in this chapter that the right to survival and development² has formed the foundation of historical and modern conceptualisations of childhood. Development has been at the fore from the first major turning point in children's rights – when the child became not just the property of the parent. Ancient Roman law is often referred to as the epitome of the objectification of children in law as it provided for the right of the father to not only give life to the child but to take it away.³

The understandings of child agency prior to the CRC are also discussed. Child agency in pre-CRC discourses was always visible, always important and always contentious. Child agency formed part of the discourse on childhood from the seventeenth century, yet it was regarded with trepidation. Children, in respect of agency, were seen as half-formed. Early theorists viewed children as unable to form views of their own or to reason with any degree of consistency, and that it was the 'process' of childhood that prepared them to exercise their citizenship rights *as adults*. The view that children were inconsistent in their ability to reason and the reluctance to view children as able to exercise their agency or form views of their own are observable in refugee case law. This chapter sets the scene for discussions in Chapter Six on the application of children's rights in the context of refugee law. The same trepidation and conflict which permeated early childhood theorising and even contemporary sociological discourse also permeates modern refugee law. The views and research of the writers, philosophers and academics included in this chapter are therefore not so far removed from the interpretation of modern refugee law in the case of children.

² Today this is represented by Article 6 of the CRC, see Chapter Three.

³ Twelve Tables (754-449 BC) in Michelle Wirth, 'Semiotics of Parenthood in Legal Perspective: Using Semiotic Tools to Deconstruct Legal Determinations of Who Holds Parenthood Obligations and Privileges' in Jan Broekman and Francis Mootz III, eds. *The Semiotics of Law in Legal Education* (Springer 2011) 174.

This chapter serves a number of purposes. Firstly, it defines the concepts ‘child’ and ‘childhood’ to be relied upon throughout the thesis. Secondly, it shows the importance and indeed the primacy of the right to survival and development (subsequently codified in Article 6 of the CRC). Lastly, this chapter seeks to show that early developments in child and childhood studies, philosophy and rights based discourses continue to be relevant, indicating that children’s rights have perhaps evolved less than we might have expected, in particular when it comes to agency. The purpose of this discussion is to not only show that the issues grappled with for centuries persist, but also that there is work to be done in general children and childhood studies, children’s rights *and* refugee law. The focus of this thesis is child refugee law and therefore these discussions largely inform the subsequent analysis of case law and modern legislation pertaining to child refuge. This chapter in and of itself is an innovation in this area of study.

Chapter Two serves as a prelude to the rights based discussions in subsequent chapters. As mentioned in Chapter One, this thesis begins from a children’s rights perspective rather than a refugee law perspective. The purpose of widening the net to include discussions in other disciplines is to mitigate the risk of over-simplifying children’s rights in international law by failing to consider the developments in children and childhood studies. This thesis aims to establish an understanding of children and explore the rights attributed to that understanding. This exercise aims to examine the universal understanding of childhood that has been established by the CRC and analyse to what extent early childhood discourses influenced the international children’s rights law. Chapter Six then analyses to what extent early discourses have influenced or remain relevant in the context of refugee law. Violations of the rights associated with the universal understanding of children are then explored within the context of international law (Chapter Three) and Refugee Law (Chapters Four and Six). This chapter briefly introduces the most significant developments

and discourses around childhood and children stemming from a doctrinal and sociological analysis of the literature.

2.1 Context: Indicators of childhood and being a child and refugee law

The refugee child in effect is a minority by two categorisations, namely: the child in relation to the majority adult group and the refugee in relation to the majority of the human race who are not classified as refugees.⁴ Social theorist, Wirth, defined a minority as a group of people residing on the peripheries of others in society due to ‘their physical or cultural characteristics. Wirth noted that the minority group is discriminated against and is identified as different by the surrounding society.’⁵

The perceived differences between adults and children define childhood in any given society at any given point in time. For the purposes of this thesis, the concept of the period of childhood is equally as important as the concept ‘child’ itself. This is because the child can often be defined by the attributes or characteristics associated with childhood. And in contemporary society, or at least sections of society that engage in this debate, the period of childhood exists and is something to be protected.⁶ For this reason, children are often conceived of in sociological discourse and the law, in particular refugee law, as forming a social group.⁷ This thesis is concerned with both how children are conceived of in society and what characteristics define or indicate childhood. It is precisely these characteristics which inform children’s rights and thus rights that can be violated and in some cases amount to persecution. This section discusses the key characteristics and indicators of childhood before moving on to unpack them in Sections 2.2-2.5.

⁴ Jacqueline Bhabha and Wendy Young, ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines’ (1999) 11 (1) *International Journal of Refugee Law* 766.

⁵ Louis Wirth ‘The Problem of the Minority Groups’ in Ralph Linton (ed.), *The Science of Man in the World Crisis* (Columbia University Press 1945) 347 – 372.

⁶ See Rosalind Ekman Ladd *Children’s Rights Re-Visioned: Philosophical Readings* (Wadsworth Publishing Co Inc 1995).

⁷ See Chapter Five.

Age, as emphasised by Archard and Ariès, is almost universally considered to be an indicator of childhood, at least within the western construct of childhood.⁸ Children in these discussions and in this thesis are people under the age of 18, recognising the contribution of the CRC in Article 1:

*For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.*⁹

Age is an important aspect of refugee law and has been referred to in judgements as an indicator of childhood and as a characteristic associated with being a member of a particular social group (See Chapter Five). The child case law examined in Chapter Six refer directly to children or minors. It is presumed that where children or minors are referred to in judgements as such that the receiving country considers them to be under the age of 18.

2.1.1 Childhood as development

In considering the need to provide for adequate education, Locke, Rousseau, and others (discussed further in Section 2.2) noted that children needed certain protections in order to develop into adulthood. Locke in *Some Thoughts Concerning Education*, for example, remarked on the necessity of good nutrition to engage fully with education. Education is discussed in Chapter Three in the context of provision rights, one of the ‘Three Ps’ categories of rights. Education is developed herein as a key indicator of childhood, perhaps the key indicator. Locke therefore expanded on the process of becoming an adult which included access to other rights in order to become moral and rational through

⁸ Phillippe Ariès, *Centuries of Childhood* (Pimlico 1996) (originally published in 1962) 13; David Archard *Children: Rights and Childhood* (2nd edn, Routledge 2004) 19. See also: Jane Fortin, *Children’s Rights and the Developing Law* (3rd edn, CUP 2009); Michael Wyness, *Childhood* (Polity 2015).

⁹ Convention on the Rights of the Child 1989 (CRC), Article 1.

education, namely, health,¹⁰ which is now embedded as standard in childhood studies.¹¹ Health is also a provision right as introduced in Chapter One and again developed in Chapter Three as a right that also derives from the CRC. The Committee on the Rights of the Child's (Committee) Comment No. 5 demonstrated (as highlighted in Chapter One) that both rights were encapsulated by the Article 6, the right to survival and development:

*'a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development'*¹²

Rousseau, and later Postman and Archard,¹³ commented that children also needed protection from the corrupt outside world. Rousseau argued that it was their youth and innocence that required protection. Rousseau described youth and innocence as something that not only sets children apart from adults, but as something that should be protected and thus considered part of childhood in and of itself (these contributions are developed further in Section 2.2).¹⁴ Protection based rights, one of the Three P's categories of rights discussed in Chapter One, are grounded in this idea – children are in need of protection by a third party due to their vulnerability. The CRC rights associated with the right to protection relate to *inter alia* economic exploitation,¹⁵ abuse, harm and neglect.¹⁶ The Committee in Comment No. 5 also draws out the link between protection rights and elements of development concerning physical,

¹⁰ John Locke, *Some Thoughts Concerning Education* (1693) <<http://www.bartleby.com/37/1/>> accessed 23 August 2014.

¹¹ See, generally: Michael Wyness, *Childhood* (Polity 2015); David Archard, *Children: Rights and childhood* (2nd edn, Routledge 2004).

¹² General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) para 12. See Chapter One.

¹³ Neil Postman, *The Disappearance of Childhood* (Dell Publishing Co 1982) 59; David Archard *Children: Rights and Childhood* (2nd edn, Routledge 2004) 22.

¹⁴ Jean-Jacques Rousseau, *Émile, or, On Education* (originally published in 1762) in Jean-Jacques Rousseau, *The Essential Writings of Jean-Jacques Rousseau* (Vintage 2013) 229 – 290.

¹⁵ CRC, Article 32. See Chapter Three.

¹⁶ CRC, Article 9. See Chapter Three.

mental and even psychological needs.¹⁷ Chapter Three discusses these rights and this aspect of development. Rights relating to the protection of childhood are most often discussed in the context of refugee law compared to other rights groupings (ie provision and participation). In fact, as discussed in Chapter Six, the guidance, literature and the case law to-date supports the view that protection rights are dominant in the refugee context.

All the aforementioned authors and theorists also mentioned one other key aspect of childhood – agency. Most acknowledged that children had agency, but argued that they were unable to exercise that agency consistently. The view during the period of Enlightenment and into the twentieth century (and perhaps beyond), as discussed below, was that children required education to enable them to become active participants in society *as adults*. Despite the reluctance to attribute agency to children, even early philosophers recognised that children could formulate views or participate in society, at least sometimes. Although the Committee’s elaboration on the right to develop, Article 6, did not specifically refer to the right to participation or the right to be heard, rights we typically attribute to child agency (as discussed in Chapter Three), it does refer to the child’s mental, spiritual, moral, and social development.¹⁸ These needs can all be traced back to the seventeenth century. Locke, Rousseau and Kant, as discussed below, all believed education facilitated the mental, spiritual, moral and social development of children. Locke, for example, often referred to education as a pathway to becoming a virtuous adult.

Despite not referring to child agency, the Committee showed that the objective of Article 6 was ‘aimed at achieving the optimal development for all children’ and the outcome often of providing education in this regard results in children participating by expressing their views or

¹⁷ See Chapter One.

¹⁸ *Supra* note 12, para 12.

behaving according to their own developing opinions and wishes.¹⁹ The Preamble of the CRC clarified that the ‘child should be fully prepared to live an individual life in society’.²⁰ It was these developments in the late twentieth century that demonstrated that children could also participate *during* childhood, a period almost universally characterized as a process of development. Therefore, the participation rights category of the Three Ps approach was the least developed prior to the adoption of the CRC, but the ‘child agency’ seed was nevertheless planted from as early as the seventeenth century.

In summary, the most common indicators of childhood, or being a child are age, innocence, vulnerability and the need for the provision of protection and assistance (e.g. nutrition and health) from a third party *and* their evolving capacity for reason, which must be cultivated through education (discussed in further detail in Sections 2.2-2.5). These indicators are consistent with the Three Ps categories, which are discussed in detail in Chapter Three. Basic needs such as health and education form the foundation of those rights considered to be provision in nature (discussed in Chapter Three). Vulnerability characterises many of the protection rights discussed in Chapter Three. Children’s evolving capacity relates to many of the provision rights also discussed in Chapter Three. This chapter also establishes that childhood is mainly characterised by development. It is considered as a process. The Three Ps as discussed here and revisited in Chapter Three represent three prongs of Article 6, the right to survival and development.

Primarily, what indicates childhood may simply be that it is not adulthood and that being a child is simply not being an adult.²¹ It is established that children are different and therefore their rights are different (See Chapter Three). However, this does not seamlessly

¹⁹ See contributions from John Locke and David Archard in Section 2.2 below.

²⁰ CRC, Preamble Recital 7.

²¹ Archard reflecting on Ariès’ contention that childhood did not exist before the seventeenth century. Archard believed there has always been a distinction between adults and children and thus childhood existed at least to some degree. David Archard, *Children: Rights and childhood* (2nd edn, Routledge 2004).

translate to refugee law. The meaning of children's rights is well outlined in international guidance and literature. However, the way the child is conceptualised within asylum decisions and State legislation and policy is rarely defined. At times, children are considered the same as adults in the determination of the substance of their cases. It may be possible that States simply do not spend much time developing laws, guidance and an evidence base related to children seeking international protection.

At other times, children, in particular separated children, are deemed too vulnerable to even access asylum procedures.²² The former challenge may relate to a lack of visibility. The latter challenge may relate to the perception of vulnerability. A third scenario is the tendency to view children as dependent, vulnerable, objects in need of protection. The view that children are secondary to adults and can be protected by their family permeates all areas of asylum procedures worldwide. This has resulted in child claims often being subsumed within adult claims (See Chapter Six). These challenges relate to matters of procedure and are therefore outside the scope of the present research, but they indicate inherent difficulties facing child refugee applicants and explain the low numbers of child asylum seekers in the Global North and the limited case law.

The conceptualisation of childhood, which has developed across a variety of disciplines, is only beginning to trickle into the area of refugee law. There is evidence to suggest that the gap between these two areas of study, and two areas of law, has begun to narrow.²³ This thesis also aims to contribute to the narrowing of this gap. Sections 2.2-2.5 take a step back to unpack the contributions made by theorists and researchers and their relationship with the origins of children's rights. The following sections examine the relevance of historical and contemporary

²² See, for example: Samantha Arnold et al, *Durable Solutions for Separated Children in Europe, National Report: Ireland* (Irish Refugee Council 2015) 51.

²³ See Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 205 and Chapter Six.

perceptions or understandings of children and how that has also influenced refugee law, to be developed in Chapter Six.

2.2 A paradigm shift: the emergence of childhood

In considering the protection needs of children, including in the context of refugee law, one needs to reflect on those characteristics which are attributed to or belong to children. Those characteristics have evolved, as stated above, but how much have they evolved and how far are they from the origins of children's rights and childhood studies? This section explores theorists and early literature on children and childhood to provide a baseline. The seventeenth century marked a turning point in conceptualising children - children were identified as persons worthy of investment, as the human capital of the future. Children needed to develop into productive adults. It was exactly this point, development, which underscored the few theorists engaging in this debate in the seventeenth and eighteenth centuries and beyond. This section looks at theorising around development and how that has impacted upon contemporary discourse around children in the sociological sphere and indeed how that has influenced or is relevant to international law, including and refugee law.

In 1962, Phillippe Ariès published his seminal book, *Centuries of Childhood*, a comprehensive and historical overview of theorising and developments relating to children. He traced the evolution of the child as a social construct. Ariès referred to the contributions made by Locke, Rousseau, Kant²⁴ and other early writers and theorists.²⁵ These authors were responsible for contributing to, reinforcing and commenting on an early paradigm shift in childhood studies and theorising around children.

²⁴ Howard Ozmon and Samuel Craver eds, *Philosophical Foundations of Education* (6th edn, Pearson 1999) 45-46.

²⁵ In fact he argued that childhood did not exist prior to the seventeenth century. However, that has since been challenged by Archard and others. See: Phillippe Ariès, *Centuries of Childhood* (Pimlico 1996) (originally published in 1962); David Archard, 'Do parents own their children?' (1993) 1 *International Journal of Children's Rights* 293; Jeroen Dekker, 'The Century of the Child revisited' (2000) 8 *International Journal of Children's Rights* 133 and *Supra* note 21.

Ariès argued that until the seventeenth century, or the Age of Enlightenment,²⁶ children were not considered as anything other than the property of man with economic benefit.²⁷

John Locke, a seventeenth century English philosopher and physician, became a heavily influential writer on childhood and education.²⁸ Locke made a number of literary contributions revolving around understanding, thinking and education. Locke, in his first major work, *An Essay Concerning Human Understanding*, argued that the human mind began as a white slate,²⁹ building on Plato's *tabula rasa*.³⁰ Plato believed that the mind could be moulded and had few innate ideas, unlike his predecessors who had argued that humans were born with certain principles or ideas.³¹ Based on this premise, Locke stated in *Some Thoughts Concerning Education* that the child had capacity to reason from a young age and that parents should treat their children as persons capable of such. He argued that children merely needed guidance and experience to achieve adult-levels of reasoning, as children were inherently good and able to achieve basic levels of reasoning from an early age. Despite the recognition of children's agency as early as the seventeenth century, we have only been engaging in this debate in policy and law, including child-specific law, in recent years (Discussed in detail in Chapter Three).

²⁶ In fact he argued that childhood did not exist prior to the seventeenth century. However, that has since been challenged by Archard and others. See: Phillippe Ariès, *Centuries of Childhood* (Pimlico 1996) (originally published in 1962); *Supra* note 21.

²⁷ Phillippe Ariès, *Centuries of Childhood* (Pimlico 1996) (originally published in 1962).

²⁸ John Wall, 'Human Rights in Light of Childhood' *International Journal of Children's Rights* (2008) 16 530.

²⁹ As interpreted by John Wall, *Ibid*, 528.

³⁰ Neil Postman, *The Disappearance of Childhood* (Dell Publishing Co 1982) 59. J. Locke (1690) *An Essay Concerning Human Understanding*; Plato (circa 369 BC) Theaetetus line 191a–196c. Full Text available at: <http://www.gutenberg.org/files/1726/1726-h/1726-h.htm> (last accessed 7 September 2014).

³¹ See, generally: Peter Carruthers, *Human Knowledge and Human Nature. A New Introduction to an Ancient Debate*, (OUP 1992) Chapter 1.

In 1689 in *Two Treatise of Government*, Locke reiterated that the child was rational and capable of reason, but only inconsistently.³² Locke contended that as children gained knowledge and experience, their views became more important and more reasoned. The crux of his argument was that children required education to become their future selves.³³ This conceptualisation of children is known today as the as adults-in-becoming approach, an approach that is well-established yet sometimes challenged (See Section 2.3).³⁴ Locke contended that it was the parents' responsibility to ensure the child was led down the right path³⁵ arguing that children were the 'property' or 'temporary property' of their parents.³⁶ It is therefore noteworthy that Locke, although he began to create a picture of the child as an individual, viewed the child within the family more so than as a subject of rights in their own right. This is developed further in subsequent sections and chapters as it is the main conflict which exists in contemporary children's rights law. It also exists in refugee law in the context of the role of the parent as protector, persecutor or as a barrier to accessing rights (See Chapters Three and Six).

Locke, writing in the seventeenth century, wrote about the role of the parents in teaching and guiding their children. Rousseau,³⁷ writing in the eighteenth century, wrote about the role of 'Tutors' in educating children, a step towards externalising the right to education. Rousseau is often associated with laying the foundations for thought on a more egalitarian approach to education,³⁸ unlike Locke who focussed his

³² Preface in *Supra* note 10.

³³ *Supra* note 10.

³⁴ Allison James and Adrian James, *Key Concepts in Childhood Studies* (2nd edn, Sage 2012) 58.

³⁵ *Supra* note 10.

³⁶ *Supra* note 28, 529; *Supra* note 10.

³⁷ A Genevan philosopher noted to have 'captured the imagination of Europe'. See: Harry Hendrick, 'Constructions and Reconstructions of British Childhood: An Interpretative Survey, 1800 to the Present' in Allison James and Alan Prout, *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (Routledge 2015) 36.

³⁸ See: Paul Heywood Hirst and Patricia White *Philosophy of Education Major Themes in the Analytic Tradition Volume III Society and education* (Routledge 1998) 16.

writings on the role of the parents, with a particular lens on those belonging to the aristocracy.³⁹

Religious reformations and the development of the public school system in the eighteenth century also supported this move. Religious orders as early as the seventeenth century applauded parents who sent their children to school and recognised them as moral superiors. The result of such reinforcement was increased interest in school enrolment and a devaluing of child labour.⁴⁰ It is perhaps for this reason that international labour laws were the first to articulate children's rights specifically and in dedicated legal instruments (discussed in detail in Chapter Three). Ariès contended that this represented a further turning point in conceptualising the child – the point when education became the cornerstone of human development.⁴¹

Postman and Archard highlighted that Rousseau viewed the surrounding society as corrupt, but viewed the child as inherently good,⁴² requiring education to reinforce their natural tendencies⁴³ through structure, rather than by guidance as Locke suggested. Stainton Rogers (discussed again in Section 2.4.2) labelled this approach as the 'discourse of control',⁴⁴ which was characterised by the need to teach children right from wrong until they are able to reason for themselves. Adults within this discourse have the responsibility to ensure that the child's long-term interests are taken into account.⁴⁵

Rousseau's views on children and their capacity also differed from Locke's. Rousseau disagreed with Locke's theory of rationality, which

³⁹ *Supra* note 10.

⁴⁰ *Supra* note 27, 125-130.

⁴¹ *Supra* note 27, 125-130.

⁴² Neil Postman, *The Disappearance of Childhood* (Dell Publishing Co 1982) 59; *Supra* note 21, 22.

⁴³ Leo Damrosch ed., *The Essential Writings of Jean-Jacques Rousseau* (Vintage 2013) 229-230.

⁴⁴ Wendy Stainton Rogers, 'Constructing Childhood, Constructing Child Concern' in Pam Foley et al (eds), *Children in Society: Contemporary Theory, Policy and Practice* (Palgrave 2001) 29.

⁴⁵ *Ibid*, 29-30.

‘thought of the man in the child without thinking of what he is before being a man’.⁴⁶ He believed that children needed to learn to be rational rather than assumed to be rational from a young age. He contended that children could not understand or believe in religion, to use an example. Rousseau argued that children were capable of reciting what was taught to them, but they were unable to think critically which would have enabled them to believe in religious doctrine.⁴⁷ Wall extrapolated that Rousseau’s views meant that children could not access social rights associated with being a full-member of society.⁴⁸ The view that children are unable to hold religious convictions or political opinions continues to pervade refugee case law concerning children (this is discussed in detail in Chapter Six, Part III). In fact, Chapter Six gives the example of a case involving children who claimed asylum on the basis of their political opinion, testifying that they were caught handing out pamphlets. However, the Norwegian decision maker in the case took the view that the children were not capable of forming such views.⁴⁹

This dichotomy existed from the seventeenth and eighteenth centuries. On the one hand, children were viewed as objects of law, persons in need of protection who were not necessarily capable of forming their own views – views linked with citizenship. On the other hand, children were increasingly viewed as subjects of law with the capacity to reason and develop political and other views or opinions. Despite Locke’s, Rousseau’s and Kant’s view that only adults could access their citizenship rights, children have since been shown to adopt views of their own and at times have found themselves at risk of, or experiencing, persecution as a result. This is a primary theme and is discussed throughout Chapter Three in the context of participation rights and Chapter Six in the context of participation rights and refugee law. This

⁴⁶ Jean-Jacques Rousseau, *Emile, or on Education* in Leo Damrosch ed., *The Essential Writings of Jean-Jacques Rousseau* (Vintage 2013) 229-289.

⁴⁷ *Ibid*, 229-289.

⁴⁸ *Supra* note 28, 529.

⁴⁹ See Kate Halvorsen, ‘Asylum Decisions on Child Applicants Report on 4-Country Pilot Project’ (Ministry of Local Government and Modernisation 2004). Discussed in further detail in Chapter Six.

conflict, which is inherent to children's rights, is reflected upon throughout the thesis and conclusions are drawn in Chapter Seven.

Rousseau's belief that children could not be socialised until they reached adolescence set Rousseau apart from Locke. However, Kant, to some degree, agreed. Immanuel Kant, a German philosopher, also wrote on the education of children during the eighteenth century.⁵⁰ He also believed that education served to provide guidance on the path to rationality.⁵¹ He also argued that children did not host innate wisdom, but that their actions were led by impulse and play. Kant suggested a more disciplinarian approach, falling under the umbrella of the 'discourse of control'. He argued that children needed to be taught to overcome *their* natural impulses⁵² in order to prepare them to follow the laws of society.⁵³ Kant's view of children was therefore slightly more cynical than Locke and Rousseau. Locke believed children were inherently good and merely needed guidance. Rousseau viewed the surrounding society as bad and argued that children needed protection from outside world. Kant, however, believed that children themselves needed discipline to learn to reason. All three conceptualisations of children can be seen in contemporary discourse (discussed in Section 2.3).

Wall⁵⁴ and Dwyer noted that Kant nevertheless recognised that children were beings capable of acting with some autonomy.⁵⁵ However, Kant contended, like Locke and Rousseau, that only adults could be framed as subjects of rights within society.⁵⁶ The view that children are not subjects of rights has existed for centuries. Chapter Three shows that

⁵⁰ See, for example: Susan Turner, 'Justifying Corporal Punishment of Children Loses its Appeal' *International Journal of Children's Rights* (2003) 11 219.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ H.Ozmon and S. Craver eds (1999) *Philosophical Foundations of Education* 6th ed. Up Saddle River, NJ: Merrill p. 45-46.

⁵⁴ *Supra* note 28, 529.

⁵⁵ James Dwyer, *Religious Schools v. Children's Rights* (Cornell University Press 1998) 67.

⁵⁶ *Supra* note 50, 219.

agency is still a principal theme in children's rights and child refugee law (discussed in Chapter Six).

The above mentioned theorists believed children had an evolving capacity to reason that needed to be cultivated through education with a view to earning full citizenship rights once they reached adulthood.⁵⁷ None of the authors discussed above suggested that children had rights in their own right, but their discussions on their evolving capacity to reason provided a foundation for contemporary children's rights. However, it is important to note that Locke and Rousseau in particular discussed children and childhood merely in the context of their educational needs and not their wider capacity to engage with the rights regime. In fact, quite the opposite is true; the aforementioned theorists did not view children as rights holders. They viewed children as existing in a development limbo awaiting maturation. Their contributions are nevertheless useful in grounding discussions and highlighting the origins of the conflicts we still see today in law and sociology (as discussed throughout this thesis).

The following section looks at the sociological contributions in the development of the modern international children's rights movement beginning in the 1960s. The movement provides important contributions in respect of our understanding of children. The discussions below begin from the 1960s (following the publication of Ariès seminal work) and conclude with the adoption of the CRC (1989). Chapter Three picks up from this point and discusses the developments in children's rights stemming from international law, while reflecting on contributions discussed above.

⁵⁷ The discourse herein relates to education. It does not sit easily with the rights discourse. It nevertheless contributes to our understanding of childhood and the trajectory of the conceptualisation that ultimately influenced the children's rights regime.

2.3 The modern children's rights movement

Childhood studies and debates have grown and expanded since the period of Enlightenment, but did not hit their stride until the 1980s.⁵⁸ Prior to the 1980s, very little was written about children from a sociological perspective. Historical sociologists such as Durkheim, Comte, Marx and Parsons, for example, did not address childhood in their studies.⁵⁹ Quennerstedt remarked upon the limited published research and indeed interest in the area prior to this time⁶⁰ noting that sociologists did not see the relevance of the period of childhood on society as a whole.⁶¹ However, the children's rights movement was gaining momentum in the 1960s and 1970s and some child-focussed literature in the sociology discipline emerged.⁶² The principal focus of this discourse up until the 1980s, like in the literature of the seventeenth and eighteenth centuries, was to emphasise the socialisation of the child⁶³ – the adult-in-becoming.⁶⁴ The new discourses built on early work, seeing children as requiring protection in the most basic sense, but also having agency. They began to be viewed as participants in society

⁵⁸ In terms of number of research projects and active researchers. See: Ann Quennerstedt, 'Children's Rights Research Moving into Future – Challenges on the Way Forward' (2013) 21 *International Journal of Children's Rights* 233.

⁵⁹ Anne Marie Ambert 'Sociology of sociology: The place of children in North American sociology' in Patricia Adler and Peter Adler, *Sociological Studies of Child Development* (Vol 1, JAI Press 1986) 11-31.

⁶⁰ *Supra* note 58.

⁶¹ See, for example: Kingsley Davis, 'The Child and the Social Structure' (2010) 14(4) *The Journal of Educational Psychology* 217 in Ariene Bowers Andrews and Natalie Hevener Kaufman *Implementing the UN Convention on the Rights of the Child: A Standard of Living Adequate for Development* (Praeger 1999) 48. Jens Qvortrup describes Davis' characterization of childhood as a preparatory stage. Qvortrup emphasised that the discourse has not moved on much.

⁶² See: Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009); *Supra* note 21; Lucinda Ferguson, 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights' (2013) 21 *International Journal of Children's Rights* 177; *Supra* note 58, 233; Christine Alice Corcos, 'The Child in International Law: A Pathfinder and Selected Bibliography' (1991) 23 *Case Western Reserve Journal of International Law* 23:2 171; Mark Ensaraco, 'The Right of the Child to Development' in Mark Ensaraco and Linda Majka, *Children's Human Rights: Progress and Challenges for Children Worldwide* (Rowman & Littlefield Publishers, INC 2005); Michael Freeman, 'The Future of Children's Rights' (2000) 14:4 *Children & Society* 277; Jill Marie Gerschutz and Margaret Karns 'Transforming Visions into Reality: The Convention on the Rights of the Child' in Mark Ensaraco and Linda Majka, *Children's Human Rights: Progress and Challenges for Children Worldwide* (Rowman & Littlefield Publishers, INC 2005).

⁶³ *Supra* note 59, 11-31.

⁶⁴ *Supra* note 59, 11-31.

rather than an element of society left to adults to control.⁶⁵ Building on Locke's, Rousseau's and others' views on capacity, children were starting to be seen as having a role in their own development and interactions with people around them, in particular their families, and were thus increasingly becoming studied.⁶⁶ The expansion is also attributed to debates surrounding the CRC and the publication and the global process of drafting and ratifying it.⁶⁷ This time was marked by a general consensus in research that children were considered to be independent members of society with rights to participate and with important roles to play.⁶⁸

This shift did not come without its challenges, criticised by those who did not believe *any* rights should be attributed to children.⁶⁹ The changing perception of children in society brought about tensions between the role of children and the role of parents in accessing rights and protections,⁷⁰ based on the fear that children's rights would

⁶⁵ See, for example: Martha Minow, 'What Ever Happened to Children's Rights?' (1995-1996) *Minnesota Law Review* 80 268.

⁶⁶ Research on children's studies grew considerably in the first three decades of the 1920s. See, for example: Edwin Kirkpatrick, *Fundamentals of Child Study: A Discussion of Instinct Trends and Other Factors in Human Development with Practical Applications* (4th edn, Macmillan 1929); Ruth Andrus, *A Tentative Inventory of the Habits of Children from Two Years to Four Years of Age* (Teacher's College, Columbia University 1924); Ada Arlitt, *Psychology of Infancy and Early Childhood* (McGraw-Hill 1928); Sara Josephine Baker, *The Growing Child* (Brown 1923); Josephine Foster & John Anderson, *The Young Child and His Parents: A Study of One Hundred Cases* (University of Minnesota Press 1927).

⁶⁷ See: *Supra* note 58, 233.

⁶⁸ Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger eds *Childhood Matters. Social Theory, Practice and Politics* (Avenbury 1994); *Supra* note 34; Allison James, Chris Jenks and Alan Prout, *Theorising Childhood* (Polity Press 1998) 235; Pamela Reynolds, Olga Niewenhuys and Karl Hanson, 'A view from anthropology – Introduction' (2006) 13(3) *Childhood*: 291; Nick Lee, *Childhood and Human Value. Development, Separation and Separability* (Open University 2005).

⁶⁹ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 30.

⁷⁰ John Bennet, 'Supporting Family Responsibility for the Rights of the Child: An education viewpoint' (1996) 4 (1) *International Journal of Children's Rights* 45-56; Nigel Thomas and Claire O'Kane, 'When Children's Wishes and Feelings Clash with their Best Interests' (1998) 6 (2) *International Journal of Children's Rights* 137-154; Jack Westman, 'Children's Rights, parents' prerogatives, and societies obligations' (1999) 29 (4) *Child Psychiatry and Human Development* 315-328; Brian Howe, (2001) 'Do Parents have Fundamental Rights?' *Journal of Canadian Studies* 36(3) 61-78; Sandra Mason and Cynthia Cohen, 'Children's Rights in Education' in Stuart Hart et al eds, *Children's Rights in Education* (Jessica Kingsley 2001); Njal Hostmaelingen, 'Mandatory religious education that builds tolerance: Lessons to be learned from Norway?' (2005) 13 (4) *International Journal of Children's Rights* 403-412; Laura

undermine the rights and the role of the family.⁷¹ It is these tensions and the lack of inclusion in mainstream sociological research that have likely resulted in children's rights not featuring in mainstream human rights law and refugee law. The lack of child refugee case law is consistent with the general tendency to address their rights in a sphere siloed from mainstream discourses. These tensions are discussed below.

2.3.1 *The beginning of the Children's Rights Movement*

The Civil Rights Movement in the United States and developments across the industrialised world increased public sympathy around minority rights, including the rights of children.⁷² Advocates in the United States during the Movement in the 1960s and 1970s began to argue for constitutional rights to be applied to children as well as to adults - separate to the family unit.⁷³ The literature focuses on two main children's rights approaches: the liberationist and protectionist frameworks. Liberationists viewed children as rights holders to whom all constitutional rights, or adult rights, apply.⁷⁴ Protectionists viewed children as having rights 'in their own right', but also requiring third party protection from adult responsibilities and harm.⁷⁵ These two views are discussed below. The developments that arose during this time further elaborate the debates and characteristics of childhood discussed in Section 2.2, which have, as we will see in Chapter Three, informed international children's rights law, but perhaps not in the way we would expect. International children's rights law did not start from the position

Lundy, 'Family values in the classroom? Reconciling Parents' wishes and children's rights in state schools' (2005) 19 *International Journal of Law, Policy and the Family* 346-372; Clare Huntington, 'Rights myopia in child welfare' (2006) 53 (3) *UCLA Law Review* 637-699; Sonja Grover, 'Children's right to be educated for tolerance: Minority rights inclusion' (2007) 19 (1) *Education and the Law* 59-70; Ann Quennerstedt, 'Balancing the rights of the child and the rights of the parents in the Convention on the rights of the child' (2009) 8 (2) *Journal of Human Rights* 162-176.

⁷¹ *Supra* note 69, 4.

⁷² *Supra* note 69, 4.

⁷³ See, for example: Richard Farson, *Birthrights* (Macmillan 1974); John Holt, *Escape from Childhood: The Needs and Rights of Childhood* (Dutton 1974); Beatrice Gross and Ronald Gross, *The Children's Rights Movement: Overcoming the Oppression of Young People* (Anchor 1977).

⁷⁴ See, generally: John Holt, *Escape from Childhood: The Needs and Rights of Childhood* (Dutton 1974); *Supra* note 69.

⁷⁵ See, generally: Richard Farson, *Birthrights* (Macmillan 1974); *Supra* note 69.

that children had both rights to protection and agency despite chronologically following these debates. International law began from a strict protectionist perspective, perhaps stemming from a reluctance to attribute rights to children (See Chapter Three).

2.3.2 Bringing children's rights to the fore: the liberationist and protectionist approaches

Liberationists viewed children as rights holders to whom all constitutional rights, or adult rights, apply.⁷⁶ Liberationists argued that children had capacity for self-determination believing, as Holt⁷⁷ and Farson argued, that children had a fundamental right to participate in decisions affecting them.⁷⁸ Holt concluded in his 1974 book, *Escape from Childhood: The Needs and Rights of Children*, that children should be viewed as having rights to: work, own and sell property, travel, have a minimum salary, vote, have ownership over their education, use drugs and control their private and sexual lives⁷⁹ *should they choose to*.⁸⁰ This suggested that he did not see these rights as absolute, but that if children had the capacity to take on the responsibilities typically attributed to adults, they should be able to have access to them.

Fortin argued that the liberationist paradigm may have impacted negatively upon the children's rights movement as a whole as it fed into fears relating to diminishing parental rights. However, she also noted that it also led to a re-examining of children's capacity to make decisions and contribute to decision-making processes.⁸¹ Advocates during the

⁷⁶ See, generally: John Holt, *Escape from Childhood: The Needs and Rights of Children* (E.P. Dutton 1974); *Supra* note 69.

⁷⁷ In John Holt, *Escape from Childhood: The Needs and Rights of Childhood* (Dutton 1974), Holt concluded that children should be viewed as having rights to: work, own and sell property, travel, have a minimum salary, vote, have ownership over their education and educational choices, use drugs and control their private and sexual lives *should they choose to* (emphasis added).

⁷⁸ *Ibid*, 3.

⁷⁹ *Ibid*, 5.

⁸⁰ *Supra* note 69.

⁸¹ Fortin notes that 'There is now a fairly widespread view that it is wrong to underestimate children's abilities and moreover that they should be encouraged to develop their independence. A general interest in this notion continues to underlie much of what is written about children's rights today'. See: *Supra* note 69, 5.

1960s and 1970s increasingly addressed the rights of children on a spectrum which correlated with the child's individual capacities.⁸² For example, in 1979, Hillary Rodham [Clinton] argued that children should be viewed by the courts as having rights and legal capacity in their own right.⁸³

The liberationist discourse also brought into focus the gap that exists between protection rights and participation rights and the fact that attempts at closing that gap remained contentious in the 1970s (and beyond as discussed throughout this chapter and Chapter Three). Fundamentally, the reactions to the floating of the liberationist approach indicated reluctance generally to attribute rights to children, which supports findings in subsequent chapters on the low numbers of child refugees compared to their adult counterparts, the limited child refugee case law and the low recognition rate associated with separated children seeking asylum (discussed in detail in Chapter Six). The liberationist view emphasised agency, drawing out participation rights. Chapter Six finds that exercising agency in the case of children is often either hard to substantiate or results in a low recognition rate compared to claims grounded in protection rights, for example (See Chapter Six for detailed discussion).

Although the liberationists reflected some of the core principles relating to children and childhood developed by their predecessors, the liberationist framework did not withstand the test of time and was largely overtaken by more protection-minded writers and activists.⁸⁴ The protectionist framework incorporated some of the liberationist's philosophy into their understanding of children.⁸⁵ Henry Foster in his

⁸² See: *Supra* note 65.

⁸³ Hillary Rodham, 'Children's Rights: A Legal Perspective' in Patricia Vardin and Ilene Brody, *Children's Rights: Contemporary Perspectives* (Teachers College Press 1979); Martha Minow, 'What Ever Happened to Children's Rights?' (1995-1996) 80 *Minnesota Law Review* 269.

⁸⁴ Discussed Chapter Three.

⁸⁵ See, generally: Richard Farson, *Birthrights* (Macmillan 1974); Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009); *Supra* note 77; Helen

‘Bill of Rights’ advocated for the child’s right to equal treatment, while also emphasising the need to protect children from hazardous work, ensure that children have access to necessary medical care, for example, and ensure administrative procedures take into account children’s best interests.⁸⁶ Freeman, in 1983, put forward his argument for the protection of children on the basis of their vulnerability, but also argued that children must be cared for in such a way that they are capable of becoming responsible for themselves.⁸⁷ Protectionists held that rights must be interpreted in relation to the child’s age and capacity.⁸⁸ Their views were not far off from those developed during the period of Enlightenment.

Building on the inherent conflicts in attributing rights to children, Wendy Stainton Rogers provided a division of the protectionist framework into two separate discourses for conceiving of children’s rights, or two ‘discourses of childhood’.⁸⁹ She argued that the ‘welfare discourse’ viewed the child as pure and innocent and childhood as a time of growth and enjoyment (as children were described in Rousseau’s *Emile*, for example). This discourse is reflected in the drive to improve services for children, for example.⁹⁰

Similar to Kant’s views, the second discourse, the ‘discourse of control’, viewed the child as inherently bad and argued that education served to teach right from wrong. Parents within this discourse were considered to have the responsibility to ensure that the child’s long-term interests were taken into account. Stainton Rogers suggested that each discourse represented a different side of the agenda to protect the best interests of

Baker, *Growing up Unheard* in Beatrice Gross and Ronald Gross, *The Children’s Rights Movement: Overcoming the Oppression of Young People* (Anchor 1977) 187.

⁸⁶ Henry Foster, *A ‘Bill of Rights’ for Children* (Thomas 1974).

⁸⁷ Michael Freeman *The Rights and Wrongs of Children* (F. Pinter 1983).

⁸⁸ *Supra* note 86, xv and 6-7.

⁸⁹ *Supra* note 44, 29.

⁹⁰ *Supra* note 44.

the child.⁹¹ Neither discourse focussed on the promotion of participation rights.

The picture of childhood we have based on the liberationist and protectionist approaches, both competing and overlapping, is that children play an important role in society and also have the capacity to participate in that society, including in relation to their own lives and future outcomes. The debates during this time also recognised the innate vulnerability of children and recognised that children, required certain protections and access to certain rights. Both ‘protection from harm’ and rights relating to self-determination serve to aid the child in becoming an active citizen and member of society. The protectionist approach therefore encapsulated aspects of childhood that correspond with protection, provision *and* participation rights. It is therefore possible to see the link between the more sociological (and pre-CRC) discourse and the CRC itself (discussed in Chapter Three). The children’s rights movement and the contributions that preceded and followed shaped contemporary conceptualisations of childhood and children, including in the context of refugee law. The developments during this time closely reflected the contributions of the theorists discussed in Section 2.2 further supporting the view that development and agency are core themes in children’s rights and thus should be in the context of refugee law. Chapter Six asks if this is the case.

The following section unpacks what is referred to above as *understandings* of childhood. Childhoods exist differently – varying by culture, community, religion or country. However, international law and the discourse herein largely stem from concepts of children and childhood deriving from the Global North. The following section asks how the conceptualisation of childhood may differ in other parts of the world and to what extent those differences contribute to our understanding of childhood and the application of international

⁹¹ *Supra* note 44, 29 – 30.

children's rights law. The purpose of including this discussion relates to the global nature of refugee law - a regime which serves to provide surrogate protection in *one* country when *another* country fails to fulfil their protection obligations to their citizens (discussed in detail in Chapter Four). One question that arises in the context of global childhoods and where the concept intersects with refugee law is whether or not determination bodies define persecution relative to the receiving country, relative to the country to which the child would otherwise be returned or relative to a global conceptualisation of children. This question arises again in Chapter Six and while it is not possible to fully answer it based on the limited and inconsistent case law, it is addressed and is highlighted as an area for potential future research throughout.

2.4 Global childhood

Since the beginning of the children's rights movement, culminating in the publication of the CRC, there has been a push to establish a global standard for childhood or a 'global meaning of childhood'.⁹² Political, economic and technological developments in the past thirty or forty years have resulted in increased movement of people and information across borders.⁹³ The exchange and remittance⁹⁴ of information which influences one country, culture or peoples thus affects understandings of children and childhood worldwide. An increase in non-governmental organisations and the use of the media to highlight issues concerning children worldwide has also resulted in more information being made available about the deprivation of children globally. In addition, the CRC and other regional frameworks such as the African Charter on the

⁹² See, generally: *Supra* note 11; A. Bame Nsamenang 'Cultures in early childhood care and education' in Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge (eds) *Childhood Studies and the Impact of Globalisation: Practices at Global and Local Levels* (Routledge 2009); Pam Foley et al (eds), *Children in Society: Contemporary Theory, Policy and Practice* (Palgrave 2001); Madeleine Leonard, *The Sociology of Children, Childhood and Generation* (Sage 2016).

⁹³ James Mittleman, 'Restructuring the global division of labour: old theories and new realities' in Stephen Gill (ed.) *Globalisation, Democratisation and Multilateralism* (Macmillan 1997).

⁹⁴ See, for overview: Paolo Boccagni and Francesca Decimo, 'Mapping social remittances' (2013) 10 (1) *Migration Letters* 1-10.

Rights and Welfare of the Child 1999⁹⁵ and initiatives such as the Millennium Development Goals⁹⁶ have progressed the establishment of a global conceptualisation of childhood.⁹⁷ James, Jenks and Prout, argued that these developments have resulted in children being considered one global minority group.⁹⁸ Wyness described this phenomenon as a

*‘dominant unitary model of childhood, a Western, affluent world view of childhood held up as a norm by international organizations and powerful nation-states’.*⁹⁹

More recently, there has been a push to discuss childhood in terms of childhoods, reflecting the diversity of the world’s children and their circumstances.¹⁰⁰

The global standard approach provides a baseline for other childhoods to be compared against. Childhoods that do not satisfy the standard are seen as deficit childhoods. Fler, Hedegaard and Tudge described deficit childhoods as those located in less affluent regions of the world that need to be brought up to meet the global standard.¹⁰¹ The result of this approach may be seen to demonise a particular society based on the way it understands childhood and thus treats children. The best example of this is the case of child labour. In some countries it is an economic necessity to engage children in labour.¹⁰² Child labour may be demonised where it is in conflict with the global standard which protects

⁹⁵ African Charter on the Rights and Welfare of the Child 1999.

⁹⁶ See, generally: Malcolm Langford et al (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (CUP 2015).

⁹⁷ *Supra* note 11, 69.

⁹⁸ Allison James, Chris Jenks and Alan Prout, *Theorizing Childhood* (Polity 1998).

⁹⁹ *Supra* note 11, 61.

¹⁰⁰ See: Nick Lee and Johanna Motzkau, ‘Navigating the Bio-politics of Childhood’ (2011) 18 *Childhood* 7-19.

¹⁰¹ Marilyn Fler, Marianne Hedegaard and Jonathan Tudge, ‘Constructing childhood: global-local politics and practices’ in Marilyn Fler, Marianne Hedegaard and Jonathan Tudge (eds) *Childhood Studies and the Impact of Globalisation: Practices at Global and Local Levels* (Routledge 2009).

¹⁰² Child labour is not an uncommon theme in refugee case law. There is an established link between labour exploitation in certain instances and persecution (Chapter Six). It is also a prominent and well developed children’s right (See Chapter Three).

children from labour harmful to their development or where the child labourer has not reached a sufficient age.¹⁰³

It is the threshold of harm that is of interest to this thesis and refugee law generally. This thesis asks when a breach of the right of the child to develop and to be free from harmful labour practices, for example, (Chapter Three) amounts to persecution. Cases dealing with child labour, and other forms of harm constituting deficit childhood, are analysed in Chapter Six and the question is asked whether or not the determination bodies consider the threshold relative to the Western construction of childhood, to the child's country of origin or to the global standard as established by the CRC. This question is not answered specific to the country of origin, rather it looks at the wider divide between the 'Global North' and the 'Global South' (see Chapters Three and Six for further discussions on this divide).

It is also important to note that the literature on childhood does not deal with children in refugee situations. In fact, even in the literature which looks at global childhood(s), there is very infrequent reference to children who are refugees or children who are in need of refugee protection. There is research on the needs, mainly welfare, of children in refugee camp or reception settings,¹⁰⁴ however. There are countless studies on the experiences and needs of children who are in protracted circumstances of displacement, in camps¹⁰⁵ or living on the streets.¹⁰⁶

¹⁰³ *Supra* note 11, 61.

¹⁰⁴ See, for example: Daniel Steinbock, 'Unaccompanied Refugee Children in Host Country Foster Families' (1996) 8 *International Journal of Refugee Law* 6; Muireann Ni Raghallaigh, 'The negotiation of culture in foster care placements for separated refugee and asylum seeking young people in Ireland and England' (2015) 22 (2) *Childhood* 263.

¹⁰⁵ See, for example: Brechtje Paardekooper et al, 'The Psychological Impact of War and the Refugee Situation on South Sudanese Children in Refugee Camps in Northern Uganda: An Exploratory Study' (1999) 40(4) *Journal of Child Psychology and Psychiatry*; 'Recommendations of the Seminar on the Psychological Well-Being of Refugee Children organized by Catholic Child Bureau (September 23-27, 1991 Geneva Switzerland)' (1992) (2) *International Journal of Refugee Law* 285.

¹⁰⁶ See, for example: Benno Glauser, 'Street children' in Allison James and Alan Prout, *Constructing and reconstructing childhood: Contemporary issues in the sociological study of childhood* (2015) 128; Lorraine Young, and Hazel Barrett, 'Adapting visual

The needs of children in global childhood studies are compared against the existing understanding of childhood as developed in the Global North. This is also the case for international law, ie it was also drafted and developed in the Global North.¹⁰⁷ These studies tend to focus on the rights contained within the CRC. Studies that seek to define childhood do so in a general sense from the Global North perspective rather than from the developing context. The approach taken in this thesis which is to apply the universal conceptualisation of children and childhood as the foundation, is reinforced by the fact that there is a paucity of research which has established other standards of childhood for those in the refugee context, except that which is referred to as deficit. Furthermore, the CRC experienced near universal ratification and thus is seen to amount to a global standard.¹⁰⁸ The term deficit also implies a need to intervene, which may be relevant in the context of refugee protection (discussed again in Chapter Six).

Locke through to Foster framed their contributions around the Global North (in the case of Locke and Rousseau, their contributions were framed exclusively around education in the Global North), where rapid industrialisation and growing wealth allowed space for discussions on fundamental and personal freedoms and protection. That is not to diminish their contributions, but to contextualise the approaches adopted by these writers and reiterate the limitations in applying their contributions throughout this thesis in respect of children's rights law and refugee law as discussed in Chapters Three and Four, respectively. Although the aforementioned discourses are Western-centric, the same

methods: action research with Kampala street children (2001) *Area* 33 (2) 141; Tobias Hecht, *At home in the street: Street children of Northeast Brazil* (CUP 1998).

¹⁰⁷ See, generally: Brian-Vincent Ikejiaku, 'International Law is Western Made Global Law: The Perception of Third-World Category' (2013) 6 *African Journal of Legal Studies* 337.

¹⁰⁸ All UN recognised countries ratified the Convention on the Rights of the Child except the United States of America <http://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en> accessed 12 July 2016.

can be said about both the CRC and the Refugee Convention as mentioned above (discussed in Chapters Three and Four, respectively).

Regardless of the region or economic situation or birthplace of childhood studies and children's rights, some children globally are unable to avail of rights typically considered to belong to them. It is the violation of these rights that is of interest to this thesis. The lack of research on the qualification of refugees, or refugees in general, in the context of global childhood studies also reinforces the idea that a dichotomy exists between children's rights and refugee law and shows that this dichotomy goes beyond international law and is heavily engrained across disciplines. This is unpacked throughout the thesis.

2.5 Conflicts within the paradigm shift: an externalisation of rights, romanticism and the role of the family

The shift towards public education influenced the children's rights movement. A push emerged to externalise children's rights-based discourse which removed some rights and responsibilities from the parents. The shift toward public school education meant that parents were no longer the sole educator of their children and it introduced the notion that the State was also responsible for elements of the care and upbringing of the children in their jurisdiction. This in turn has influenced international children's rights law in that education, a provision right, must be provided by the State (discussed in further detail in Chapters Three and Six).

The shift also brought about a formalised external element to the experience of childhood, namely, educators. Educators, who were either based in religious or educational institutions, had an external influence on the child. The public school system in particular mapped out a new family structure which, as Ariès noted, placed the child outside the adult world into a space of their own.¹⁰⁹ In response to this, however, Ariès

¹⁰⁹ *Supra* note 27, 125-130.

noted that a new dynamic between the family and society was created. Due to the introduction of a formalised external influence in the case of children, the family needed to reorganise and respond. Ariès argued that the familial response was to introduce the notion of ‘private life’, with families raising ‘a wall of private life between the family and society’.¹¹⁰ This notion is discussed again in Chapter Three in relation to one of the corresponding rights - family unity.

Ariès described this shift in the conceptualisation of children, arising from the period of Enlightenment, as the romanticisation of children. Children in the Global North were needed less and less for labour and were seen more and more as a source of entertainment and something to be nurtured.¹¹¹ The conceptualisation of childhood to which we are accustomed reflects this shift. The family has the responsibility to ensure the child has a positive experience of childhood.¹¹² This is reflected in various examples of child protection legislation across the globe. The recent amendment to the Irish constitution addressed this point of law:

*‘In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the state as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child’.*¹¹³

Protection is at the fore in contemporary international discourse and family is right behind it. However, the role of the family in the context of children’s rights is the most contentious. Child agency is now a common and often competing aspect of the experience of childhood.

¹¹⁰ *Supra* note 27, 397.

¹¹¹ *Supra* note 27.

¹¹² UDHR, Article 16.3. See Chapter Three.

¹¹³ Constitution of Ireland, Article 42a(1)(2)(1°).

Current discourse asserts therefore that children, consistent with their capacity, should be facilitated in participating in aspects of their experience of childhood, including in making decisions around their future. Discourse around agency has therefore evolved considerably since the times of Locke and Rousseau. Self-determination forms part of this debate.¹¹⁴ Children have rights to self-determination as decisions made in childhood impact upon their experiences of adulthood.¹¹⁵ Examples of children exercising their right to self-determination may include child stars (musicians, actors)¹¹⁶ or athletes (gymnasts, football players).¹¹⁷ A child may wish to enter into these industries or competitions based on an innate and/or cultivated talent that manifests at a young age. Another example relates simply to choices made in education, a process that, as Rousseau acknowledged, children should have a role in. Children in their teenage years may wish to enrol in certain classes or sit certain exams to improve their chances of realising their future career goals. The realisation of future goals (including having a family) and career objectives is part of the experience of adulthood, but something that also begins in childhood.

Agency and self-determination are therefore important aspects of childhood, considered in parallel with their evolving capacities *en route* to adulthood. Childhood was described by theorists in previous sections as a process and the process is completed by achieving reason, an ability

¹¹⁴ See, generally: Allison James and Alan Prout, 'Hierarchy, boundary and agency: Toward a theoretical perspective on childhood' (1995) 1 *Sociological Studies of Childhood* 77-101; Richard Farson, *Birthrights* (Macmillan 1974); *Supra* note 77; Beatrice Gross and Ronald Gross, *Introduction to the Children's Rights Movement: Overcoming the Oppression of Young People* (Anchor Books 1977).

¹¹⁵ See Chapter Three.

¹¹⁶ For a general overview of the rights and challenges around child performers, see: Katherine Sand, 'Child performers working in the entertainment industry around the world: An analysis of the problems faced' working paper (International Labour Office 2003) <http://staging.ilo.org/public/libdoc/ilo/2003/103B09_652_engl.pdf> accessed 15 July 2016.

¹¹⁷ For a general overview of the rights and challenges around child athletes, see: Siri Farstad, 'Protecting Children's Rights in Sport: The Use of Minimum Age' <https://www.nottingham.ac.uk/shared/shared_hrlcpub/Farstad.pdf> accessed 15 July 2015.

to care for one's self *en route* to self-actualisation.¹¹⁸ It is the other aspects of childhood, health and protection etc that must be provided to ensure the child's right to positive development is not impacted upon or breached.

Education in pursuit of adulthood, as addressed herein is different to encouraging participation *during* childhood (discussed in detail in Chapter Three). However, the evolution of children's rights is moving more towards the promotion of participation rights during childhood, yet ambivalence persists. For example, and as discussed in the introduction to this thesis, child agency has a relationship with the 'religion' and 'political opinion' (and indeed other) Refugee Convention grounds. It is precisely the objective of childhood – development to facilitate and encourage participation in society, or access to civil and political rights – that may place children at risk of persecution.

By achieving reason through education it is foreseen that children may also then form opinions relating to religion and politics, for example, that may conflict with societal norms and thus place them in a position of risk - regardless of whether or not a given society views them as entitled to exercise civil and political rights traditionally associated with adulthood. It is precisely this potential challenge to interpreting the rights of the child that permeates refugee case law on the topic of participation rights (discussed in detail in Chapter Six, Part III). Bhabha and Crock described refugee determination bodies' approach to cases of children invoking violations of civil and political rights with 'trepidation'.¹¹⁹ This view and the approach of determination bodies runs contrary to the trends in refugee law – civil and political rights are favoured over social and economic rights in decision making concerning

¹¹⁸ Self-actualisation is achieved when a person experiences positive development throughout childhood and beyond and eventually attains the skills and knowledge needed to achieve their individual potential. See, generally: Abraham Maslow *Toward a psychology of being* (3rd edn, Wiley 1999).

¹¹⁹ Jacqueline Bhaba and Mary Crock, *Seeking Asylum Alone – a Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press 2007) 106.

adults (Chapter Five).¹²⁰ However, protection rights, most often of a social and economic nature are dominant in refugee case law concerning children (See Chapter Six).

We can see that although agency is a dominant theme, second to protection, in the conceptualisation of childhood established herein, it remains contentious in the application of law. The conflicts identified above have very early origins, yet we can also see that they are relevant in the context of modern child refugee law. This is developed in Chapter Six.

These developments and conflicts in the evolution of childhood and children's rights are still present in today's discourses – sociological and legal. From the seventeenth century, capacity, or child agency, the right to a protected childhood *and* the rights of the family unit dominated the discourse. The underlying conflict between attributing rights to the child and the rights of the parent was already apparent. The two pillars, protection from harm and childhood *and* autonomous rights, nevertheless remain two sides of the one main objective: development. The sensitivities around the division of authority between the State and the parents and the perception of children as having capacity, as subjects of law, continue today and they may also account for firstly, the late (in the context of international human rights law generally) drafting of the CRC and the lack of visibility in other areas of human rights law. This point is central to this thesis and is developed throughout.

2.6 A conceptualisation of childhood

A conceptualisation of children is established here based on the contributions above. Children exist within the period of childhood. The parameters of childhood vary but include: health, access to adequate resources to ensure good health and participation in other aspects of childhood, family and the protection of the family, protection from

¹²⁰ See: Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007).

economic exploitation, protection from harm, development including through education and lastly participation and the ability to exercise agency. In this way we can see that these characteristics of childhood also correspond to the Three Ps. The right to protection from harm generally, from economic exploitation and protection deriving from family fall within the protection rights category. Health, adequate resources, development deriving from the family and education rights all fall within the provision rights category. Participation and the ability to exercise agency fall within the participation rights category. This was reiterated by the Committee on the Rights of the Child (Committee) in 2003 in the context of Article 6 of the CRC (as defined in Chapter One and developed in Chapter Three):

*‘The Committee expects States to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children’.*¹²¹

By referring to the child’s physical, mental, spiritual, moral, psychological and social development in the context of interpreting Article 6, the Committee has shown the wide expanse of this right. Physical development relates to health and freedom from harm such as abuse and freedom from forced labour, for example. These are protection (and provision in the case of health) rights as contained within the CRC. Protection rights may also relate to mental and psychological development as well in the context of harm. Spiritual, moral and social development may relate to education and other provision rights such as the right to play. In addition, these aspects of development also relate to participation rights. For example, the right to religion as contained in the CRC is provided for as a child specific right, a right which may involve the child exercising their agency in expressing beliefs or behaving

¹²¹ *Supra* note 12, para 12.

consistent with, or in contravention of, behaviours associated with that religion. These rights clusters are dealt with in detail in Chapter Three. Development, as confirmed by the Committee, underscores all rights (as a General Principle, discussed in Chapter Three)¹²² and all three categories. Provision rights are in place to facilitate development (health, etc). Protection rights serve to ensure no harm can impact upon the child's development. Participation rights are in some way the effect of positive development, but they are also increasingly recognised as part of the process. Developmental interventions, especially education, should serve to improve the child's ability to exercise their agency *en route* to adulthood. Adulthood is characterised by citizenship rights, which are themselves characterised by the exercise of agency and ability to reason. All three categories of rights serve to facilitate development in line with Article 6 of the CRC, as discussed in further detail in Chapter Three.

One of the aims of this chapter was to establish that Article 6, or the right to survival and development, is at the core of contemporary and indeed historical understandings of childhood. Chapter Three further develops this principle, but it is this core understanding of childhood as a period of development that is presumed to also form the foundation for debates around refugee protection. In cases where rights specific to children are breached they are also presumed (in this thesis) to violate the child's right to survival and development. It is therefore suggested that a child centred approach to the interpretation of the Refugee Convention should start from the perspective that the experience of positive development should not be interrupted. Chapters Three and Six examine interruptions to development where there is a link to a convention ground and asks in which instances these violations are considered, or should be considered, to amount to persecution.

¹²² General Principles are commonly used to interpret the CRC. The General Principles contextualise the Convention, all four are understood to encompass all other CRC rights. *Supra* note 69, 37.

2.6.1 Limitation to the modern conceptualisation of children's rights

Children within the rights discourse are now a visible social group and there is an acknowledgment that they have a role to play in society, as discussed throughout this chapter. However both sociology and legal research points to one overarching challenge facing children who seek to access their rights and that is the perception and treatment of them by others.¹²³ In Chapter Three, this barrier is discussed in terms of accessing legal rights and exercising legal agency – noting the necessity to have a third party involved in both the process of accessing their rights, but also the assessment of their interests. And as Federle notes, 'the notion of best interests seldom, if ever, redounds to the child's advantage'.¹²⁴ Federle argues that the interest approach disadvantages children and further embeds notions of their incompetency.¹²⁵ It is thus those with power, as compared to the powerless children, that ultimately decide which rights children have and whether or not claims from children will indeed be recognised.¹²⁶ Freeman referred to this as 'liberal paternalism'.¹²⁷ It is argued that claims from children are so easily dismissed because they are not considered to have autonomy or agency by the elite, or those with decision making power. Therefore the rights that children have remained incongruent with the rights children may access, in particular those associated with autonomy. To put it another

¹²³ Jens Qvortrup, William Corsaro and Michael-Sebastian Honig *The Palgrave Handbook of Childhood Studies* (Palgrave 2009) 387.

¹²⁴ Katherine Hunt Federle 'Children's Rights and the Need for Protection' (2000) 34(3) *Family Law Quarterly* 423.

¹²⁵ *Ibid* 422-424.

¹²⁶ Katherine Hunt Federle 'Rights Flow Downhill' (1994) 2(4) *International Journal of Childhood Studies* 344; Michael Freeman *The Rights and Wrongs of Children* (F. Pinter 1983) 54-60.

¹²⁷ Michael Freeman *The Rights and Wrongs of Children* (F. Pinter 1983) 54-60.

way – children infrequently access their rights notwithstanding the fact that they indeed have rights to access. This perception likely contributes to the invisibility of children in refugee case law and literature and the inconsistency in decision making (discussed in Chapter Six).

2.7 Conclusion

This chapter is somewhat of a prelude to the discussions to come. Chapter Two established that a conceptualisation of childhood exists outside of the legal discipline. Chapter Three demonstrates that it is that conceptualisation that has informed international law. This chapter also established that the concepts ‘child’ and ‘childhood’ have been evolving, albeit not free of conflict and tension, for centuries. As the approach adopted for this research includes socio-legal research, the contributions from non-legal disciplines is an important part of analysing whether or not the legal responses to child refugees reflects other societal norms associated with, and understandings of, childhood. Furthermore, the analyses undertaken in this chapter sets a baseline for gauging progress in the development of international law, including refugee law, in its application in the case of children. The baseline unearthed herein also reflects the main themes associated with modern conceptualisations of child and childhood as seen through the lens of international children’s rights law (Chapter Three). The conflicts identified in this chapter can also be traced in the development, interpretation and application of children’s rights law (Chapter Three), including refugee law (Chapters Four and Chapter Six).

The principle purpose of Chapter Two was to establish a conceptualisation to be relied upon in subsequent chapters. However, the principal finding was that in fact the main trends, themes and most importantly conflicts are still relevant today – including in the context of refugee law. Reluctance to attribute agency rights to children has always been a feature in child and childhood studies. The discussions herein

indicate that the same trepidation associated with attributing agency to children, which still permeates the discourse, at least up until the drafting of the CRC has very early origins. The contributions this chapter makes to the field and to this research is primarily that modern conceptualisations of children may not have evolved as much as we thought. Perhaps children have access to more rights generally, but the difficulties they encounter accessing those rights relate to conflict and perceptions that date back to Enlightenment. In Chapter Six I reflect on the inconsistency in which children's rights law is interpreted in the context of refugee law and whether or not it is possible to suggest that the inconsistency stems from ambivalence associated with child agency, with its origins in the seventeenth century.

Lastly, this Chapter also reflects on the limited literature which bridges children's rights and refugee discourses. The lack of literature supports the notion that a dichotomy between children's rights and refugee law persists. This therefore points to the fact that children who may be in need of refugee protection did not form part of the discourse around conceptualisation children and childhood outside the legal discipline. Even in the literature which looks at global childhood(s), there is very infrequent reference to children who are refugees or children who are in need of protection. There is some research on the needs, mainly welfare, of children in refugee camp settings or in the context of reception conditions, however.

As mentioned, this chapter serves as a prelude to the rights based discussions in subsequent Chapters. The following chapters look at developments in international children's rights law with a particular focus on the CRC (Chapter Three), developments in refugee law where children were considered with a particular focus on the Refugee Convention (Chapter Four), the possibility of a children's rights approach to the interpretation of the Refugee Convention and making a case for its development (Chapter Five) and violations of children's rights amounting to persecution in the context of refugee law (Chapter

Six). This conceptualisation of children and childhood, which revolves heavily around the right to survival and development, serves to provide a foundation from which we can examine the overarching question – what children’s rights when violated amount to persecution. This exercise was undertaken to ensure the socio-legal analysis in Chapters Three to Six stem from child and childhood discourses. This thesis builds upon a multi-disciplinary conceptualisation of children and within that childhood. These points are revisited throughout this dissertation and in particular Chapter Six.

Chapter 3 International Children's Rights Law

3. Introduction

The Convention on the Rights of the Child (CRC) represents the culmination of the international children's rights movement and a solidification of the conceptualisation of children arrived at in Chapter Two. The CRC is now the foundation of modern children's rights law. The rights contained within the CRC are rights which are directly attributed to children 'irrespective of the child's or their parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth of other status'.¹ In addition to the CRC, children have rights as set out in the Universal Declaration of Human Rights (UDHR),² the International Covenant on Civil and Political Rights (ICCPR),³ the International Covenant on Economic and Social Rights (ICESR)⁴ and international labour laws, including the Worst Forms of Child Labour Convention (WFCLC).⁵ The existence of children's rights is therefore not disputed. This chapter rather looks at how children are conceptualised within international law and the way these provisions may interact with refugee law.

¹ Convention on the Rights of the Child 1989 (CRC), Article 2.

² Universal Declaration of Human Rights 1948 (UDHR).

³ International Covenant on Civil and Political Rights 1976 (ICCPR).

⁴ International Covenant on Economic and Social Rights 1976 (ICESCR).

⁵ Worst Forms of Child Labour Convention (no. 182) 1999 (WFCLC).

3.1 Origins of children's rights in international law

The Covenant of the League of Nations (1919)⁶ referred specifically to children in Article 23(a)(b):

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend,⁷

Additionally, Article 23(c) required members to 'entrust the League with the general supervision over the execution of agreements with regard to trafficking⁸ in women and children...'⁹ Both paragraphs (a) and (c) of the Covenant recognised the vulnerability of children while also placing

⁶ Frederick Samuel Northedge, *The League of Nations: its life and times, 1920-1946* (Leicester University Press 1998).

⁷ The Covenant of the League of Nations 1919 (Covenant), Article 23(a)(b).

⁸ The United Nations Office on Drugs and Crime, in their 2004 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, define trafficking in persons as: 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation'. The United Nations goes on to define exploitation as: 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.

⁹ Covenant, Article 23(c).

the responsibility on the State to prevent harm,¹⁰ reminiscent of the protectionist approach.

The first example of international law mentioning children and their rights specifically, emerged in 1919 in the context of labour. The ILO published 13 Conventions between 1919¹¹ and 1973,¹² which addressed children's rights and protections, specifically in relation to minimum age,¹³ the hours children could work¹⁴ and health.¹⁵ The most recent iteration of children's rights in the context of labour was the WFCLC, adopted in 1999. It is viewed alongside the Minimum Age Convention 1973 (No. 138) as fundamental to the rights regime under the aegis of the ILO. The main objective of the WFCLC¹⁶ was to oblige ratifying States to prohibit and eliminate the worst forms of child labour for all persons under age 18.¹⁷ Uniquely for mainstream international law, children were visible within these developments.¹⁸ Developments in early international labour law reflected the increased value placed on

¹⁰ *Ibid*, Article 23(a) & (c).

¹¹ International Labour Organization (ILO) Minimum Age (Industry) Convention, 1919 (No.5).

¹² ILO, Minimum Age Convention 1973 (No. 138).

¹³ ILO, Minimum Age (Sea) Convention 1920 (No. 7), Minimum Age (Agriculture) Convention 1921 (No. 10), Minimum Age (Trimmers and Stokers) Convention 1921 (No. 15), Minimum Age (Non-Industrial Employment) Convention 1932 (No. 33) revised in 1937 (No. 60), Minimum Age (Fisherman) Convention 1959 (No. 112), and Minimum Age (Underground Work) Convention 1965 (No. 123) and *Ibid*.

¹⁴ ILO, Minimum Age (Industry) Convention 1919 (No. 5). Revised 1948 (No. 90). It provides that no person under 18 years of age should be employed during the night with some exceptions for those aged 16 and over. This convention was ratified by 72 States. For more information on ratifications. See: <http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312150> accessed 28 January 2014.

¹⁵ *Ibid*.

¹⁶ Entered into force November 2000.

¹⁷ WFCLC, Article 1.

¹⁸ See: Yoshie Noguchi, '20 years of the Convention on the Rights of the Child and International Action against Child Labour' (2010) 18 *The International Journal of Children's Rights* 515.

education and the devaluing of child labour as highlighted by Ariés (discussed in Chapter Two).¹⁹ Chapter Two identified the clear link between development and labour, establishing that harmful labour practices can impact upon the right to develop. Looking ahead, exploitative and harmful labour practices feature prominently in child refugee case law. Protecting children from harmful labour that impacts upon the child's development therefore has both early origins and continued relevance in international law, including refugee law.

The 1924 Declaration recognised and outlined the responsibility of 'mankind' to ensure certain rights were afforded children regardless of their 'race, nationality or creed':²⁰

'The child must be given the means requisite for its normal development, both materially and spiritually;

The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;

The child must be the first to receive relief in times of distress;

The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;

¹⁹ The laws and policies around child labour had already been emerging at national levels, in particular in Britain. See: Education Act of 1918; International Labour Office, *Child Labour: A textbook for university students* (International Labour Organization 2004) 40; Children and Young Person's Act of 1933.

²⁰ *Ibid.*

The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men'.²¹

As early as 1924, this international document, written in the global north, referred to the protection needs of those who were experiencing deficit childhoods, or childhoods below the status quo.²²

Not only were the needs of children during times of distress prioritised, but requisite conditions for childhood were also outlined. The 1924 Declaration therefore painted a picture of a childhood that entails: (1) protection from harm and illness, (2) education so that children have the necessary skills to earn a living and serve others (3) and protection from exploitation. This conceptualisation implied that children: (1) were vulnerable to harm and exploitation, (2) required intervention or protection from others to prevent harm and (3) that childhood was seen as a period of growth or transition into adulthood. This reflects the conceptualisation put forward by early theorists in the seventeenth and eighteenth centuries and the main contributions in modern childhood studies - reflecting the general 'baseline' of positive development for the conceptualisation of children.

In 1959, the United Nations (UN) General Assembly adopted the second Declaration of the Rights of the Child,²³ which expanded on the rights

²¹ Declaration of the Rights of the Child 1924.

²² Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge, 'Constructing childhood: global-local politics and practices' in Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge (eds) *Childhood Studies and the Impact of Globalisation: Practices at Global and Local Levels* (Routledge 2009).

contained within the 1924 Declaration and also included principles deriving from the UDHR. The preamble stated that the child ‘by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.²⁴ The provisions referred to the responsibility of parents, governments and the international community to protect the child from: harm including in the workplace, exploitation including trafficking and neglect.²⁵ The 1959 Declaration, like its predecessor, nevertheless presented a romanticised, or Rousseauian, conceptualisation of the child, which placed the child firmly at the centre of society.

The Declarations represented a period in the children’s rights movement characterised by the notion that the international community had a responsibility to intervene or protect children experiencing deficit childhoods. The 1924 and 1959 Declarations grounded accepted notions of children’s rights in international guidance, as declarations are non-binding,²⁶ and provided a framework for the development and expansion of the international children’s rights movement. Both documents, and the burgeoning human rights framework (see below), contributed to the successful drafting and near universal ratification of the CRC.

In the years between the 1924 and 1959 Declarations, the UDHR and the Convention relating to the Status of Refugees (Refugee Convention)

²³ Declaration of the Rights of the Child 1959.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 321.

were adopted by the General Assembly of the United Nations in 1948 and 1951, respectively. Neither document attributed rights to children with the exception of the right to education,²⁷ but neither excluded them from rights which were attributed to ‘all members of the human family’²⁸ or refugees,²⁹ respectively. This may be emblematic of the drafters’ ambivalence towards attributing rights to children. Throughout history, commentators and authors have remarked upon the fear that articulating the rights of children would result in the destabilisation of the family unit.³⁰

In the years following the UDHR’s entry into force, the International Bill of Rights (IBR) grew to include the ICCPR³¹ and the ICESCR,³² which expanded on some of the rights provided for in the UDHR. The ICCPR and the ICESCR were adopted almost 20 years after the 1959 Declaration. The ICESCR and the ICCPR were the first examples of mainstream international human rights law which codified rights explicitly referring to children.

²⁷ UDHR, Preamble, Article 26; Convention relating to the Status of Refugees 1951 (Refugee Convention), Article 4.

²⁸ UDHR, Preamble, Recital 1.

²⁹ Refugee Convention, Article 1A(2).

³⁰ See: Ann Quennerstedt, ‘Balancing the rights of the child and the rights of the parents in the Convention on the rights of the child’ (2009) 8 (2) *Journal of Human Rights* 162-176.

³¹ ICCPR, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

³² ICESCR, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976.

These documents made clear that the international community and individual States had a duty to protect people from abuses of their fundamental rights. Children were among those who were considered to require protection from human rights abuses and who had rights, albeit largely in the context of their families. The provisions arising from the IBR are discussed under the provision, protection and participation rights headings.

3.2 Convention on the Rights of the Child 1989 and *life, survival and development*

The CRC codified and reinforced the existing understanding of childhood. The main aim of the CRC was to establish an exhaustive and legally binding instrument that established standards and guidance for the entitlements and freedoms of children.³³ The CRC contains 54 articles of which 41 relate to the rights of children, specifically.³⁴ The Preamble referred to earlier treaties, including the UDHR and the 1924 and 1959 Declarations. It emphasised the need to extend particular care to children. The rights contained in the Convention cover both civil and political rights as well as economic, social and cultural rights.³⁵ A children's rights approach to the interpretation of the Refugee Convention would thus encompass both sets of rights (discussed in Chapters Five and Six).

³³ Douglas Hodgson, 'The Historical Development and "Internationalisation" of the Children's Rights Movement' (1992) 6 *Australian Journal of Family Law* 25.

³⁴ The remaining 13, largely, address enforcement measures.

³⁵ UNICEF, 'Rights under the Convention on the Rights of the Child' (2014) <www.unicef.org/crc/index_30177.html> accessed 7 September 2016.

The General Principles contextualise the Convention, all four are understood to encompass all other CRC rights³⁶ and govern the implementation and interpretation of the rights within the CRC.³⁷ The four³⁸ General Principles are: the right to life, survival and development, the right to non-discrimination (see below), the best interests principle (see Section 3.6.2) and the right to have one's views heard (see Section 3.6.2.1).³⁹ The principles serve to guide our understanding of children's rights in the modern age. Indeed, the present research shows that the only General Principle which comprehensively covers all the rights of the child and reflects the conceptualisation of children established in Chapter Two is Article 6.

Article 6, as already discussed, referred to the child's right to survival and development:

- 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.*⁴⁰

³⁶ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 37.

³⁷ UNICEF contended that these principles inform all rights generally in the CRC where applicable and relevant. UNICEF, 'Rights under the Convention on the Rights of the Child' <http://www.unicef.org/crc/index_30177.html> accessed 23 July 2016.

³⁸ UNICEF considers Article 1 to be a general principle. <http://www.unicef.org/crc/files/Guiding_Principles.pdf> accessed 23 July 2016.

³⁹ General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) para 12.

⁴⁰ *Ibid*, Article 6.

‘Development’ is referenced a number of times throughout the Convention in respect of children’s health,⁴¹ family,⁴² culture,⁴³ spiritual needs,⁴⁴ social integration,⁴⁵ economic support,⁴⁶ education,⁴⁷ moral education⁴⁸ and language.⁴⁹ Thus this right does not merely serve to emphasise the children’s right to life alone as already elucidated in the UDHR,⁵⁰ for example, but also to emphasise the children’s right to develop into healthy, productive adults, as confirmed by the Committee.⁵¹ This principle reinforces the view, as established in Chapter Two, that childhood is a period of development and preparation for adulthood. Agency is an outcome of positive development, it accompanies spiritual, social, moral and mental development, all considered aspects of Article 6 by the Committee (see below).

This principle is defined by the content in the rest of the CRC, like the other General Principles. The right to life and development is therefore interpreted to mean a period of growth that takes into account the many different facets of childhood, including education, religion, culture, health and integration. The Committee captures this in General Comment No. 5 (2003) *General measures of implementation of the*

⁴¹ *Ibid*, Article 24.

⁴² *Ibid*, Preamble, Recital 6.

⁴³ *Ibid*, Article 30.

⁴⁴ *Ibid*, Article 30.

⁴⁵ *Ibid*, Article 27.

⁴⁶ *Ibid*, Article 27.

⁴⁷ *Ibid*, Article 28.

⁴⁸ *Ibid*, Article 27.

⁴⁹ *Ibid*, Article 30.

⁵⁰ UDHR, Article 3.

⁵¹ *Supra* note 39 para 12.

Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)
(Comment No. 5) in the interpretation of Article 6:

*‘Article 6: the child’s inherent right to life and States parties’
obligation to ensure to the maximum extent possible the survival
and development of the child. The Committee expects States to
interpret “development” in its broadest sense as a holistic
concept, embracing the child’s physical, mental, spiritual, moral,
psychological and social development. Implementation measures
should be aimed at achieving the optimal development for all
children’.⁵²*

As detailed in Chapter One, this interpretation encompasses rights contained in all three categories of the Three Ps approach.

It is arguable that the period of childhood, one characterised by development and positive growth, is encapsulated by Article 6. All other rights contained within the CRC provide for protection, provision and participation rights which aim to ensure the child is able to survive, live, thrive and have the chance to self-actualise. This provision and how it is developed throughout the CRC highlights the multi-faceted nature of childhood and the different areas that require protection.

⁵² *Ibid.*

It is argued that where violations in rights impact upon children's positive development and there is a causal link with a convention ground (See Chapter Five for detailed discussion on the convention grounds), the violation may amount to persecution in the context of refugee law. It is argued therefore that development must form part of the analysis of the threshold for persecution in the case of child refugees - the test that is applied should stem from Article 6. However it is not possible to suggest that any violation of a children's right will amount to persecution. The child applicant must show that their experience is different to the status quo in their country of origin. It is the differential impact stemming from discrimination that bridges the gap between a violation of a children's right as a standalone concept and the Refugee Convention. Chapter Six examines Article 6 in the context of refugee law and instances where a children's rights violation *may* amount to persecution.

While the Committee's Concluding Observations to State Parties reports include Article 6 in reference to the general principles and 'development' is referred to throughout, Concluding observations do not deal with Article 6 comprehensively. In fact all other General Principles are addressed, for example in the most recent Georgian, Irish and Italian reports, but not Article 6.⁵³ This runs contrary to the Committee's view that Article 6 is a General Principle and as such is an important

⁵³ Committee on the Rights of the Child, 'Concluding observations on the fourth periodic report of Georgia' CRC/C/GEO/CO/4, 9 March 2017; Committee on the Rights of the Child, 'Concluding observations on the combined third and fourth periodic report of Ireland' CRC/C/IRL/CO/3-4, 1 March 2016; Committee on the Rights of the Child, 'Consideration of reports submitted by States parties under article 44 of the Convention' CRC/C/ITA/CO/3-4, 31 October 2011.

provision. It is perhaps necessary to promote Article 6 not only as of paramount concern in the context of refugee law but wider areas of law and policy as well.

Sections 3.4, 3.5 and 3.6 look at the provisions contained within the CRC under three headings, corresponding with the Three Ps rights groupings: provision rights, protection rights and participation rights.

3.3 Provision rights

As discussed throughout, children have rights in their own right, but they often need adults to facilitate access to those rights, including provision rights. Provision rights are those which adults, in particular the State, provide to children. These rights include health, adequate standard of living, family unity (discussed in Section 3.7) and education, all of which have been referred to in child refugee case law. Stainton Rogers categorised this area of rights as forming part of the ‘welfare discourse’ which refers to childhood as a time of growth.⁵⁴ These rights are therefore underscored by the right to develop or, Article 6 of the CRC. Provision rights are surprisingly visible within child refugee case law. This breaks from the norm somewhat as provision rights largely relate to social and economic rights – an area that is less developed and more contentious in adult cases.⁵⁵ This section introduces these rights in

⁵⁴ Wendy Stainton Rogers, ‘Constructing Childhood, Constructing Child Concern’ in Pam Foley et al (eds), *Children in Society: Contemporary Theory, Policy and Practice* (Palgrave 2001). See Chapter Two.

⁵⁵ See Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007) and Chapter Six.

international children's rights law and indicates how they may be relevant in the context of refugee law.

3.3.1 Health

UNICEF classified the right to health as one associated with 'survival and development'.⁵⁶ Article 24 of the CRC and Article 12.2(a) of the ICESCR (see Section 3.3)⁵⁷ embedded the children's right to health in law. Article 24.1 of the CRC stated that children have the right

'to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States party shall strive to ensure that no child is deprived of his or her right of access to such health care services'.

Article 24 also requires States to implement measures to prevent infant and child mortality;⁵⁸ combat disease and malnutrition⁵⁹ and work towards 'abolishing traditional practices prejudicial to the health of children'.⁶⁰

⁵⁶ UNICEF, 'The Convention on the Rights of the Child: Survival and development rights: the basic rights to life, survival and development of one's full potential' <http://www.unicef.org/crc/files/Survival_Development.pdf> accessed 23 July 2016.

⁵⁷ ICESCR, Article 12.2(a) 2.

⁵⁸ CRC, Article 24.2(a).

⁵⁹ *Ibid*, Article 24.2(c).

⁶⁰ *Ibid*, Article 24.3. Article 24 also requires States to work towards ensuring that parents and others have access to education to empower families to implement this Article.

In Article 23 the CRC provided that children require special care and that States should support children and families in ensuring children with disabilities ‘enjoy a full and decent life, in conditions that ensure dignity’.⁶¹ Article 25, which provided that all persons have a right to the highest attainable standard of health, also highlighted the importance of family, but specifically the mother and child. It provided that ‘[m]otherhood and childhood are entitled to special care and assistance’.⁶²

In refugee law, the right to health has been cited in a variety of child cases. Examples include instances where children due to their particular background (corresponding with convention grounds: race, nationality, membership of a particular social group etc) may have been prohibited from accessing medical treatments⁶³ or subjected to female genital mutilation.⁶⁴ Health has nevertheless been applied in child (and adult) cases inconsistently, as discussed in Chapter Six.

3.3.2 Standard of living

The Convention also mentions economic needs, referring to the obligation to ensure children have access to adequate economic support. Article 26 requires States to take necessary steps to ensure children

⁶¹ *Ibid*, Article 23.1.

⁶² *Ibid*, Article 25.

⁶³ United Nations High Commissioner for Refugees, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees* HCR/GIP/09/08 22 December 2009 para 15.

⁶⁴ *Ibid* para 31.

benefit from social security and social insurance.⁶⁵ This is followed by Article 27, which states that children have the right to ‘a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’.⁶⁶ This paragraph, Paragraph 1, required the State to recognise this right. Paragraph 2, however, provides, mirroring early theorising by Locke, that it is the parents’ responsibility to ‘secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development’.⁶⁷

Locke, who wrote about the aristocracy in the West, contended that children's rights were limited by their parents’ circumstances, ie the child’s right to subsistence only extended as far as the parent’s means to provide such subsistence.⁶⁸ The CRC requires the State to ensure parents are equipped to provide a standard adequate for development, while still recognising that the child’s standard of living may be relative to the parents’ resources. Noguchi contended that adult wages/employment conditions should nevertheless be adequate to ensure children do not *need to/are not required* to access the labour market (discussed further in Section 3.5).⁶⁹

⁶⁵ CRC, Article 26.

⁶⁶ *Ibid*, Article 27.

⁶⁷ *Ibid*, Article 27.2.

⁶⁸ John Locke, *First Treatises* (1689) <www.nlhnrac.org/earlymodern/locke/documents/first-treatise-of-government> accessed 2 May 2014.

⁶⁹ Yoshie Noguchi, ‘ILO Convention No.182 on the worst forms of child labour and the Convention on the Rights of the Child’ (2002) 10 *The International Journal of Children's Rights* 362.

This right raises questions not only about the divide in responsibilities between the State and the parents in ensuring children have access to adequate resources to promote development as described in Article 27, Paragraph 1, but it also raises the same questions around the universality of the CRC and the different standards that might apply depending upon the country in which the child was born, or into which economic circumstances the child was born.

The CRC nevertheless included protection from poverty at least to some degree as part of protecting childhood. Poverty overlaps with and is underscored by many other rights including health and education and also the General Principles, including Article 6. The right to an adequate standard of living to promote positive development is grounded in the protectionist approach, discussed in Chapter Two. Social and economic deprivation or disadvantage is an indicator of risk of other rights violations and interruptions to development.

On its own, the right to an adequate standard of living relates primarily to cases where children, due to discrimination (with a link to a convention ground) are unable to access basic services and who would otherwise, without a grant of protection, be unable to obtain national identity, access the labour force in the future or be eligible for social welfare support. The right to an adequate standard of living does not often feature in child refugee case law as *the* primary reason of persecution, but it is, as stated herewith, often an indicator of risk of

violations of other rights. For example, the right to an adequate standard of living may be referred to in the context of human trafficking –child applicants who experience social and economic deprivation are more likely to be subjected to human trafficking or re-trafficking.⁷⁰

Another example is children born in contravention of China’s one-child rule, who have been recognised as refugees as they would be deprived of education or healthcare or economically disadvantaged. These cases emphasise the link between an adequate standard of living and becoming productive citizen adults, with a link therefore with development.⁷¹ Instances where the right to an adequate standard of living arise are discussed in detail in Chapter Six.

3.3.3 Education

Education has long been seen as a fundamental right of children and as part of the experience of childhood, as established in Chapter Two.⁷² It has also been described as a way to break cycles of poverty and exploitation (discussed further in Section 3.5 in the context of labour).⁷³ The UDHR in Article 26, and Article 13 of the ICESCR,⁷⁴ provides the right to education to ‘everyone’, noting that elementary education should also be compulsory, attributing the obligation to provide this right to the

⁷⁰ *Supra* note 63 para 11.

⁷¹ See: *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, Canada: Federal Court of Appeal, 1 April 1993; *Chen Shi Hai* 201 C.L.R. 297.

⁷² See Chapter Two.

⁷³ See, generally: United Nations, *The Millennium Development Goals Report, 2015* (United Nations 2015).

⁷⁴ International Covenant on the Economic, Social and Cultural Rights 1966, Article 13.2.

State. Although the provision in the UDHR did not explicitly mention children, it is clear by the reference to elementary education that children were the intended subjects. Article 26.2 of the UDHR, reflecting the intention of the 1924 Declaration, defined education as something that:

*‘shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace’.*⁷⁵

The ICESCR, in Article 13,⁷⁶ stipulates that education is a right that belongs to children, specifically:

‘The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all

⁷⁵ UDHR, Article 26.2.

⁷⁶ ICESCR, Article 13.3.

*racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace’.*⁷⁷

Firstly, Article 13 recognises that all persons have the right to education. Secondly, the ICESCR, like the UDHR, describes education as part of the process of developing into productive members of society in the same way as Locke saw education as a path to earning citizenship, preparing children for adulthood in the spirit of tolerance, understanding, equality, the natural environment and responsibility.⁷⁸

In Article 29, the CRC elaborates on the State’s obligations to ensure education is aimed at the development of the child to their ‘fullest potential’. This provision also referred to education as playing a role in teaching children to respect their parents, their cultural identity, language and the national values of the country in which the child is resident.⁷⁹ Also in this same vein, the CRC, in Article 31, articulates the child’s rights to rest, leisure, play and recreational, artistic and cultural activities reflecting a move towards a more romanticised conceptualisation of children (often considered to have originated with Rousseau).⁸⁰ Access to leisure, play and recreational activities are not dealt with in Chapter Six as it has not arisen in the context of qualifying as a refugee in case

⁷⁷ *Ibid*, Article 13.1.

⁷⁸ Charter of the United Nations 1945; UDHR; 1924 Declaration of the Rights of the Child; 1959 Declaration of the Rights of the Child; John Locke, *Some Thoughts Concerning Education* (1693) <<http://www.bartleby.com/37/1/>> accessed 23 August 2014; Jean-Jacques Rousseau, *Émile, or, On Education* (originally published in 1762) in Jean-Jacques Rousseau, *The Essential Writings of Jean-Jacques Rousseau* (Vintage 2013) 229 – 290. See Chapter Two.

⁷⁹ CRC, Article 29.1.

⁸⁰ *Ibid*, Article 31.

law. It has however arisen in relation to the treatment of children seeking asylum.⁸¹ The rights discussed herein, including the rights to leisure and play, support the view that childhood is a period marked by growth.

Education is a significant part of law and theorising around childhood. The CRC reiterated this position and it placed the obligation to provide this right on the State. All treaties also referred to non-discrimination in education based on religion, race, etc. The CRC referred specifically to non-discrimination in the context of the socio-economic circumstances of children and families. The CRC linked the right to education to a number of other children's rights, including the right to an adequate standard of living, acknowledging that social and economic disadvantage may increase the risk of a violation of the right to education.

The CRC and the Refugee Convention established that refugee parents also share the responsibility to ensure their children receive primary education, yet have the right to align their children's education with their culture and religious beliefs.⁸² The right is therefore limited by the role of the parents. However, read in conjunction with the child's right to be heard and also the best interests principle, it may be argued that children have a say in the direction of their education in accordance with their age and maturity. However, this illustrates the conflict that exists in the

⁸¹ General Comment No. 17 *on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts* (art. 31); See Generally: Samantha Arnold, 'A Childhood Lost: Exploring the Right to Play in Direct Provision' (2013) 31 (10) *Irish Law Times*.

⁸² CRC, Article 4.

application of any children's right – between children and their views and interests and those that belong to parents or other adults.

Education has arisen in refugee case law. In one example, *D. [a minor] v Refugee Appeals Tribunal*, the court noted that the child, as a result of being denied education, would not be able to meaningfully participate in Serbian society.⁸³ The High Court also referred to the infamous US case, *Brown v. Board of Education*, highlighting the link between education and development.⁸⁴ Participation in society is the goal of development, thus this right also breaches the child's overarching Article 6 right. This case is expanded upon in Chapter Six.

3.3.4 Non-discrimination

As discussed throughout, violations of provision rights are often considered to fall within the scope of the Refugee Convention where differential impact on the basis of discrimination with a convention nexus can be shown. The General Principle of non-discrimination, Article 2 of the CRC, deriving from the UDHR⁸⁵ and as included in the ICCPR,⁸⁶ is a useful tool to determine whether or not a violation of a provision right amounts to persecution within the Refugee Convention. Article 2 requires States to ensure all children on a given State's territory have access to the rights in the Convention regardless of their

⁸³ *D. [a minor] v Refugee Appeals Tribunal & Anor* [2011] IECH 431 at 24, since overturned by Supreme Court.

⁸⁴ *Brown v. Board of Education of Topeka* 347 US 483 (1954) in *Ibid* at 18.

⁸⁵ UDHR, Article 7; CRC, Preamble.

⁸⁶ ICCPR, Article 24; Convention on the Rights of the Child 1989, Preamble.

background or their parents’.⁸⁷ The principle of non-discrimination is useful in establishing, at least theoretically, the universality, including within a given society, of the rights in the CRC. Although this does not assist in defining or conceptualising childhood, other than to say that all childhoods should be equal within a society or legal system, it impacts upon other rights and, generally, the experience of a positive childhood. In the context of refugee law, non-discrimination has featured in a number of cases which fall within each of the Three Ps rights category. Discrimination, in particular when it is State-sanctioned or condoned, has often been a key reasoning behind a grant of protection on the basis of a violation of a children’s right – it often serves to establish the causal link with a convention ground, ie a violation of a right linked to discrimination on the basis of one’s race, nationality, religion, membership of a particular social group or political opinion (the convention grounds). Chapter Six analyses case law where there is an overlap between the Refugee Convention and the principle of non-discrimination.

3.4 Protection rights

International law began from the perspective that children are vulnerable to exploitation. Protection rights aim to prevent abuse, harm, neglect and anything that may have an adverse effect on the standard of childhood established by the CRC – impacting upon their right to develop as established in Chapters One and Two. Protection based rights in terms of

⁸⁷ CRC, Article 2.

development can be considered as rights relating to ‘physical, mental, spiritual, moral, psychological and social development’ with the overall objective of ‘optimal development’ in mind.⁸⁸ Protection rights arising from the CRC and other treaties are discussed below where links with refugee law were also identified (discussed in Chapter Six). This section discusses the following protection themes: labour and other forms of exploitation, including prostitution, pornography and trafficking; military conscription and gang recruitment; and child marriage.

3.4.1 Labour exploitation

Child labour is often regarded as a consequence of poverty,⁸⁹ or something that perpetuates a cycle of poverty.⁹⁰ In the global context some families may view child labour as essential to survival. We still see this today. The majority of child labourers can be found in developing countries, where a family’s livelihood might depend on income from some or all of their children.⁹¹ The right to education in the case of poor and rural families as part of the conceptualisation of childhood therefore does not necessarily reflect the demands of society.⁹² Nevertheless and as discussed in the previous chapter, education was a key marker in the evolution of the children’s rights movement. Concerns around labour exploitation led to the inclusion of interventions in the CRC, ICESCR,

⁸⁸ *Supra* note 39, para 12.

⁸⁹ *Supra* note 18 517.

⁹⁰ *Ibid*, 518-519.

⁹¹ See: International Labour Office, *Child Labour: A textbook for university students* (International Labour Organization 2004).

⁹² Clark Nardinelli, *Child Labor and the Industrial Revolution* (Bloomington 1990).

ICCPR and ILO Conventions that aimed to ensure that work did not interfere with education and health.⁹³

Article 8 of the ICCPR prohibits slavery, servitude and compulsory labour.⁹⁴ The ICCPR does not, however, specifically mention children. The ICESCR, on the other hand, in Article 10 provides that

*‘Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law’.*⁹⁵

Building upon the early ILO treaties (see Section 3.2), the CRC provides for protections for children engaged in labour. Article 32.1 of the CRC provides:

States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

⁹³ *Supra* note 18, 518-519.

⁹⁴ ICCPR, Article 8.

⁹⁵ ICESCR, Article 10.

The CRC made clear that labour exploitation impacts upon development. Article 32 of the CRC requires States to ensure work performed by children is not hazardous or harmful to the child's mental or physical health or moral, spiritual or social development. States are required to implement measures to provide: a minimum age for employment, regulation of hours and conditions of employment and penalties or sanctions to ensure the provision's effective enforcement.⁹⁶ The reference to minimum age requirements for children engaging in work requires States to consider other international instruments, like the ILO Conventions. The Implementation Handbook of the CRC also heavily references the ILO Conventions.⁹⁷

A number of States made reservations to Article 32 of the Convention when ratifying for this reason (among others).⁹⁸ This conflict – the conflict of deficit childhood⁹⁹ – challenges the application of law and guidance relating to labour, including in the context of refugee law (discussed above).

Increased attention on child labour followed the CRC's entry into force.¹⁰⁰ The WFCLC (adopted some 10 years after the CRC) is viewed

⁹⁶ CRC, Article 32.

⁹⁷ UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (3rd edn, UNICEF 2007).

⁹⁸ India, New Zealand, Singapore, United Kingdom (in respect of overseas territories). See William Schabas, 'Reservations to the Convention on the Rights of the Child' (1996) 18 *Human Rights Quarterly* 472.

⁹⁹ Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge, 'Constructing childhood: global-local politics and practices' in Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge (eds) *Childhood Studies and the Impact of Globalisation: Practices at Global and Local Levels* (Routledge 2009).

¹⁰⁰ *Supra* note 18, 518-519.

alongside the Minimum Age Convention 1973 (No. 138) as fundamental to the rights regime under the aegis of the ILO. The main objective of the WFCLC¹⁰¹ was to oblige ratifying States to prohibit and eliminate the worst forms of child labour for all persons under age 18,¹⁰² which included slavery, debt bondage, sale, trafficking, forced military conscription, prostitution, pornography, use of children to produce or traffic harmful or illegal substances and work, which by its nature, ‘is likely to harm the health, safety or morals of children’.¹⁰³ This convention was drafted from the perspective that children are in a position of vulnerability and are at risk of exploitation – a protectionist approach.¹⁰⁴ The WFCLC experienced the fastest ratification of any other ILO convention.

Labour in the context of the WFCLC, as argued by Noguchi, encompassed self-employment, unpaid work and working for/with family.¹⁰⁵ Under the WFCLC, parental consent cannot override the provisions therein nor the ILO standards in respect of labour.¹⁰⁶ Article 19 of the WFCLC, for example, required States to

‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent

¹⁰¹ Entered into force November 2000.

¹⁰² WFCLC, Article 1.

¹⁰³ *Ibid*, Article 3.

¹⁰⁴ For more information: *Supra note* 18, 520.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* 533.

*treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’.*¹⁰⁷

This raises important questions regarding the role of parents – in particular when parents are perpetrators of forced labour, sexual exploitation and trafficking (discussed in Chapter Six). The role of family has arisen in the context of refugee law in respect of labour exploitation, including when unattached, or separated, children cannot avail of protection from family from economic exploitation.

Provisions relating to education occur most frequently across a variety of treaties thus education is the most represented right in children’s rights law. However, the most comprehensive area of law in relation to children is international labour law (and subsequently other forms of economic exploitation). The link between economic exploitation and refugee protection is difficult to make with any degree of certainty as labour practices involving children vary greatly internationally. However, where the WFCLC and the CRC make reference to labour practices amounting to violence against children, it is perhaps easier to make a link. As mentioned above, exploitative and harmful labour practices feature in child refugee case law, particularly in the context of forced labour and trafficking, which are discussed below.

¹⁰⁷ WFCLC, Article 19.

3.4.2 Other forms of economic exploitation

Alongside growth in awareness and interest in regulating child labour was a growing awareness of children being sexually exploited, used in conflict and trafficked.¹⁰⁸ Article 36 of the CRC requires States to prohibit ‘all other’ forms of exploitation, which negatively affects the child’s welfare. Article 35 reiterated States’ obligations to implement bilateral and multilateral measures to prevent trafficking of children for any purpose.¹⁰⁹ These provisions are especially relevant in cases of child exploitation that occur across borders – an area which has the potential to interact with refugee law. Importantly, the WFCLC allocated the responsibility to ensure adequate safeguards were in place not just to the State, but to the international community.¹¹⁰

Article 3(b) of the WFCLC¹¹¹ and Article 34 of the CRC state that the use, procurement or offering of a child under 18 in prostitution must be prohibited and eliminated¹¹² by implementing measures to prevent exploitation and abuse, in particular in relation to: the coercion of children to engage in unlawful sexual activities and the exploitation of children in prostitution and unlawful sexual practices and pornographic performances and materials.¹¹³ The WFCLC states that prostitution, child pornography and the sale and trafficking of children are crimes of violence against children in addition to being crimes of labour

¹⁰⁸ *Supra* note 18, 518-519.

¹⁰⁹ CRC, Article 36.

¹¹⁰ WFCLC, Preamble.

¹¹¹ *Ibid*, Article 3(b).

¹¹² CRC, Article 34.

¹¹³ *Ibid*, Article 34.

exploitation. One of the Optional Protocols to the CRC, on the the Sale of Children, Child Prostitution and Child Pornography,¹¹⁴ provided additional guidance in this regard,¹¹⁵ referring to the WFCLC in the preamble.¹¹⁶

In the area of refugee law, cases have arisen relating to the rights listed herein. At times, children are conceived of as objects of protection, for example in the case of trafficking. In *Bian v. Canada* for example, the Federal Court of Canada held that the child applicant was unable to consent to being trafficked and was a refugee on that basis.¹¹⁷

3.4.3 Involvement in other illicit trades

The CRC also outlines States' responsibility to protect children from involvement in the drugs trade and also to prevent children from being exposed to drugs culture. Article 11 requires States to 'take measures to combat the illicit transfer and non-return of children abroad'.¹¹⁸ Article 33 of the Convention requires States to implement measures to prevent children from using, and children's involvement in producing and trafficking, illicit drugs.¹¹⁹ This provision is relevant in the context of

¹¹⁴ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

¹¹⁵ Optional protocols are treaties themselves. They are open to signature, accession or ratification. See: UNICEF, 'Advancing the CRC' <http://www.unicef.org/crc/index_protocols.html> accessed 24 July 2016.

¹¹⁶ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography 2000, Preamble, Recital 9.

¹¹⁷ *Bian v. Canada (Minister for Citizenship and Immigration)*, IMM-1640-00, 11 Dec. 2000, para 46. See Chapter Six.

¹¹⁸ CRC, Article 11.

¹¹⁹ CRC, Article 33.

refugee law as it relates to child involvement in gangs, an emerging and prominent area, in particular where it intersects with exclusion, discussed in detail in Chapter Six.¹²⁰

3.4.4 Military conscription

Article 38 established States parties' obligations to ensure children are not exploited during times of conflict. Article 38.1 reiterated the obligation to respect international humanitarian law.¹²¹ Article 38.2 requires States to take all feasible measures to ensure children under the age of 15 do not have an active role in conflicts, this includes the recruitment of children under the age of 15 into national armed forces. The age provided in the CRC is quite young considering the age of military recruitment in most developed countries. For example, recruits must be 17 in the United States (however, those under 18 must have consent from guardians)¹²² and 16 in the United Kingdom (however, those under 17 must have consent from guardians).¹²³ Countries where participation in military is mandatory like Israel and South Korea, the minimum age is 18 (however, Israel reserves the right to call 17 year olds for service dependent on a health assessment).¹²⁴ Article 38

¹²⁰ See: Michele Voss, 'Young and Marked for Death: Expanding the Definition of 'Particular Social Group' in Asylum Law to Include Youth Victims of Gang Persecution' (2005) *Rutgers Law Journal* 37 325; Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 233; Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines' (1999) 11 (1) *International Journal of Refugee Law*.

¹²¹ CRC, Article 38.

¹²² 10 U.S. Code § 505 - Regular components: qualifications, term, grade (a).

¹²³ ForcesWatch, 'The recruitment of under 18s into the UK armed forces' <www.parliament.uk/documents/joint-committees/human-rights/Briefing_from_Forces_Watch_age_of_recruitment.pdf> accessed 24 July 2016.

¹²⁴ CIA World Factbook, 'South Korea Military service age and obligation' (CIA 2015) <<https://www.cia.gov/library/publications/the-world-factbook/fields/2024.html>>

nevertheless encouraged States to set an age higher than 15. Additionally, the Optional Protocol on Children in Armed Conflict, which was adopted by the UNGA in 2000 and entered into force in 2002, requires States to ‘take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities’ – both forced and voluntary.¹²⁵

Child soldiers have been a visible group of refugees within the discourse over the years.¹²⁶ It is a prominent area of research in humanitarian law¹²⁷ and in the area of refugee law.¹²⁸ Cases involving underage military recruitment were not hard to find in the main asylum law databases used for this research. Under-age military recruitment is discussed in detail in Chapter Six and its relationship with exclusion is also developed in light of the current literature and available case law.

3.4.5 Child marriage

accessed 24 July 2016; Canada: Immigration and Refugee Board of Canada, *Israel: Military service, including age of recruitment, length of service, grounds for exemption, and availability of alternative service (March 2009 - January 2013)*, 13 February 2013 <www.refworld.org/docid/5152beb62.ht> accessed 24 July 2016.

¹²⁵ Optional Protocol to the Convention on the Rights of the Child on Children in Armed Conflict Adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

¹²⁶ See: Mathew Happold, ‘Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention’ (2002) *American University International Law Review* 17 (6) 1131.

¹²⁷ See: David Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’ (2007) *American Anthropologist* 109 (2) 296.

¹²⁸ See: *Supra* note 126; United Nations High Commissioner for Refugees on Child-Soldiers, reprinted in *Refugee Law in Context: the Exclusion Clause* 43, 44 (stating that “[t]he exclusion clauses do not distinguish between adults and minors”).

There is a significant body of research on the experience of forced child marriage.¹²⁹ In addition, it is listed as a ‘child-specific form of persecution’ in the Guidelines.¹³⁰ In 1979, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) was adopted and contained a provision relating to child marriage. Article 16.2 noted that:

*‘The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory’.*¹³¹

There was no mention of this protection in the CRC, but Article 24 of the CRC, as discussed above, requires States to work towards ‘abolishing traditional practices prejudicial to the health of children’,¹³² which may be relevant.

Although protection from child marriage was not mentioned in the CRC, due to its inclusion in the refugee discourse and also other UN treaties and guidelines (see Chapter Five), it is nevertheless a relevant aspect of the protection of childhood. This is also discussed in Chapter Six as it features in child refugee case law and literature.

¹²⁹ UNICEF, *Child Marriage and the Law: Legislative Reform Initiative Paper Series* (UNICEF 2008).

¹³⁰ *Supra* note 63.

¹³¹ Convention on the Elimination of all Forms of Discrimination against Women 1979, Article 16.2.

¹³² CRC, Article 24.

3.4.6 Other non-economic forms of harm

3.4.6.1 Indiscriminate violence

Article 38.4 of the CRC reiterates the State's obligations to ensure protection for the civilian population, including the protection and care of children who are affected by armed conflict. Despite the origins of the international children's rights movement as discussed in the previous chapter, this is the only explicit reference to protecting children during times of war or conflict in the CRC. It is only dealt with briefly in Chapter Six as indiscriminate violence is not mentioned in the UNHCR Guidelines. However the effects of war often form part of claims involving children and are discussed throughout this chapter and Chapter Six.

3.4.6.2 Torture, inhuman or degrading treatment or punishment

Article 37 of the CRC requires States to ensure the child is not 'subjected to torture or other cruel, inhuman or degrading treatment or punishment' or imprisoned indefinitely for crimes committed when under the age of 18. In the context of prison or detention, Article 37 reiterates the child's right to liberty, noting prison or detention should be used as a last resort. Article 37 provides that where a child is imprisoned, they should be treated with humanity, respect and dignity with access to legal advice and other assistance.¹³³ Article 37 reflects the purpose of, and provisions contained within, the Convention against Torture and

¹³³ *Ibid*, Article 37.

other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), which was adopted by the General Assembly in 1984.¹³⁴ This Convention built upon Article 5 of the UDHR¹³⁵ and Article 7 of the ICCPR.¹³⁶ Both Articles 5 and 7 of the respective treaties stated that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. However, neither Article mentioned children. Additionally, the Convention against Torture did not mention children or minors at any point. Therefore, the CRC plays an important role in explicitly including children within this right.

Torture, inhuman or degrading treatment and punishment may be used to interpret the threshold of persecution in the context of mainstream refugee law.¹³⁷ In the context of children, the Guidelines referred to the potential for harm arising from domestic abuse, which may amount to torture.¹³⁸ Torture or other cruel, inhuman or degrading treatment or punishment has arisen in refugee law. For example, in *Juan Carlos Martinez-Mejia*, the child applicant was granted protection on the basis of abuse at the hands of his stepfather, the abuse was determined to amount to torture (discussed in Chapter Six).¹³⁹

¹³⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

¹³⁵ UDHR, Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

¹³⁶ ICCPR, Article 7 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

¹³⁷ See, for example the analysis in James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 305 – 306.

¹³⁸ *Supra* note 63, para 33.

¹³⁹ *Matter of Juan Carlos Martinez-Mejia* A 76 312 250, 5-6 (BIA Jan. 20, 1999).

Protection rights is the most prominent of the rights groupings in the refugee literature and case law, which is likely reflective of the prioritisation of the protection of the child and the tendency to view children as vulnerable and in need of protection as established in Chapter Two.

3.5 Participation rights

As discussed in Chapter Two, the CRC introduced self-determination and capacity rights into international children's rights law. The CRC was influenced by the general consensus that children were considered to be independent members of society with rights to participate and with important roles to play.¹⁴⁰ The changing perception of children in society nevertheless brought about tensions. The literature highlighted resistance to attributing rights, in particular participation rights, to children from all sections of society,¹⁴¹ including in political discourse.¹⁴²

The basis for contemporary debate on agency is the notion that children have an evolving capacity to make decisions or participate in decision

¹⁴⁰ Jens Qvortrup, Marjatta Bardy, Giovanni Sgritta and Helmut Wintersberger eds *Childhood Matters. Social Theory, Practice and Politics* (Avenbury 1994); Allison James and Adrian James, *Constructing Childhood. Theory, Policy and Social Practice* (Palgrave Macmillan, 2004); Allison James, Chris Jenks and Alan Prout, *Theorising Childhood* (Polity Press 1998) 235.

¹⁴¹ See, for example: Richard Farson, *Birthrights* (Macmillan 1974); John Holt, *Escape from Childhood: The Needs and Rights of Childhood* (Dutton 1974); Ann Quennerstedt, 'Balancing the rights of the child and the rights of the parents in the Convention on the rights of the child' (2009) 8 (2) *Journal of Human Rights* 162-176.

¹⁴² The Comprehensive Child Development Bill of 1971, which outlined children's basic rights to health care, education, nutrition and development, cleared the Senate, but was vetoed by President Nixon as he suggested that the bill would weaken the family structure. See: H.R. 6748, 92d Cong., 1st Sess. (1971) in Rosalind Rosenberg, *Divided Lives: American Women in the Twentieth Century* (Hill and Wang 1992); Cynthia Lightfoot et al, *The Development of Children* (7th edn, Macmillan 2005).

making. In mainstream children's rights debates, there has been growing interest in understanding what is meant by 'agency' concerning children.¹⁴³ Firstly, the literature has explored the relationship between the child's agency and their ability to participate in the realisation of their rights.¹⁴⁴ Secondly, it has explored how capacity relates to the nature of rights made available to children, for example, whether they are provision, protection or participation rights.¹⁴⁵ In large part, the literature recognises that the roots of 'child agency' have very early origins.¹⁴⁶

In considering approaches to children seeking international protection, the legal capacity of child applicants has been a topic of recent debate. The present debates surround the content of children's rights. The main divide rests between protection and provision rights considered to be within the purview of the parents, guardians and/or the State¹⁴⁷ and participation rights which may be civil and political in nature. Participation rights encompass instances where children assert views and invoke rights historically considered to belong to adults.¹⁴⁸ The extent

¹⁴³ See, for example: Kate Bacon and Sam Frankel, 'Rethinking Children's Citizenship: Negotiating Structure, Shaping Meanings' (2014) 22 *IJCR* 22; David Archard *Children: Rights and Childhood* (2nd edn, Routledge 2004); Allison James and Adrian James, *Key Concepts in Childhood Studies* (Sage 2008).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Supra* note 36.

¹⁴⁶ Nessa Lynch, 'Restorative Justice through a Children's Rights Lens' (2010) 18 *IJCR* 161; Kingsley Davis, 'The Child and the Social Structure' (1940) 14 (4) *The Journal of Educational Psychology* 217: 'an individual's most important functions for society are performed when he is fully adult, not when he is immature'.

¹⁴⁷ Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998) 21; Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007) 16.

¹⁴⁸ See: Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights – Cases, Materials and Commentary* (3rd edn, OUP 2013) 35. See also: Chapter Two.

to which this conflict is present in international protection decision making, law and policy is consistent with the imbalance between the literature and practice. On the one hand, there is extensive literature and guidance supporting the view that children have capacity and rights in their own right and are considered subjects of law. On the other hand, there is very little case law or guidance on children qualifying as refugees in their own right. This is in part due to the fact that the intersection of refugee law and children's rights law is relatively new (discussed in Chapter Five).

3.5.1 Agency in the CRC

Article 12, a General Principle, explicitly referenced the child's right to participate in the realisation of, or access to, their CRC rights. Article 17 of the CRC recognises the importance of providing information to children which supports children's 'social, spiritual and moral well-being and physical and mental health'.¹⁴⁹ Accordingly, this information should not only educate, but also empower children to access their rights.

The child, pursuant to Article 8, has the right to preserve their identity 'including nationality, name and family relations' 'without lawful interference'.¹⁵⁰ This provision, read in conjunction with Article 12, allocates the right to have and maintain an identity regardless of family or parental relationships or circumstances. In fact, family ties, or origins

¹⁴⁹ CRC, Articles 17.

¹⁵⁰ *Ibid*, Article 8.

based on family background, were not mentioned in this provision. It is however referred to in Article 2, which deals with non-discrimination, as discussed in Section 3.4.4. Articles 13, 14, 15 and 30 also addressed the child's individual and autonomous rights to freedom of expression,¹⁵¹ thought, conscience and religion,¹⁵² freedom of association and peaceful assembly¹⁵³ and the protection of the right to practice their religion and speak their language (respectively).¹⁵⁴ These rights signal an acceptance that children are individuals, with important roles to play in society. These provisions indicate that children have their own identities and have rights to express their identity.

Article 16.1 provides a fundamental and autonomous right to unlawful interference of the child's privacy, family life and correspondence: 'No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation'.¹⁵⁵ This right was attributed to adults in all human rights treaties mentioned in this chapter. Article 16.1 is thus important in acknowledging that this most basic human right also applies to children *in their own right*. These articles in particular support the notion that children are rights holders with the potential capacity to participate in society in a way that is consistent with their identity.

¹⁵¹ *Ibid*, Article 13.

¹⁵² *Ibid*, Article 14.

¹⁵³ *Ibid*, Article 15.

¹⁵⁴ *Ibid*, Article 30

¹⁵⁵ *Ibid*, Article 16.1.

Despite the historical reluctance to attribute agency to children, even early philosophers recognised that children could formulate views or participate in society, at least sometimes. Article 12 provides that their views should not only be heard but be ‘given due weight in accordance with the age and maturity of the child’.¹⁵⁶ An additional tenet of being able to form views, as discussed above, is having access to information. The CRC provided that

*‘The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice’.*¹⁵⁷

The CRC provides the right to the child to receive information as part of the right to freedom of expression. Therefore, the CRC confirmed that agency and participation rights are closely linked with education and the process of development. This link was illustrated by Locke, Rousseau and many others and as we can see, it is still relevant today.

Although the Committee’s elaboration on the right to develop, Article 6, did not specifically refer to the right to participation or the right to be heard, rights we typically attribute to child agency, it does refer to the child’s mental, spiritual, moral, and social development. The Committee

¹⁵⁶ *Ibid*, Article 12.

¹⁵⁷ *Ibid*, Article 13.

also showed that the objective of Article 6 is ‘aimed at achieving the optimal development for all children’.¹⁵⁸ Chapter Two established that the outcome of providing education (formal or otherwise) results in children participating by expressing their views or behaving according to their own developing opinions and wishes. The Preamble of the CRC also clarified that the ‘child should be fully prepared to live an individual life in society’. It was these developments in the late twentieth century that led to a shift in thought in respect of the capacities of children. Commentators began to argue that children could also participate *during* childhood, a period almost universally characterised as a process of development. The CRC established that participation rights are part of development and therefore children have agency *during* childhood. A children’s rights approach would in the least require recognition that children, in line with their evolving capacities, have legal agency in the context of refugee law.

In the context of refugee law, agency, or participation, rights are often linked with the religion and political opinion convention grounds. There are a number of examples in refugee case law where children have exercised their agency and have invoked these two grounds. However, the category of participation rights is the newest area of children’s rights law and refugee law and it continues to be the most contentious of the Three Ps (discussed in Chapter Six).

¹⁵⁸ *Supra* note 39.

3.5.2 Determining agency

All provisions in the CRC have one main limitation in respect of child ‘agency’; this relates to the best interests principle. The best interests principle, Article 3 of the CRC, is thought to inform all rights as its scope covers ‘all actions concerning children’:

*‘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’.*¹⁵⁹

In 2003, the Committee explained that the best interests must be deduced from the wider rights of the child as contained within the convention, rather than through a subjective assessment of welfare needs.¹⁶⁰ Fortin noted that the principle requires that decision makers consider the child’s best interests only as *a* primary consideration, reflecting the drafters’ acknowledgement that sometimes other considerations must be taken into account, for example the protection of society or the wishes of the family unit. Fortin gave the example of a child offender. The best interests of the child may come second in balancing children’s rights with the need to protect society from the child concerned.¹⁶¹

¹⁵⁹ CRC, Article 3.1.

¹⁶⁰ *Supra* note 39. See also: General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14.

¹⁶¹ *Supra* note 36, 38.

Paragraph 2 of Article 3 reiterated the primacy of the parents by noting that in all measures taken by the State in an effort to protect and care for children in their jurisdiction, the State must take into account both the child's individual rights *and* the responsibilities of the parents (or legal guardians):

*'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures',*¹⁶²

The concept of the best interests is unique to children in international law, reinforcing the assumption that children have different and special needs in comparison to adults and that the experiences of childhood need to be tailored to ensure children's best interests are taken into account, while also noting that adults play a role in assessing those interests. The best interests principle is therefore subject to third party interpretation. In the case of refugee, the third party is likely the family or nominated guardian,¹⁶³ the determination body or the court or a combination of these parties. In decision-making procedures in the case of refugee protection, parents, governmental agencies or officials or adjudicators

¹⁶² CRC, Article 3.2.

¹⁶³ See: Samantha Arnold, Martine Goeman and Katja Fournier, *Durable Solutions for Separated Children in Europe, National Report: Ireland* (Irish Refugee Council 2015) 51.

may weigh the views of children not only in relation to the child's capacity, but, as Bhabha argued, also their opinion, perhaps coupled with their own prejudices (discussed in Chapter Six).¹⁶⁴

The best interests principle in the context of refugee law is largely reflected in case law as procedural. States are reluctant to include this principle in refugee legislation due to the fear that the definition of persecution could be influenced by a best interests assessment rather than a more exclusive assessment of the well-foundedness of the fear itself. From the literature¹⁶⁵ and case law¹⁶⁶ it is clear that a best interests assessment may be *a* consideration and even *a primary* consideration, but it does not impact upon the interpretation of persecution *per se*. The best interests principle is most widely referred to in relation to aspects of the child's claim not related to the refugee qualification process, such as care arrangements, age determinations and safeguards in the determination of a child's claim.¹⁶⁷ These procedural elements impact upon the child's ability to access asylum, participate in the procedures and qualify for protection. However they fall outside of the scope of this research. These insights nevertheless in part explain the inconsistencies associated with child refugee claims (See Chapter Six).

¹⁶⁴ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 207.

¹⁶⁵ See, for example: Ciara Smyth, *European Asylum Law and the Rights of the Child* (Routledge 2014).

¹⁶⁶ UNICEF and United Nations High Commissioner for Human Rights Regional Office for Europe, *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children* (UNICEF and United Nations Human Rights Office of the High Commissioner 2012).

¹⁶⁷ See, for example: *Ibid*; *Supra* note 165.

3.5.2.1 Right to be heard

Commentators during the years following the adoption of the CRC debated whether or not the best interests principle referred to determinations taken by a third party *and* the right to be heard referred to the determination made by the child.¹⁶⁸ The Committee, however, stated in the *travaux préparatoires* that there was no incompatibility between the two. In the drafting stage of the CRC the right of the child to be heard formed part of Article 3.¹⁶⁹ The provision was moved and became a General Provision in its own right. It therefore applies across all other rights contained within the CRC.¹⁷⁰ This move was significant as it served as recognition of the right and ability of children to exercise their agency. The contention is that one cannot determine the best interests of the child without consulting the child. The principle, as written in Article 12, articulated the child's right to have their voice heard in all matters that affect them if they are capable of forming their own views:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative

¹⁶⁸ See: John Eekelaar, 'The Importance of Thinking That Children Have Rights' (1992) 6 *International Journal of Law and the Family* 223.

¹⁶⁹ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 89.

¹⁷⁰ *Supra* note 39.

*proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*¹⁷¹

Article 12 provided that the views of the child should not only be heard but ‘given due weight in accordance with the age and maturity of the child’. This principle is most relevant for discussions around participation rights. Article 12 not only recognises the established view that children’s capacities are evolving, but that they have the right to contribute to decision making around their interests and future. Child agency has therefore been a growing concept with very early origins. Attributing agency to children, however, has been wrought with conflict. Locke, Rousseau, Kant and the protectionists and others that followed recognised the child’s ever-evolving ability to reason and thus interact with the world around them (See Chapter Two), but also argued that this right had a ceiling. The protectionists reinforced the view that children could participate and indeed had agency, but that others, namely adults or family, had a role in also determining their best interests, including as regards their futures.¹⁷²

Article 12, perhaps more than any other provision, placed children in the centre of the rights regime and recognised children as important actors in the realisation of their rights, including those considered to be protection based. However, refugee law, like all other areas of international human

¹⁷¹ CRC, Article 12.

¹⁷² See Chapter Two, Section 2.3.

rights law, has not interpreted or applied this right consistently. Chapter Six asks why participation rights are underdeveloped in child refugee jurisprudence. Chapter Six asks if it is to do with society's long-held view that children are not-yet-fully-formed, not-yet capable of reason or developing religious or political views (See Chapter Two).

3.6 The role of the family in the CRC and provision, protection and participation rights

The right to a family environment and the role of family are relevant to each category of rights discussed in Sections 3.4, 3.5 and 3.6. The international children movement brought with it a paternalistic view of family and State responsibilities. In the UDHR, child-specific provisions relating to children were mainly constructed within the family unit. Article 16 recognised the family as the natural unit,¹⁷³ requiring States Parties to ensure that the family was protected, and by extension, ensure children were protected within the unit. Even today, post-CRC, there is an assumption in law that the child receives protection and access to rights through the family unit. This is of course not an absolute presumption as, in some instances, the State may be required to intervene to protect children. It is nevertheless clear that the objective of provisions relating to children in the IBR revolved around protection – the outcome of sufficient protection being access to developmental rights, namely health and education. Overtime, this began to change. International guidance and law following 1989 created a universal code-

¹⁷³ *Ibid*, Article 16.3.

of-conduct for childhood,¹⁷⁴ removing the exclusive responsibility to protect and promote children's rights from the parents.¹⁷⁵

The CRC addressed two of the most pronounced and competing children's rights paradigms in the developed world¹⁷⁶ the role of the parents in protecting and promoting children's rights *versus* the rights of children. The CRC was often, and continues to be, criticised by some as placing children's rights in contrast to adult's rights.¹⁷⁷ The CRC took 10 years to draft, which is an indication of the challenges (or the lack of will) encountered marrying the two strands of children's rights and the articulation of children's rights, generally. The CRC exists somewhere between the two perspectives: the rights of the child in respect of familial protection and nurturing *and* the child's individual rights.

All international human rights treaties discussed throughout this chapter have emphasised the importance of the family unit. The CRC also reiterates this point. In its preamble, the CRC stated that the best place for a child to be raised is in a family environment:

*'Convinced that the family, as the fundamental group of society
and the natural environment for the growth and well-being of all*

¹⁷⁴ Ann Quennerstedt, 'Children's Rights Research Moving into the Future – Challenges on the Way Forward' (2013) 21 *International Journal of Children's Rights* 233.

¹⁷⁵ Henry Foster, *A 'Bill of Rights' for Children* (Thomas 1974); Beatrice Gross and Ronald Gross, *Introduction to the Children's Rights Movement: Overcoming the Oppression of Young People* (Anchor Books 1977).

¹⁷⁶ John Bennet, 'Supporting Family Responsibility for the Rights of the Child: An education viewpoint' (1996) 4 (1) *International Journal of Children's Rights* 45-56.

¹⁷⁷ *Ibid*, 45-56; Martha Minow, 'What Ever Happened to Children's Rights' (1995-1996) 80 *Minnesota Law Review* 267.

*its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community’.*¹⁷⁸

This area of rights is important in defining children and childhood for the purposes of both provision and protection rights. International human rights law, and indeed domestic law, has long prioritised the family unit as a unit in need of protection for the benefit of society. Parents have a distinct and prominent role in raising, educating, providing for economically and emotionally, and protecting children during the period of childhood. The CRC clarified therefore that it is both the parent’s right and responsibility to raise and protect their children.

Article 5 in the CRC states that parents have the overarching right and responsibility to provide their children with guidance to exercise their rights.¹⁷⁹ Article 9 reinforces this by outlining the State’s responsibility to ensure family unity is preserved.¹⁸⁰ The right to family unity also plays an important role in refugee law as introduced below and discussed in Chapter Six.

Article 9, Paragraph 1 made clear that the responsibility to care for the child lies with the parents and only in circumstances where a competent body (competent authority subject to judicial review) determines that it is in the best interests of the child is it possible to proceed with

¹⁷⁸ CRC, Preamble, Recital 5.

¹⁷⁹ *Ibid*, Article 5.

¹⁸⁰ *Ibid*, Article 91.

separating the child from family members. Paragraph 1 emphasised that this may be necessary in instances of abuse or neglect. Paragraph 2 provided for all parties to have their voices heard. Although children were not specifically mentioned in this paragraph, we can assume they were included in reference to ‘all interested parties’ if read in line with Article 12.¹⁸¹ Article 9 therefore not only introduced the notion that parents are one of the many ‘enforcers’ of children’s rights as set out in the CRC, but equally, the State has a role in ensuring the parents are carrying out, and able to carry out, their responsibilities. Although this provision does not frame the child as a subject of law, it does establish a limit to the omnipotence of the parent and the institution of family, where the best interests is concerned *and* it provides an avenue through which the child can be heard.

Paragraph 3 of Article 9 also articulates the child’s right to access and maintain relationships with parents in the case of separation.¹⁸² This paragraph framed the child as a subject of this law in that it is *their* right to access their parents (except when it is not in their best interests). It is arguable that Article 9 is both objective and subjective in nature as it recognises the children’s right to access their parents, but this right may be limited by an external assessment of the child’s best interests, as discussed previously.

¹⁸¹ *Ibid*, Article 12. 1.

¹⁸² *Ibid*, Article 9.

The role of the family is also important in the context of refugee law as discussed in Chapter One as it relates to the family-as-protector, the family-as-persecutor, or the potential for the family to either provide access to rights or act as a barrier to accessing rights. The significance of the link between Article 6, the right to family, and child refugees is emphasised by the case of separated children. The right to survival and development is considered to be within the purview of the parents as stated above. In the case of separated children, this relationship is missing and thus the primary protector of rights relating to survival and development is missing. The link between Article 6 and the role of the parent as protector and indeed persecutor is looked at again in Chapter Six.

The following section looks at the one CRC provision that refers specifically to refugee law, which establishes a formal link between the CRC and the Refugee Convention. This section shows to what degree the two conventions are aligned before moving on to the examination of children in the development of refugee law (see Chapter Four) and the examination of the possible scope for the application of the CRC in the interpretation of the Refugee Convention (see Chapter Five).

3.7 Children's rights and refugee law – an indirect link?

The international treaties and declarations referred to in this chapter spanned nearly six decades (from the ILO Minimum Age (Industry) Convention, 1919 (No.5) to the entry into force of the ICCPR and the

ICESCR in 1976). The invisibility of children in refugee law prior to the CRC (discussed in Chapter Four) and the invisibility of children in human rights law prior to the CRC illustrates the dichotomy between children's rights and refugee law. Before concluding, it is necessary to address the dichotomy between children's rights and refugee law. This discussion is only informed by the provisions contained within the international human rights treaties dealt with herein. Of all the treaties and declarations mentioned in this chapter, only the UDHR provides for 'the right to seek and to enjoy in other countries asylum from persecution'.¹⁸³

While the CRC mentions child refugees, it deals with refugee protection in one provision, 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.*

¹⁸³ UDHR, Article 14.

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 non-governmental 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.*¹⁸⁴

This provision deals with a number of points of law. It does not explicitly provide a right to seek refugee protection, however. It nevertheless referred to other ‘applicable international or domestic law...’ that may provide that right (such as the UDHR). The focuses of this Article were rights pertaining to the family and other protection and social and economic rights for children who are seeking refugee status or who are recognised as refugees. It can be assumed that within this right children have the right to seek asylum, but again it is not provided for explicitly.

¹⁸⁴ *Ibid*, Article 22.

The CRC in this provision, like the Refugee Convention (to be discussed in Chapters Four and Five), focused more on social and economic rights of the beneficiary rather than the process or the criteria associated with qualifying for refugee protection. This provision requires States Parties to provide appropriate protection and assistance ‘in the enjoyment of’ rights set out in the CRC and other relevant instruments. This is provided for in Paragraph 1. Paragraph 2 focused specifically on reunification with family and the provision of a family environment in the case of children deprived of family. In balancing the rights set out in Article 22 it is evident that the right to family (specifically a family environment) is the most prominent.

The dichotomy between the two regimes even in light of the CRC and Article 22 therefore persists in modern international children’s rights law. In Summary, Article 22 states that those rights which normally apply generally to children *also* apply to refugee children or children seeking refuge. It did not provide a right to seek refuge, an avenue through which a child might do so or criteria for the qualification of children as refugees. It did not suggest that a violation of any right may amount to persecution. This is revisited in Chapter Four in the context of Refugee Law.

3.8 Conclusions

Childhood as constructed in this chapter, based on international law and in particular the CRC, paints a picture of both vulnerability and autonomy. Children require the State and their families to provide them with certain supports and services to enable them to develop. The provision rights discussed included family, health, education and an adequate standard of living. Children also require protection from exploitation and harm that might interrupt their development including: deprivation of a family environment, labour and sexual exploitation, involvement in illicit trades, military conscription, child marriage and protection from harm such as harmful religious practices (eg female genital mutilation). Lastly, today, children are seen in law as rights holders in their own right with rights to participate in decisions affecting them. The participation rights grouping focussed on identity and the expression of identity. Childhood within the CRC and within this thesis is underscored by the right to develop. Childhood requires protection and the provision of services to ensure the child is able to exercise their agency in accordance with their increasing capacity. The process of childhood, as portrayed in international law, is a process of development *en route* to adulthood. This conceptualisation is a close reflection of that which exists in other disciplines and it is evident that the themes, divergences and conflicts have very early origins both in sociology and in international law.

As discussed in Section Chapter One, a dichotomy exists between children's rights and refugee law, yet the picture of childhood as discussed in Chapter Two has become in some ways universal due to the CRC and its wide-ratification. The question asked throughout this thesis on the whole relates to how this conceptualisation of children and childhood has influenced, or indeed should influence, refugee law.

The following chapter, Chapter Four, discusses the development of refugee law. It looks in particular at the extent to which children were considered in refugee law and other protection initiatives leading up to the adoption of the Refugee Convention. This analysis informs discussions on the scope for a children's rights approach in Chapter Five.

Chapter Four Children in the development of refugee law

4. Introduction

A children's rights approach to refugee law is not only a modern innovation, it is rooted in early international human rights law. In fact, efforts to protect children at a global level were on the human rights agenda from the 1920s (as discussed in Chapter Three). Reflecting the human rights efforts, rights regimes emerged in the areas of fundamental rights and freedoms¹ including social and economic rights,² and children's rights³ during and following World War I. At the same time, various initiatives to deal with displacement, as a result of various conflicts, in particular in Europe, and fallen empires,⁴ were also established. Therefore, three distinct areas of international law emerged during this time: children's rights, human rights (fundamental rights, including social and economic rights) and migrant rights, reflected in bilateral and multilateral initiatives and agreements.

There is evidence that indicates that the areas mentioned here influenced each other. However, there is also evidence to suggest that pre-Convention on the Rights of the Child (CRC) children's rights did not influence human rights and refugee law in the same way that human rights law and refugee law, for example, influenced each other. This becomes most apparent when examining contemporary law. For example, the Convention relating to the Status of Refugees (Refugee Convention),⁵ which was adopted by the United Nations General Assembly in 1951, included contributions from human rights law. In addition to being the foremost treaty in respect of refugee law, it also provided for numerous human rights including social and economic

¹ Universal Declaration of Human Rights 1948 (UDHR).

² For example: Hours of Work (Industry) Convention, 1919 (No. 1).

³ Minimum Age (Industry) Convention, 1919 (No. 5) and Declaration of the Rights of the Child 1924.

⁴ See generally: Peter Fitzmaurice, 'Between the wars – the Refugee Convention of 1933: A contemporary analysis' in David Keane and Yvonne McDermott (eds) *The Challenge of Human Rights: Past, Present and Future* (Edward Elgar 2012) 236.

⁵ Convention relating to the Status of Refugees 1951 (Refugee Convention).

rights applicable to those recognised as refugees, indicating that the Refugee Convention was influenced by the Universal Declaration of Human Rights (UDHR) (discussed in detail in Chapter Five)⁶. Children's rights during this time, however, remained siloed.

The children's rights movement discussed in Chapter Two, made important contributions and heavily influenced the CRC. As Chapter Three showed, the first drafting of an international treaty on the rights of the child began in 1924. There were very few initiatives targeting children and no international legal provisions specifically targeting children in relation to refugee situations between the 1920s and the 1950s, when refugee law was developing and when Europe was at war. The initiatives that did target children were *ad hoc*, small and infrequent. Not much changed between 1951, when the Refugee Convention was adopted, and 1989, when the CRC was adopted. The CRC, which inspired development and expansion in children's rights law all over the world, including in international law, did impact upon children in refugee situations. However, aside from soft law guidance and case law, very little changed by way of a targeted approach to child refugee law. This is discussed in the following two chapters (Five and Six). This chapter takes a step back to look at the historical trajectory of children in refugee law.

The purpose of this chapter is to identify where children's rights were considered in refugee discourse and law and where the potential need of international protection was considered in the children's rights discourse and law up until the adoption of the Refugee Convention. This analysis informs discussions in subsequent chapters (Five and Six) on the development of a children's rights approach to refugee law and on the conceptualisation of children as refugees.

⁶ See Chapter Five.

Analysing the historical and contemporary debates and dialogues occurring in the space between children's rights law and refugee law provides a foundation for the promotion of a children's rights approach. Discussions around the conceptualisation of the child refugee assist in our analysis of which rights when breached may amount to persecution. This involves two steps. The first of which is identifying the characteristics of children and childhood and the rights children possess. This was developed in Chapters Two and Three. The second of which is identifying nexuses between the rights associated with children and childhood and the provision of international protection. This is developed in Chapters Five and Six.

The following chapter discusses the potential for applying a children's rights approach to the interpretation of the Refugee Convention. This approach is based on the premise that children's rights as contained within the CRC and our modern understanding of 'child' and 'childhood' building on discussions in Chapters Two and Three, are universal and are considered within the human rights framework. A human rights approach to the interpretation of the Refugee Convention is well established in the literature, guidance, law and jurisprudence. Before turning to discussions on this approach, this chapter looks back to the development of the modern refugee paradigm and looks at where and how children were considered, if at all, and how that might influence contemporary interpretations of the Refugee Convention in considering child claims, taking account of the contributions made in respect of human rights.

4.1 Children and the beginnings of international refugee law

International laws have grown and expanded to meet new challenges in maintaining global peace and security. One of the ways it expanded was to seek to ensure all human beings have access to fundamental rights and freedoms wherever they might live.⁷ The overarching regime of

⁷ UDHR.

international law and the object and purpose of individual treaties (discussed in Chapter Five), provide useful insights into the interpretation of the refugee paradigm as well as the children's rights paradigm. In order to understand the development of the children's rights and refugee regimes, it is necessary to look back at developments in international law, generally and in brief, and how those developments influence the way we interpret modern refugee law.

The expansion in international law to focus on human rights and freedoms helped pave the way for a singular convention on refugee protection as the developments during and in the aftermath of the World Wars were responding not only to rights violations, but also to mass displacement in the context of the Cold War.⁸ Both human rights and refugee law developed in response to both the harm experienced by people in their home countries and those forced to flee and left displaced. The topic of children and their protection was also at the fore, albeit in a separate sphere to mainstream human rights, during this time; a time marked by the establishment of Save the Children⁹ and UNICEF.¹⁰

Refugee law has evolved since the 1920s in a number of ways. There was a move away from the category approach¹¹ to a more individualised approach to those considered refugees. The category approach was focused on short-term and reactive responses to emerging conflicts and mass displacement.¹² In addition, and as a result of displacement, States

⁸ See: James Hathaway, *The Rights of Refugees under International Law* (CUP 2005); James Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31 *Harvard International Law Journal* 129; James Hathaway, *The Law of Refugee Status* (Butterworths 1991); Sir Guy Goodwin-Gill and Jane McAdam, 'The Refugee in International Law' (3rd edn OUP 2007).

⁹ Save the Children International comprises 30 member organisations in over 120 countries where they work to 'deliver change for children'. Save the Children International, 'About Us' <www.savethechildren.net/about-us> accessed 13 July 2016. It was established in 1920 (formerly called the International Save the Children Union).

¹⁰ UNICEF was established in 1946. UNICEF, 'Our History' <www.unicef.org/about/who/index_history.html> accessed 7 September 2016.

¹¹ Sir Guy Goodwin-Gill and Jane McAdam, 'The Refugee in International Law' (3rd edn OUP 2007) 16.

¹² *Ibid.*

began to re-assert themselves and introduce more border interventions, leading to legal separation between citizens and non-citizens.¹³ Two other significant developments occurred. Firstly, the Minority Treaties drew attention to the difficulties faced by ethnic and religious minorities¹⁴ and provided a framework for States to adhere to in order to ensure those minorities had access to basic social and economic rights. Secondly, the international community began to recognise that refugees were not always able to return to their countries of origin or residence and thus needed access to some social and economic rights afforded to the citizens of the host country.¹⁵ No legal developments in the area of refuge up to this point or the tangential areas of law which impacted upon the development of refugee law dealt with children specifically, with the exception of the one reference in the constitution of the IRO, discussed below.

Although the drafters of the Refugee Convention did not include any provisions relating to children's rights or the qualification of children as refugees specifically, this was not a reflection of the times. As outlined in the previous chapter, children's rights were and had been developing internationally before and during the drafting of the Refugee Convention. In fact, the international children's rights movement¹⁶ had its origins in conflicts occurring before World War I. It continued to gain momentum during World War I, in the interwar period, into World War II and beyond.¹⁷ The movement depicted children during this period as disproportionately affected by war and requiring protection from

¹³ Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman 2003); John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2000).

¹⁴ Peter Hilpold, 'The League of Nations and the Protection of Minorities - Rediscovering a Great Experiment' (2013) 17 *Max Planck Institute for Comparative Public Law and International Law* 87.

¹⁵ James Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 86; Claudena Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann, ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 14.

¹⁶ International children's rights are described as rights based in international treaties, such as the Convention on the Rights of the Child 1989. Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 31-68.

¹⁷ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 35.

indiscriminate violence, starvation and disease.¹⁸ The first output of the movement in international law was the 1924 Declaration of the Rights of the Child published under the auspices of the League of Nations, followed by a revised and expanded version in 1959 published under the auspices of the United Nations.¹⁹ Neither document referred to the child's right to refuge, but acknowledged that children, internationally, needed protection from the hardships of war, conflict and also poverty, more generally.²⁰ The 1924 Declaration asserted that 'mankind owes to the Child the best that it has to give', implying that world community had a collective, or shared, responsibility to ensure children received adequate protection, as discussed in Chapter Three.

These developments and the assertion that children needed special protection and assistance²¹ did not, however, appear to influence the Refugee Convention. There remained a dichotomy in international law. Leading up to the drafting of the Refugee Convention there were nevertheless examples of children specifically benefitting from international protection through initiatives such as the *Kindertransport* (discussed below).²² The *transport* and the 1924 Declaration indicated that governments and inter-governmental organisations recognised that children required international protection decades before the drafting of the Refugee Convention.

4.2 Children and protection

In the area of international children's rights law one underlying trend emerged, children were seen as persons requiring protection. Goodwin-Gill highlighted the fact that the 1924 Declaration was drafted and

¹⁸ This movement was spearheaded by Eglantyne Jebb and the Save the Children [Fund]. See: Clare Mulley, 'The Woman who Saved the Children: A Biography of Eglantyne Jebb, Founder of Save the Children' (Oneworld Publications 2009, 2011 ebook reprint).

¹⁹ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009) 35.

²⁰ See Chapter Two.

²¹ See Chapter Two.

²² Anthony Grenville, 'The Kindertransport: An Introduction' in Andrea Hammel and Bea Lewkowicz eds, *The Kindertransport to Britain 1938/39: New Perspectives* (Brill 2012).

submitted to the League of Nations in response to the problems faced by refugee children.²³ In 1919, five years prior to the publication of the Declaration, the ILO drafted legislation establishing minimum standards to protect children in the labour force, including establishing a minimum age. Additionally, children and their specific protection needs were referred to in the Covenant of the League of Nations. There was therefore, an awareness around the need to protect children. It would stand to reason that this would impact upon the early development of modern refugee law, which began in earnest in 1921. However, as discussed above, this was not the case.

No refugee treaty or administrative arrangement mentioned the right of the child to seek or qualify for refugee protection. Nevertheless, other child-specific initiatives emerged. Prior to 1939, for example, the UK had allowed entry for 471 German children between 1936 and 1938²⁴ and 3,800 children from the Basque region in Spain.²⁵ During the First World War, the UK also allowed entry for several thousand Belgian children.²⁶

The most prominent and well-known development in refugee law emerged in 1938, which highlighted the international community's concern for child refugees - the *Kindertransport* (Children's Transport). It took place between 1938 and 1940.²⁷ This initiative was undertaken by private refugee organisations with approval from the government of

²³ Sir Guy Goodwin-Gill, 'Unaccompanied Minors: The Role and Place of International Law in the Pursuit of Durable Solutions' (2005) *International Journal of Children's Rights* 413.

²⁴ Jane McAdams, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 *International Journal of Children's Rights* 251.

²⁵ These children were granted entry on the condition that their stay in the UK would not be permanent and that they would eventually return to Spain. Jane McAdams, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 *International Journal of Children's Rights* 251.

²⁶ Hansard Bd 341 Sp. 1471 ff (21 November 1938), cited in Göpfert, R. (1999) *Der jüdische Kindertransport von Deutschland nach England 1938/39: Geschichte und Erinnerung*, Frankfurt, Campus Verlag, p. 57 in McAdam (2006).

²⁷ Anthony Grenville, 'The Kindertransport: An Introduction' in Andrea Hammel and Bea Lewkowicz eds, *The Kindertransport to Britain 1938/39: New Perspectives* (Brill 2012).

the UK who waived the requirement to present passports and visas.²⁸ The *Kindertransport* was a name given to the British government's initiative to allow children to enter Great Britain from Germany (and annexed territories) on temporary travel visas. This protectionist initiative followed *Kristallnacht* (Night of the Broken Glass) on 9-10 November 1938.²⁹ The aim of the *Kindertransport* was to provide temporary safe haven to children under the age of 17 until such time as it was safe to return to their home to be cared for by their parents and families. The children travelled alone to Great Britain. The last transport left Germany 1 September 1939 just as World War II began. The last transport left the Netherlands 14 May 1940 when the Dutch surrendered to the German invasion. The *Kindertransport* brought 9,000-10,000 children to Great Britain, 7,500 of whom were Jewish.³⁰

The 1946 Constitution of the IRO also included orphans less than 16 years of age as a category of refugee:³¹ 'children who were war orphans or whose parents had disappeared'.³² This conceptualisation was based on concern for child survivors of World War II.³³ This stream of refugee beneficiaries did not continue into the modern framework, at least as articulated in law. Although this category was never included in any of the multilateral treaties, including the Refugee Convention, it was nevertheless an indication of the recognition that children may require protection as early as 1946, in this case, orphaned children.

These examples indicate that child refugees were persons of concern to the world community during and after World War II. However, they

²⁸ Sir John Hope Simpson, *The Refugee Problem: Report of a Survey* (OUP 1939) 343 in Jane McAdams, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 *International Journal of Children's Rights* 251.

²⁹ *Supra* note 120.

³⁰ United States Holocaust Memorial Museum, 'Kindertransport, 138-140' <www.ushmm.org/wlc/en/article.php?ModuleId=10005260> accessed 15 July 2016.

³¹ Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum' (2004) 16(2) *International Journal of Refugee Law* 229.

³² Atle Grahl-Madsen, *The Status of Refugees in International Law* vol. 1 (A.W. Sijthoff 1966) 35.

³³ *Ibid.*

were not considered in mainstream refugee law discourse and drafting, beyond the singular mention in the IRO Constitution. However, due to the categorical nature of refugee law prior to 1951, one could suppose that drafters merely identified the group of persecuted persons, rather than specifying that the law applied to individuals, such as men, woman and/or children. It is also possible that children were seen as dependents to the head-of-household protection-seekers and that this was perhaps why the only mention of children in the IRO Constitution provided for the protection of orphaned children, who could be conceived of in contemporary terms as one group considered to be separated children (discussed in the following chapters), recognising that children required family to protect and promote their rights, as argued in Chapter Three. However, as previously stated, this is not discussed in the literature.

4.3 Modern refugee law under the United Nations

The Office of the United Nations High Commissioner for Refugees (UNHCR) succeeded the IRO in December 1950 after the dissolution of the League of Nations.³⁴ The Refugee Convention³⁵ undertook to incorporate past League of Nations arrangements and expanded upon them to reflect lessons learned from World War II as set out in the Statute of the UNHCR.³⁶ The Statute was informed by Article 14 of the UDHR, which provided the right to all persons to ‘seek and enjoy asylum in countries other than their own’.³⁷ The Refugee Convention,

³⁴ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <www.refworld.org/docid/3ae6b3628.html> accessed 21 March 2015.

³⁵ The Convention also reiterates United Nations principles such as the right to non-discrimination and freedom to practice their religion and provide religious education for their children. The provisions contained in the 1951 Convention relate, however, almost exclusively to those who are considered to be refugees. The rights and obligations of the refugee remain outside the scope of the research as the thesis of this dissertation centres on the ways in which the child is conceptualised within international refugee law. The discussions surrounding the law relating to refugees are therefore focused on the qualification of the child refugee, which relates primarily to a single Article, Article 1, which remains the foundation for the qualification of refugees all over the world.

³⁶ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) <www.refworld.org/docid/3ae6b3628.htm> accessed 21 March 2015.

³⁷ Universal Declaration of Human Rights 1948, Article 14 (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not

which entered into force in 1954, was thus meant to serve as a full-length treaty to give effect to Article 14. It also established the agency as a non-political entity with the principal aim of providing international protection and to find ‘permanent solutions for the problem of refugees’.³⁸ The original remit included working on behalf of those identified as refugees by previous treaties and arrangements and those who were determined refugees due to events occurring before 1 January 1951 and outside of their country of origin ‘owing to a well-founded fear of being persecuted’³⁹ or, in accordance with the 1938 Convention, ‘for reasons other than personal convenience’.⁴⁰

In 1967, the Refugee Convention was revised in accordance with the 1967 New York Protocol relating to the Status of Refugees in order to remove the temporal and geographical limitations relating to the qualification of refugees. The shorthand ‘Refugee Convention’ is used to mean the Refugee Convention as amended by the 1967 Protocol throughout the thesis. The revised definition encompassed the original and expanded it to define refugee as a person:

‘who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reasons of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence’.⁴¹

be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

³⁸ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> [accessed 21 March 2015] Chapter 1.

³⁹ Refugee Convention, Article 1A(2).

⁴⁰ 1938 Convention concerning the Status of Refugees coming from Germany.

⁴¹ 1967 Protocol relating to the Status of Refugees.

Refugee protection, whether for adults, or children though not explicitly referred to in the definition, was therefore provided to persons who: (1) were outside of their country of origin, (2) could not or were unwilling to seek the protection of their country or place of residence and (3) had a well-founded fear of persecution with a link to one of the five convention grounds. This definition did not contain any temporal, geographical or categorical limitations. This expansion was the key feature of the new agency.⁴² Refugee determination became individualised, meaning the refugee applicant needed to show that they were individually at risk of persecution. This requirement presumably also applied to children. In this case, children would have to be conceived of as subjects of rights in the context of refugee protection to be able to avail of protection. Yet, the Refugee Convention did not articulate the right of the child to seek, or qualify for, protection. This is nevertheless the universal definition that is relied upon in this thesis. The Refugee Convention was drafted during the Cold War and civil and political rights were to the fore (See Chapter Five). The invisibility of children within the Refugee Convention may therefore be consistent with the views of Locke and others and the findings in more recent literature in sociology and the discourses around children's rights discussed in Chapter Two in that children were not (and often are still not) considered to be able to or eligible to access civil and political rights. This is developed in Chapter Six in the context of children and the intersection between civil and political rights and refugee law (See Chapter Six).

4.3.1 The visibility of children in the Refugee Convention

As mentioned in Chapter Three, children's rights in the context of war and protection in general were developing during this same time, for example the 1924 Declaration of the Rights of the Child. The first draft of the 1959 Declaration on the Rights of the Child, which was submitted to the League of Nations in 1942, referred specifically to refugee

⁴² Sir Guy Goodwin-Gill and Jane McAdam, 'The Refugee in International Law' (3rd edn OUP 2007) 18.

children (although this did not make it into the final declaration).⁴³ Yet, these developments did not trickle into the early development of international refugee law.

The Refugee Convention did not specifically refer to children as potential recipients of international protection, with the exception of Article 4 relating to the parents' right to provide religious education to children.⁴⁴ This was very much a right of the parents and not the right of the child, however. The Convention heavily references human rights principles and logic would suggest that children's rights, which were published decades later, also form part of a contemporary interpretation of the treaty based on the existing relationship between refugee law and human rights law. However, this applies mostly in the context of rights that flow from a grant of refugee protection. This is developed in the following chapter.

In July 1951, when the draft convention was finalised, the ILO, IRO, the Council of Europe and a number of non-governmental organisations including two children's charities, were represented.⁴⁵ However, none of the above had voting rights, they were invited as observers. During the drafting of the Refugee Convention, the U.S. delegation proposed the inclusion of an 'unaccompanied children' category. The category would apply to the unaccompanied child who is

⁴³ *Supra* note 124, 229.

⁴⁴ 1951 Convention relating to the Status of Refugees, Article 4 – Religion The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

⁴⁵ Agudas Israel World Organization, Caritas Internationalis, Catholic International Union for Social Service, Commission of the Churches on International Affairs, Consultative Council of Jewish Organizations, Co-ordinating Board of Jewish Organizations, Friends' World Committee for Consultation, International Association of Penal Law, International Bureau for the Unification of Penal Law, International Committee of the Red Cross, International Council of Women, International Federation of Friends of Young Women, International League for the Rights of Man, International Social Service, International Union for Child Welfare, International Union of Catholic Women's Leagues Pax Romana, Women's International League for Peace and Freedom World Jewish Congress, World Union for Progressive Judaism, World Young Women's Christian Association (emphasis added). See 1951 Convention relating to the Status of Refugees, Final Act 7-8.

‘sixteen years or under who is a war orphan, or whose parents have disappeared, who is unable or unwilling to avail himself of the protection of the government of his country of nationality, or former nationality, and who has not acquired another nationality’.⁴⁶

This category was not included as its continued relevance post World War II came into question. There were also concerns raised around undermining the role of the guardian in respect of war orphans.⁴⁷

The Refugee Convention, which remains the cornerstone of international law relating to refuge, does not specifically mention children as potential persons requiring protection or any children’s rights as emphasised throughout this section. This thesis asks, however, whether the convention is nevertheless capable of including children within the scope of the definition of refugee. As discussed previously and throughout this thesis, every indication points to the continued relevance and capacity of the Refugee Convention to encompass a wide variety of human rights and children’s rights violations as potential acts of persecution. This is discussed in greater detail in the next two chapters.

Considering these insights, it is possible to suggest that the protection of children was important in the development of international laws. However, these insights also indicate a reluctance to include children’s rights in any primary international legal document. Children’s rights were siloed. Chapter Two discussed the sociological development of children to draw further conclusions as to the place children have held in

⁴⁶ Ad Hoc Committee on Statelessness and Related Problems, United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and stateless Persons) (E/AC.32.2) Statelessness Conference, 18 January 1950 UNITED STATES OF AMERICA: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (E/AC.32.2).

⁴⁷ Jane McAdams, ‘Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection’ (2006) 14 International Journal of Children’s Rights 252.

society over time to begin to suggest answers to the question of why mainstream international law did not undertake to significantly include child-specific provisions prior to 1989. The likely explanations in the case of refugee law, reflecting the discussions in Chapter Three, are that governments involved in the drafting of international legal instruments did not want to assign rights to children for fear of undermining the rights of the family unit and/or children were merely not considered as significant by the drafters.⁴⁸

4.4 Conclusion

The primary literature on the development of refugee law, such as Goodwin-Gill and Hathaway, did not address children in reference to the early development of this area of international law, as discussed in Chapter One. The reason children were not discussed is likely due to the limited reference to children in early treaties and arrangements dealing with refugees. Furthermore, the Refugee Convention does not include any specific provisions for children. This is an indication of the lack of significance placed on children in earlier documents and during the drafting of the Refugee Convention. It is striking that children, although championed by the League of Nations and the UN as reflected in the 1924 and 1959 Declarations, were not considered important beneficiaries of protection in their own right at least in refugee law. This is perhaps a reflection of the ways in which society, including the international community and those responsible for drafting international treaties, viewed children. The indication is that children were not considered to be rights holders in their own right and perhaps the assumption was, in the context of refugee law, that the child had the same rights as the parents and that the child would be ‘attached’ to the family in these circumstances, with the exception of those orphaned by conflict and war. What is clear is that there has historically been a dichotomy in international law, with children’s rights on one side and refugee law on the other. There is only one reference to children in the Refugee

⁴⁸ See Chapter Two.

Convention and only one reference to refugee protection in the CRC. The dichotomy continues and is observable in contemporary law. However, it is the interpretation of each area of law and the guidance on child refugees produced by the UN and the Committee on the Rights of the Child which has narrowed this gap. This is discussed in the following chapter.

The literature and the developments in refugee law up to the drafting of the Refugee Convention, which remains the cornerstone of international refugee law, fail to comprehensively analyse the applicability or relevance of the legal framework in the case of children. There is very little in the discourse that discusses child refugees prior to the CRC. The CRC changed the way the world sees children in respect of their rights and their need for protection. The CRC has since had a great impact upon international refugee law. This is discussed in the following two chapters. The CRC did not come about until 1989, nearly 40 years after the Refugee Convention. It is arguable, therefore, that child refugee law is in its infancy.

There is some recent literature on children and refugee law that touches on the early development of international children's rights law and its connections with the modern refugee framework. However, there is very little discussion of the impact the movement had on the development of the Refugee Convention. Rather, the focus has been on the influence the CRC has had on the interpretation of the Refugee Convention. As highlighted in this chapter, this may be due to the seemingly inconsequential impact the early international children's rights law movement had on the Refugee Convention.

Despite the lack of consideration for children, the developments in refugee law leading up to the Refugee Convention created greater possibilities for children fleeing a wider-variety of circumstances to qualify as refugees. Despite refugee law becoming more exacting, the shift to focus on the individual expanded the applicability of the law to

more people, not just groups identified by the international community. The evolution of refugee law therefore holds relevance in that children, in particular in the years following the drafting of the CRC, have been able to become the subject of refugee law facilitated through international guidance, case law and domestic laws.

The following chapter takes another step towards answering the questions set out in the introduction, in particular – when do violations of CRC based rights amount to persecution? Chapter Five seeks to establish whether or not a children's rights approach to the interpretation of the Refugee Convention is possible. This chapter showed that there is a precedent for one human rights regime influencing another, generally, and international children's rights law influencing refugee law, specifically.

Chapter Five A children's rights approach to refugee law?

5. Introduction

Children have been recognised as refugees across the industrialised world for a variety of reasons. According to the United Nations Refugee Agency (UNHCR), children may fear or experience persecution on the basis of military conscription, trafficking, female genital mutilation, familial or domestic violence, forced marriage, labour and sexual exploitation among other forms of persecution.¹ UNHCR referred to these examples of persecution as *child-specific*.² In articulating the different persecution experiences that children around the world may face, it is evident that UNHCR views the child as a person with a right to asylum in their own right if they, like their adult counterparts, meet certain criteria.³ UNHCR also elaborated on the ways in which breaches in CRC rights may impact upon a child's application for refugee protection,⁴ a step towards bridging the gap between children's rights law and refugee law. These developments and contributions signalled the possibility of a nexus (or several nexuses) between both areas of international law.

The Refugee Convention is considered to form the foundation of international refugee law. It has informed practice and guidance produced by UNHCR and national governments. Yet, the Refugee

¹ United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees' HCR/GIP/09/08 22 December 2009.

² *Ibid.*

³ Convention relating to the Status of Refugees 1951 (Refugee Convention), Article 1A2. For the purposes of the present Convention, the term "refugee" shall apply to any person who:... (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

⁴ *Supra note 1*, para 5: 'A child-sensitive application of the refugee definition would be consistent with the 1989 Convention on the Rights of the Child (hereafter "the CRC")'.

Convention provided very little guidance on the *qualification* of refugees. Furthermore, the Refugee Convention did not explicitly mention children in Article 1A(2) which detailed those who may qualify as refugees. The substantive provisions of the convention dealt with the rights of refugees once recognised. None of those provisions attributed rights to children *or* excluded them from those rights. Nevertheless, child refugee law has evolved since 1951. Guidance provided by UNHCR, the Committee on the Rights of the Child, the CRC, national laws, regional laws and jurisprudence have resulted in refugee law's expansion, through the interpretation of the provisions of the Refugee Convention, to reflect the particular circumstances of children. Today, children have been recognised as refugees within the framework provided by the Refugee Convention. Some of these developments can be attributed to the interpretive guidance provided by UNHCR and the Committee following the publication of the CRC. These developments and influences are the focus of this chapter, as they make the best and most comprehensive case for the interaction between the two regimes – two regimes that have been and continue to be somewhat siloed.

The previous chapters discussed early children's rights and refugee law and the limited interplay between the two. The conclusion reached was that children, although an important part of the international discourse around protecting the vulnerable, in particular in times of conflict, did not feature significantly in mainstream international human rights law or refugee law. Children's protection needs were dealt with separately through the League of Nations (1924) and United Nations (1959) Declarations of the Rights of the Child or through once-off initiatives such as the *Kindertransport*. During this time, as discussed in Chapters Three and Four, children were conceived of as objects of law, vulnerable persons to protect. Therefore, further refugee law guidance in respect of children needed to come from another source in order to bridge the gap between the developing children's rights paradigm and refugee law.

The advent of the CRC and its impact on children's rights assisted the expansion of refugee law. The CRC changed the face of international children's rights law. It presented children as vulnerable persons in need of special protections *and* as rights' holders in their own right (as established in Chapter Three). As a result, other areas of law also evolved, including refugee law. It was not until after the CRC came into force that child refugee law began to develop with traceable momentum.

In light of the post-CRC developments, this Chapter explores how the current refugee regime is positioned to continue to develop to take into account the different forms of child-specific persecution that are emerging through various fora. This book examines the potential for breaches of children's rights, including those not traditionally associated with refugee protection, to be considered within the refugee determination process. The overarching hypothesis is that where there are breaches in children's rights (and there is a link with a convention ground), there is scope to expand the definition of persecution taking into account the fact that all children have a universal right to positive development and a positive experience of childhood as set out in Article 6. This hypothesis is based not only in theory, but also reflects the evolution of refugee law in considering claims from children and the narrowing of the gap between children's rights law and refugee law (See Chapter Six).

This chapter takes another step towards answering the questions set out in the introduction – when do violations of CRC-based rights, in particular where there is a link to development, or Article 6, amount to persecution in the context of refugee law? Part I seeks to establish whether or not a children's rights approach to the interpretation of the Refugee Convention is possible, considering contributions from guidance, jurisprudence and policy. This chapter aims primarily to show that there is a precedent for one human rights regime influencing another, generally, and international children's rights law influencing

international refugee law, specifically, building upon discussions in Chapter Four.

Key terminology and aspects of the Refugee Convention framework in its application to children are introduced in Part II. This includes a discussion on persecution, actors of persecution and protection and the five Convention grounds, with a particular focus on the particular social group ground, as it is the most developed in the context of children. This chapter concludes with a note on universality and the dichotomy between children's rights and refugee law.

Part I

5.1 Context setting

The definition of refugee as set out in the Refugee Convention did not mention children, yet it did not exclude children from being considered within the refugee paradigm. The definition is further limited by the focus on persecution, which has been interpreted to have a high threshold. Not identifying children in the Refugee Convention as possible beneficiaries of international protection, likely delayed the development of child refugee law until the drafting and subsequent ratification of the CRC. It was not until 1987 that guidance was produced to assist States in dealing with refugee claims from children.

The threshold for persecution in the context of refugee law is high. The relationship between violations of children's rights and persecution therefore must be unpacked (see Section 5.10). The systemic problem, as dealt with by Foster, of refugee grants being more commonly awarded to those whom have been denied civil and political rights than those denied social and economic rights also compounds the problem of fitting children's rights into the refugee framework. This is because children's rights as contained in the CRC include both civil and political rights and social and economic rights. Furthermore, there is a reluctance to attribute agency to children in law generally (See Chapters Two and Three). This chapter and Chapter Six shows that this reluctance also applies in the case of refugee law. As discussed in previous chapters, children have traditionally been conceived of as objects of the law, rather than subjects, despite the fact that the literature supports the view that the modern child is both object *and* subject.⁵ Although commentators and the literature argue that children are now subjects of law⁶ in practice the categorisation of children as objects of law is still dominant in international law, including refugee law. This is supported by the

⁵ See Chapters Two and Three.

⁶ Sir Guy Goodwin-Gill, 'Unaccompanied refugee minors: The role and place of international law in the pursuit of durable solutions' (1995) 3 *International Journal of Children's Rights* 405. See also Chapters Two and Three.

prominence of case law and literature dealing with protection rights compared to other categories of rights (provision and participation) examined throughout and in Chapter Six. The question must therefore be asked: Are children, inherent to the system, less likely to be recognised as refugees when compared to their adult counterparts?

These issues are explored herein considering the advances in refugee law relating to children in the past two decades. The refugee paradigm indeed has evolved through guidance, regional and national policy and legislation and jurisprudence. Decision makers, States and regional bodies have been increasingly aware of developments in the area of human rights and children's rights law and that awareness has influenced refugee decisions. This indicates the flexibility of the Refugee Convention and its capacity to evolve reflecting developments in other areas of law and the ever changing face of conflict, persecution and persistent harm.⁷ Human rights law has more and more been influencing the definition of persecution. For example, in the European Union context, the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 *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)* (Qualification Directive) provides in Article 9.1:

'In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must:

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

⁷ See Chapter Four.

*(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)’.*⁸

In the case of Europe, Article 9 reaffirms Foster’s view that there is scope for a human rights approach to the interpretation of the Refugee Convention. It is of course possible then to suggest that a children’s rights approach is also possible as children’s rights derive from human rights law sources.

Human rights influencing refugee law has led to the expansion of the term to include various harms which affect children (among others), such as female genital mutilation, economic exploitation including trafficking, domestic violence, underage marriage and underage military recruitment.⁹ This expansion has been the result of relying upon and referencing key human rights treaties, most notably the UDHR, but also the CRC. Due to the comprehensive nature of the CRC, which includes both civil and political and social and economic rights, there is arguably scope for even further development of the interpretation of persecution considering children’s rights, including those rights where a child’s development is impacted upon and where there is a link with a convention ground. There remains potential for the Refugee Convention to expand to include more claims based on denial of rights considered to be children’s rights, or even the establishment of a children’s rights approach.

The rapid development in children’s rights law has had a significant impact on refugee law. In recent decades, there has been a push to not

⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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) (Qualification Directive), Article 9.1.

⁹ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007).

only make children's rights visible, but to prioritise children's rights in the development of research, law, policy and practice. The Committee on the Rights of the Child (the committee with responsibility for monitoring the implementation of the CRC)¹⁰ (Committee) has provided guidance on the interpretation of the treaty including in the specific case of children seeking protection (the guidance focussed on separated children, but the section on child specific forms of persecution can be and is seen as relevant to all children, discussed in Section 5.9).¹¹ Most significantly, UNHCR has published a number of materials to assist States in the determination of child claims, which also drew on and made explicit reference to the CRC. The Committee also drafted optional protocols to the CRC which dealt with the sexual exploitation of children¹² and underage military recruitment,¹³ two forms of child specific persecution as established by UNHCR.¹⁴

The appointment of Special Rapporteurs on education, housing, food and health and other UN initiatives have also impacted upon the interpretation and inclusion of the provisions contained within the CRC and how they relate to general human rights law.¹⁵ This also helped pave the way for their inclusion in refugee law. The interconnectedness of children's rights law and refugee law has been exhibited at various levels of the human rights machinery (to which both children's rights law and refugee law belong).¹⁶ In addition, the acceptance that children are unique within the law has added an awareness to the different and

¹⁰ United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of the Child' <www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> accessed 15 July 2016.

¹¹ UN Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6.

¹² Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography A/RES/54/263 of 25 May 2000 entered into force on 18 January 2002.

¹³ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict A/RES/54/263 of 25 May 2000, entry into force 12 February 2002.

¹⁴ *Supra* note 1, para 4. See also Chapter Six.

¹⁵ UNICEF, *The State of the World's Children: A fair chance for every child* (UNICEF 2016).

¹⁶ As established in Chapter Four.

nuanced forms of persecution and harm children face as compared to their adult counterparts. The acknowledgement that children are different also brought to light the fact that children are affected both directly and indirectly by conflict, natural conditions including famine, poverty and access to economic and social services.¹⁷ Additionally, there is increased awareness around the domestic abuse children may suffer, where the home may be the locus of persecution, and where the State may not intervene for cultural, religious or legal reasons bringing the role of the family (as protector and/or as persecutor) into focus.¹⁸ Lastly, there is also growing awareness of the fact that children have views, beliefs and can act in their own right making them actors in their own experience of persecution, not just bystanders exposed to indiscriminate violence or harm.¹⁹ The following section begins the justification for a children's rights approach, an approach that is needed based on the fact that children are different and their needs are different, including in the context of refugee law.

5.2 Children within the Refugee Convention and the need for a cross-treaty interpretive approach: some assumptions

As defined in the previous chapter, refugees are persons who: (1) are outside of their country of origin, (2) cannot or are unwilling to seek the protection of their country or place of residence and (3) have a well-founded fear of persecution with a link to one of the five convention grounds.²⁰ A child, in order to qualify as a refugee would need to satisfy these criteria as well. In respect of point (1), it is assumed that children were mobile either in the company of their families or able to travel on their own. Point (2) assumes that children have legal agency, as in they would be persons with rights in their own right, and would be persons eligible for protection by their government, failing that, persons eligible

¹⁷ For information about children affected by conflict, see, for example: Graca Machel, *Impact of Armed Conflict* (UN 1996) <www.un.org/ga/search/view_doc.asp?symbol=A/51/306> accessed 15 July 2016.

¹⁸ *Supra* note 1, para 33.

¹⁹ *Supra* note 1, paras 42 – 47.

²⁰ Refugee Convention, Article 1A(2).

for surrogate protection in the country of asylum. Point (3) assumes that children have capacity and are thus able to substantiate a claim of a well founded fear relating to one of the five grounds: race, nationality, religion, membership of a particular social group or political opinion. It is difficult to argue that children would not be considered subjects of the law within the application of refugee law given this definition. This does not translate seamlessly into practice, however.

The reality is that children are often unable to travel without the assistance of adults. That does not necessarily mean that they cannot meet the criteria in point (1), but that there is an added barrier to accessing asylum. Additionally, and in relation to point (2), children are often not consistently considered as rights holders around the globe.²¹ Lastly and in relation to point (3), children are persons in a developmental stage in their lives where their ability to reason is evolving. Children are not always able to communicate their fears in the same way as an adult or they may be perceived to be unable to do so.²² Additionally over the years, UNHCR and adjudicators began to argue that children also have fears that are different to that of adults and a lower threshold to persecution should be applied and a generous benefit-of-the-doubt should be applied to testimony.²³ This book does not address these points, however, as they are procedural.²⁴ Based on these contributions and guidance provided by UNHCR and others, it nevertheless became clear that the Refugee Convention was not an adequate framework for child applicants *on its own* as it did not sufficiently consider their particular needs, abilities and circumstances.

Before, looking to the interpretation of the Refugee Convention through a children's rights lens, the following sections discuss whether or not this is possible. The following sections look in brief at the general rules

²¹ See Chapter Three on the 'global child'.

²² UN High Commissioner for Refugees, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union* (UNHCR 2014) 66-76.

²³ *Ibid.*

²⁴ For more information on procedural matters, see *Ibid.*

which govern international human rights law treaty interpretation. This discussion is then applied to the interpretation of the Refugee Convention in light of developments in the area of international children's rights law.

5.3 Bridging the gap: treaty interpretation

Much of the key terminology in the refugee definition is not defined in any other area of international law. This includes key terminology such as persecution and the particular social group. As a result, the aforementioned terms have only been defined in respect of refugee law. For example, the CRC did not define persecution in the context of violations of rights contained within the CRC itself. It merely stated that the rights contained within the CRC belong to all children, including those seeking refugee protection or who are refugees.²⁵ The CRC never made a link between the rights contained within the CRC and qualifying for international protection. This presents a challenge for those responsible for interpreting the Refugee Convention in the case of child applicants. The same applies to adults, as the IBR does not provide a definition of persecution. This may account for the inconsistent application of human rights and children's rights law in the context of refugee law (developed in Chapter Six).²⁶ The terminology has not been universally defined in a way that would allow for consistent application and interpretation of human rights and children's rights violations in the context of refugee law. Nevertheless, the literature and case law discussed throughout this chapter emphasised the importance of all areas of human rights law to embrace developments in other areas of law.²⁷ There is considerable overlap in content and objectives within all human rights treaties. Human rights treaties at their core have the same overarching object and purpose – that is to protect and promote the fundamental rights and freedoms of all people.

²⁵ Convention on the Rights of the Child (CRC), Article 22. See Chapter Three.

²⁶ *Supra* note 9.

²⁷ For an analysis of the human rights approach in the interpretation of the Refugee Convention, see: *Supra* note 9.

The need for a cross-treaty interpretative approach has been debated in the literature,²⁸ stemming from the inconsistency in which the refugee definition is applied in the case of all applicants, including children.²⁹ However, States and decision making authorities face some challenges in making this a reality. The International Law Commission noted that when interpreting one treaty the relevant party may need to justify the referencing of another treaty if used in the interpretation process.³⁰ However, there is a trend to reference other treaties and developments within other areas of law in the interpretation of a particular area of law, including in the context of children. The Court of Justice of the European Union also reiterated this point in relation to the need for a holistic approach to treaty interpretation, specifically referencing the CRC in a case relating to the right to family reunification. In *Case C-540/03 – European Parliament v Council of the European Union*, the Grand Chamber of the Court of Justice of the European Union stated that:

‘The court has already had occasion to point out that the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of community Law. [That] is also true of the Convention on the Rights of the Child [which], like the Covenant, binds each of the Member States’³¹

²⁸ *Supra* note 9.

²⁹ Jacqueline Bhabha and Wendy Young, ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines’ (1999) 11 (1) *International Journal of Refugee Law* 91.

³⁰ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission (A/CN.4/L.682 4 April 2006) at 175 in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007) 35.

³¹ This case, *Case C-540/03 – European Parliament v Council of the European Union*, was brought by the European Parliament against the Council of Europe asserting that a section of Council Directive 2003/86/EC on the right to family reunification breached the requirement to respect fundamental rights, referencing Article 24 of the Charter on Fundamental Freedoms and the CRC. In UNICEF and the United Nations Human Rights Office of the High Commissioner European Regional Office, *Judicial*

This case does not deal with the issue of refuge, but it demonstrates that human rights, albeit in the context of Article 8 of the European Convention on Human Rights, may interact with the CRC.

The Vienna Convention on the Law of Treaties (VCLT)³² it is generally considered to be customary international law and is thus accepted as applicable in respect of all international law.³³ The most widely referenced and most applicable provision in the VCLT is Article 31 which stated that a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.³⁴ Hathaway noted that the general approach in common law jurisdictions is to undertake holistically any interpretation of international law in light of contemporary interpretations of Article 31 of the VCLT and this has indeed been the case,³⁵ including in the case of children’s rights.³⁶

There are a number of examples where the CRC (and associated guidance material on child refugees and asylum seekers) is referred to explicitly in jurisprudence dealing with asylum decisions. For example, in *DS (Afghanistan) v. Secretary of State for the Home Department*, the UNHCR guidelines were referred to in the context of the need to ‘safeguard and promote the welfare of children who are in the United Kingdom’.³⁷

Implementation of Article 3 of the CRC in Europe (UNICEF and the United Nations Human Rights Office of the High Commissioner European Regional Office 2012) 17.

³² Vienna Convention on the Law of Treaties 1969 (Vienna Convention) entered into force in 1988 and applies ‘to treaties which are concluded by States after the entry into force of the present Convention’. This precludes the 1951 and 1967 Convention and Protocol.

³³ See, for example: James Hathaway, ‘The Rights of Refugees under International Law’ (CUP 2005) 49-51.

³⁴ Vienna Convention, Article 31.

³⁵ *Supra* note 35.

³⁶ For example, *Case of Neulinger and Shuruk v Switzerland* Application No. 41615.07, para 131; *Case of Nunez v Norway* Application No. 38058/09 para 84. These are not asylum cases, but they demonstrate that the CRC has been used in regional courts in Europe.

³⁷ *DS (Afghanistan) v. Secretary of State for the Home Department* [2011] EWCA Civ 305. In reaching her conclusion, Lady Hale also relied on guidelines issued by the

The insights discussed above indicate willingness on the part of the courts to look to the wider human rights framework, including children's rights, for guidance in interpreting other areas of law. The example of *DS (Afghanistan) v. Secretary of State for the Home Department* demonstrated that the CRC has also been used in refugee case law (discussed in further detail in Chapter Six). The following section looks specifically to the Refugee Convention and the CRC to establish shared objectives to support the assertion that the CRC can be relied upon as an interpretative tool in the field of refugee law.

5.4 The challenge of implementing international law

International laws are inherently different from national laws. International laws are written by a consortium of States for all States. States, then, must assume responsibility for ensuring that international laws are respected and implemented within their own borders.³⁸ However, States did not and do not easily reconcile the potential for their sovereignty to be undermined by an international legal regime.³⁹ The rights afforded citizens were long thought to be the responsibility of the sovereign State alone.⁴⁰ International law brought about two key shifts in governance. Firstly, the global community had a responsibility to enact laws to guide States to prevent abuses of human rights. Secondly, the global community had a responsibility to act or intervene when a State infringes upon the fundamental rights of those within their territory.⁴¹

UNHCR. I cannot read her statements of principle as being confined to article 8(2) considerations.

³⁸ Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman 2003); John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2000).

³⁹ Claudena Skran, 'Historical Development of International Refugee Law' in Andreas Zimmermann, ed., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 43.

⁴⁰ Antonio Cassese, *Human Rights in a Changing World* (Temple University Press 1990).

⁴¹ Gareth Evans, 'The Responsibility to Protect: From an Idea to an International Norm' in Robert Cooper and Juliette Voinov Kohler (eds), *Responsibility to Protect* (Palgrave 2009)

It is only where States fail to protect those within their borders that other States may intervene. This notion raises one particular question in every area of international law: what type of violation and to what level of severity must it reach for other States to intervene? This question goes to the heart of the hypothesis that breaches in human rights specific to children, most commonly those embedded in the CRC, have the potential to amount to persecution thus requiring one State to ‘intervene’ through the provision of surrogate protection. In the context of refugee law, the duty to intervene by provision of surrogate protection arises for children outside of the country of origin.

This balance of responsibility is also embedded in contemporary refugee law and children’s rights law. The definition of ‘refugee’ includes the element of State protection. The State must be found to be unwilling or unable to protect the applicant from a violation of their rights in order for another State to provide surrogate protection. This establishes a condition which may protect the applicant while respecting the country’s statehood. In respect of children’s rights, the CRC places the obligation to ensure access to the rights contained within the treaty on the State, and also the family to some degree. International laws therefore set a standard to which States must aim to fulfil or must fulfil in the case of non-derogable⁴² rights (discussed below). The individual therefore benefits from the States’ fulfilment of their obligations under international law. However, individual recourse where a State does not fulfil their obligations is not straightforward. For children, who are also often dependent on adults to realise their rights, it is even less straightforward.

⁴² Vienna Convention, Article 53 Treaties Conflicting with a Peremptory Norm of General International Law ("Jus Cogens") A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Fundamentally, the challenge of implementing international laws relates to oversight and enforcement. International laws operate *in addition* to national laws. Although States may be able to easily access recourse when one State breaches international law, for example in the case of a breach in international trade law,⁴³ avenues to access recourse may be more challenging for an individual who has suffered a breach in their human rights. International law, in relation to the individual, is sometimes described as a sort of rulebook for States, which, from time to time, also affects the individual either through the rights bestowed upon them or the responsibilities imposed upon them.⁴⁴ This means that the implementation of international law presents additional challenges as it may occur in the space between States and in the space between the State and the individual, and in the case of children – in the space between the child and the responsible adult(s). The question of child agency also arises in respect of making an application for protection, as unattached, such as separated children.

In the case of children, the parents or responsible adults may be viewed as the first benefactor of individual rights under international law. This includes those rights attributed specifically to children. This is because adults are often viewed as the first party with responsibility in realising children's rights, regardless of whether or not rights are aimed at the protection or promotion of the interests of the child or if the rights are in fact the child's right in their own right, reminiscent of the position of Locke and Rousseau and those that followed. This view was not really challenged until the 1960s. The ability of children to access their rights therefore depends on national laws on parental and guardianship roles and responsibilities. Furthermore, and as discussed in Chapter Three, the literature in a variety of disciplines, including psychology and sociology, tells us that the age and level of maturity of children may affect the child's ability to understand their rights and thus understand possible

⁴³ See, for example: Daniel Bethlehem et al (eds) *The Oxford Handbook of International Trade Law* (OUP 2009).

⁴⁴ Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law: Volume 1 Peace* (9th edn, Longman 1992) 4.

avenues for recourse where a right is breached. The role of adults and children's capacity as they are relevant to discussions on a children's rights approach to the interpretation of the Refugee Convention are revisited in Chapter Six.

This challenge also exists in the context of refugee law. Simply put, the proportion of child refugees (compared to their adult counterparts) is higher in refugee camp settings than the proportion of child asylum seekers in the Global North.⁴⁵ This indicates that children are unable to or prevented from accessing this potential avenue for protection. While this book does not ask questions around why children are not proportionally represented in refugee applications, this discrepancy brings to light two potential reasons for the limited development around child refugee law. Firstly, there are simply very few cases due to their underrepresentation and where children do seek asylum they are likely considered secondary to adult applicants and thus the child aspects of a family claim are subsumed within the head-of-household application. This is developed in Chapter Six, in the context of refugee law, but if we locate this problem within the children's rights discourse (in particular to the CRC) and in childhood studies, these issues are not surprising. Chapter Two identified as problematic the secondary position children hold within the family unit and the reluctance to attribute rights to children, in particular participation rights. The secondary position and the reluctance persists in international law, despite the contributions of the CRC.

5.4.1 International law as national guidance

Despite difficulties in the implementation and enforcement of international law, without it, States would not have a framework from which they could borrow. And despite early and on-going resistance, international legal provisions have begun to be regularly referred to in national and regional court judgments and in legislation, thus integrating

⁴⁵ See also: Jacqueline Bhabha, 'Demography and Rights: Women, Children and Access to Asylum' (2004) 16(2) *International Journal of Refugee Law* 227.

human rights norms domestically in a way that offers a direct line of recourse for violations of those rights.⁴⁶ This may mean that although international human rights law itself may not always be enforceable at the international level, international law has become more integrated into national and regional legal structures. This is also true in the case of children's rights and refugee law. Innumerable countries include the exact or near exact definition of 'refugee' as contained within the Refugee Convention.⁴⁷ A number of countries also include a provision on the 'best interests principle', among other CRC provisions, in child care law and in some cases in constitutions.⁴⁸ Even where there is reluctance to reference international law in case law and in national legislation, there are still transpositions of international principles drawing on the Refugee Convention and the CRC, among other treaties.⁴⁹ The best examples are States whose refugee legislation also includes provisions from the CRC and vice-versa. For example, the UK Border, Citizenship and Immigration Act 2009 Section 55 provided:

Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that—

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to

⁴⁶ See, generally: Javaid Rehman, *International Human Rights Law: A Practical Approach* (Longman 2003).

⁴⁷ See, Irish example: International Protection Act 2015, Section 2 "refugee" means a person, other than a person to whom section 10 applies, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it.

⁴⁸ Thirty-first Amendment of the Constitution Act, 2012, Article 42A 1(2) Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

⁴⁹ See for example: UK Borders Citizenship and Immigration Act 2009, Section 55.

arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are—

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official.⁵⁰

This is an example of transposition of children's rights law in the context of migration and a recognition that these two areas of law overlap and influence each other. The overlap and interactions between the two regimes at the international level are discussed in the following Chapter.

The notion of legal norms also emerged as a result of the mainstreaming of human rights law. Peremptory Norms, or *jus cogens*, are laws that, although perhaps also difficult to enforce, have been accepted by the international community as a standard where derogation is prohibited.⁵¹ Freedom from torture, genocide⁵² and *non-refoulement* are among those considered *jus cogens*.⁵³ In cases where these rights are violated, the international community arguably has a responsibility to intervene.⁵⁴ Interventions can range from economic sanctions⁵⁵ to military operations.⁵⁶ Or, intervention may mean providing protection to an

⁵⁰ *Ibid.*

⁵¹ See: Vienna Convention, Article 53 and Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 13(3) European Journal of International Law 491.

⁵² See, for example: Statute of the International Tribunal for the Former Yugoslavia, 1993 and Statute for the International Tribunal for Rwanda 1994.

⁵³ Jean Allain, 'The *jus cogens* Nature of non-refoulement' (2001) 13(4) International Journal of Refugee Law 533.

⁵⁴ *Supra* note 42.

⁵⁵ See, generally: Michael Reisman and Douglas Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) 9 European Journal of International Law 86.

⁵⁶ Adam Roberts, 'Humanitarian War: Military Intervention and Human Rights' (1993)

individual outside of their country to ensure that they are not returned to face a breach of a norm such as the right to be free from torture, as is the case in the application of the Refugee Convention. Norms assist in the implementation of international law or the transposition of international law at national level. Chapter Three asks which children's rights are considered to be norms. Chapter Six then asks which children's rights norms, if any, when violated amount to persecution in the context of refugee law. These questions are addressed in the following two chapters. Treaty interpretation is also discussed in Chapter Five, which shines yet more light on the use and interpretation of international law with a focus on the Refugee Convention.

5.5 The object and purpose of the Refugee Convention

Michelle Foster in her book, *International Refugee Law and Socio-Economic Rights*, provides a detailed case for the use of human rights treaties in the interpretation of the Refugee Convention. She analyses the object and purpose of the Refugee Convention in order to ask whether or not it is capable of accommodating 'more nuanced' asylum claims. Her reasoning is referred to throughout this section and the approach is also applied to the analysis of the object and purpose of the CRC in the following section.

Some of the literature has argued that there are conflicting objects and purposes reflected within the preamble itself. One view is that the purpose of the Refugee Convention was to provide international protection to those who fit the definition. Another view is that, the preamble established from the outset that the scope of the purpose related to fundamental rights and freedoms and the UDHR.⁵⁷ The view

69(3) International Affairs (Royal Institute of International Affairs 1944-) 429.

⁵⁷ Refugee Convention, Preamble: Recital 1 Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination; Recital 2 Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavored to assure refugees the widest possible exercises of these fundamental rights and freedoms.

of some decision makers has been that this indicates that the Refugee Convention was ‘written against the backdrop of international human rights law’.⁵⁸

The other perspective is the view that the convention serves to provide support to States, rather than individuals in working towards solving a difficult and cross-border problem. This view derived from one statement in the preamble that referred to the ‘unduly heavy burden’ granting asylum may have on some countries, which also referred to the importance of international co-operation.⁵⁹ This objective was also reflected in UNHCR’s mandate, which is in part to ‘resolve refugee problems worldwide’.⁶⁰ This interpretation can be seen in current European Union law, as exhibited by the Dublin Regulation,⁶¹ which assigned responsibility for determining asylum claims to the country of first arrival within the jurisdiction of the Regulation.⁶² The view within the higher courts has not reflected this sentiment as discussed below.

Foster also reiterated Klabbers’ assessment that the content of the treaty may also indicate its object and purpose.⁶³ Foster applied this approach to the Refugee Convention and found that the content focused on human rights overwhelmingly, noting that Articles 2-34 ‘are concerned with the

⁵⁸ See: *Minister for Immigration and Multicultural Affairs v. Mohammed* [2000] 98 FCR 405 at 421. Other judgments reiterating this point: *Applicant A* [1996] 190 CLR 225 at 296-7 (Kirby J); *Wang* [2000] 105 FCR 548 at 74-81 (Merkel J); *Shah* [1999] 2 AC 629 at 639 (Lord Steyn); *Premalal* [1993] 41 FCR 117 at 138 in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007).

⁵⁹ Refugee Convention, Preamble: Recital 4. Also referred to in *Applicant A* (1996) 190 CLR 225 at 247 – 248 (Dawson J) & *MMM v. Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 324 in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007).

⁶⁰ UN High Commissioner for Refugees, ‘About Us’ <www.unhcr.org/pages/49c3646c2.html> accessed 15 July 2016.

⁶¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁶² Duncan Robinson, ‘How the EU plans to overhaul ‘Dublin regulation’ on asylum claims’ *Financial Times* (Brussels 20 January 2016). The Dublin Regulation is now under review amidst the current and unprecedented refugee crisis

⁶³ Jan Klabbers, ‘Some Problems regarding the Object and Purpose of Treaties’ (1997) 8 *The Finnish Yearbook of International Law* 138.

clarification of the rights to which those falling within the definition are entitled'.⁶⁴ Although this analysis does not look at the rights of refugees after recognition, the balance of provisions nevertheless indicates that the existing human rights framework informed the drafting of the Refugee Convention.

Foster showed that the dominant view of the courts and UNHCR has been that the Refugee Convention's object and purpose was to provide international protection to those in need and to protect and promote the rights and freedoms of refugees.⁶⁵ The Australian High Court further noted that the convention was designed to ensure mistakes of the middle of the twentieth century were not repeated, referring to various countries not providing refuge to those persecuted in the Second World War.⁶⁶

UNHCR described the object and purpose as a combination of the two perspectives:

*'to ensure the protection of the specific rights of refugees, to encourage international cooperation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between states'.*⁶⁷

UNHCR referred to the VCLT and its role in the interpretation of the treaty and reiterated the significance of the relationship between human rights and refugee protection.⁶⁸ In fact, UNHCR's *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* explicitly made this connection noting that

⁶⁴ Supra note 9, 45.

⁶⁵ Supra note 9, 40-49.

⁶⁶ *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293 at 308 (Kirby J).

⁶⁷ UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR 2001) 2.

⁶⁸ *Ibid.*

*‘Refugees are owed international protection precisely because their human rights are under threat’.*⁶⁹

This supports the views that the refugee test must be holistic and that the Refugee Convention established a system for States to provide surrogate protection ‘because their human rights are under threat’.⁷⁰

The human rights approach in practice can perhaps be captured within European Union law, specifically the Qualification Directive. The following is provided for in the preamble:

*‘It is necessary to introduce common criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States’.*⁷¹

The Qualification Directive also refers to human rights violations in the context of persecution, see Section 5.1.

This section did not deal with the CRC as it was not mentioned in any of the sources discussed herein. Nevertheless, it is clear that: (a) children were not extensively referred to in the UDHR, but they were not excluded, (b) the CRC is now considered to form part of the international human rights framework, despite having been published after the drafting of the Refugee Convention and (c) there is an established approach which reflects the holistic nature of human rights law as argued by Foster. The following section turns to the object and purpose of the CRC.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Supra* note 8, Preamble.

5.6 The object and purpose of the CRC

The preamble of the CRC made a number of references to human rights and fundamental freedoms. The first three recitals of the preamble referred to principles contained within the Charter of the UN, the UDHR, the ICCPR and the ICESCR acknowledging their contributions in recognising ‘the inherent dignity and the equal and inalienable rights of all members of the human family’; the ‘human rights and *sic* dignity and worth of the human person’ and that ‘everyone is entitled to all the rights and freedoms set forth’ within the International Bill of Rights ‘without distinction’. This indicates that the CRC also builds upon the human rights framework

‘Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance’.

The CRC in this way also referred to the 1924 (League of Nations) and 1959 (United Nations) Declarations of the Rights of the Child (discussed in Chapter Three). These references indicate that the CRC’s object and purpose in one respect is to ensure that children have access to the extensive rights associated with the human person as previously developed within the UN treaty system, perhaps reminiscent of the liberationist approach discussed in Chapter Two. The preamble also stated outright that children are subjects of individualised rights:

‘Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular the spirit of peace, dignity, tolerance, freedom, equality and solidarity’.

This recital emphasised the right to develop and to grow as two important elements of the experience of childhood with the intention that they can lead an individual life *and* do so in line with the principles set

out in international human rights law. This places an obligation on the State to educate and empower children. This recital therefore indicated that within the CRC, children were considered by the drafters to be subjects of human rights law, not merely objects. Chapters Two and Three discussed the children's rights movement. This movement led to a paradigm shift in children's rights law. Children were subsequent to the movement considered more and more to be subjects of law. This notion, now arguably normative in nature is reflected in the CRC.

However the preamble also establishes that children required *special care and assistance*, as provided for in the 1959 Declaration of the Rights of the Child: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. The preamble emphasised that children need assistance and protection to ensure full access to those rights. This indicates that under the CRC children are not only subjects of the laws relating to their own development and experiences of childhood, they are also objects of the law in the case of protection rights, perhaps reminiscent of the protectionist approach discussed in Chapter Two.

The preamble also contains some conflicting references which confuse the object and purpose of the CRC. Firstly, there are two recitals which refer to the importance of family life and the child's right to a family environment. The first recital provided that the family unit is the fundamental group in society, which requires protection:

*'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'*⁷²

⁷² CRC, Preamble Recital 1.

This recital perhaps reflects the difficulty in balancing the rights of the child with the rights of the family unit in mind. Placing the family unit to the fore suggests that that unit has rights within the construct of children's rights as established by the CRC. This paradox has been present in debates since the beginning of the children's rights movement, as discussed in Chapters Two and Three. This also undermines in some way, Goodwin-Gill's assertion that children are 'subjects, not objects' of international human rights law. The literature suggested that the CRC had to strike the right balance between acknowledging the inherent rights of children, while recognising the important role of the family and indeed the rights of the family unit, including rights relating to privacy.⁷³ The reluctance to attribute rights to children identified across centuries in Chapter Two therefore persists into the drafting phase of the CRC.

The second recital provided

'that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.⁷⁴

This recital arguably constructed the family from the child's perspective and how the family should benefit the child. This introduced the scope for intervention where the family environment fails to provide 'happiness, love and understanding'. This also indicated that the drafters recognised that although the parents play an important role in protecting children, children also have rights separate to that family unit.⁷⁵ This recital also underlined the importance of the right to develop – 'full and harmonious development' – demonstrating that the right to develop (Article 6) formed part of the overall object and purpose of the CRC.

⁷³ See Chapter Three.

⁷⁴ CRC, Preamble Recital 2.

⁷⁵ As established in Chapter Three.

These two reflections on the object and purpose of the CRC relate to the need to empower and ensure children have access to all human rights in line with the IBR *and* arguably that children require protection from the State and from their family, where applicable.

Overall, the preamble suggests that the object and purpose of the CRC is to ensure the protection of children and facilitate their growth into adulthood considering the volume of human rights that already apply to children as human beings. The CRC placed this obligation not only on States to oversee the implementation of protective rights, but also family units as the potential mechanism through which protection is delivered. This is consistent with the conceptualisation of childhood in international law as established in Chapters Two and Three.

The Refugee Convention is not referred to in the preamble, but the content, as Foster and Klabbers argued, also informs the object and purpose of a given treaty. There is one provision, Article 22, which relates specifically to seeking refugee protection (discussed in Chapter Three). However, it did not state that children have the right to seek asylum or provide guidance as to the CRC rights violations that may invoke the Refugee Convention. It merely stated that all children should have access to CRC rights including child refugees and children seeking refugee protection. There is nevertheless a wealth of provisions that relate to protecting children from: violence, abuse, neglect,⁷⁶ child labour,⁷⁷ drug abuse,⁷⁸ sexual exploitation, trafficking, sale, abduction,⁷⁹ torture and inhuman treatment⁸⁰ and underage military recruitment.⁸¹ These provisions reinforce the notion that children need extra support and protection without making a link with qualification as a refugee.

⁷⁶ CRC, Article 19.

⁷⁷ CRC, Article 32.

⁷⁸ CRC, Article 33.

⁷⁹ CRC, Article 35.

⁸⁰ CRC, Article 37.

⁸¹ CRC, Article 38.

There is also an international element to the rights contained within the CRC, reflected in the final recital of the preamble:

‘...Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries’.

This, as argued in Chapter Three, opened the door for another State’s or international body’s intervention, including through the provision of refuge.

5.7 Conclusion on objects and purposes

The object and purpose of the CRC relates primarily to protecting and promoting the fundamental rights and freedoms of children in particular their development. Although it is not possible to suggest that the object and purpose of the CRC is to provide refugee protection to children, the content of the convention indicates that there is the potential for the CRC to be read in conjunction with the Refugee Convention. This case is best made by referring back to the Refugee Convention and the strong presence international human rights law has within that framework. It is possible to suggest that the CRC is now part of the human rights regime and that there is therefore scope for it to be considered within refugee determinations following the human rights argument set out in Foster and outlined in Chapter One. The following section looks at UN soft law guidance that was produced by UNHCR and the Committee to bridge the gap between refugee law and children’s rights following the adoption of the CRC.

5.8 A children’s rights approach –justification through UN Guidance

Before turning to a discussion on what a children’s rights approach to the interpretation of the Refugee Convention might look like, it is important to justify its legitimacy. Chapter Three briefly mentioned the difficulty in advocating for a children’s rights approach – an approach that would effectively allow for the rights outlined in the CRC to be used

as part of the mechanism to interpret the Refugee Convention in the case of child applicants. However, the response in guidance, law and jurisprudence has been that such an approach is possible. Let us not forget also that all human rights instruments discussed in Chapter Three and herein in their preambles called upon States to consider other areas of law and the rights therein. For example, both the preambles in the CRC and the Refugee Convention drew the readers' attention to the State's already existing obligations under the UDHR. The need for consistency in the application of the Refugee Convention has been expressed in case law⁸² and also by UNHCR.⁸³ In light of these insights, it is possible to see a justification for a uniform children's rights approach in the assessment of refugee claims. There is also a need to 'bridge the gap' between the two areas of law described in the previous chapters as representing a dichotomy.

While children's rights have been referred to in refugee case law, international guidance and some domestic policy and legislation, a universal approach does not exist. The CRC is applied in refugee law inconsistently across jurisdictions, with some countries more likely than others to regard human rights treaties as having a role in decision making and adjudication. There have only been sparse references to the CRC in national frameworks for asylum determinations, leaving the interpretation of the Refugee Convention in reference to children's rights up to the decision makers, tribunals and courts. This has resulted in the disordered application of children's rights in the interpretation of the Refugee Convention. There is nevertheless evidence to suggest that a children's rights approach is possible in the limited discourse on this topic, as shown in this chapter and in Chapter Six. This section seeks to further demonstrate this possibility through an examination of key guidance materials.

⁸² See: Reference V94/01570, RRT 28 February 1995 at 4; R v. Secretary of State for the Home Department, ex parte Robinson [1998] QB 929, [1997] 4 All ER 201, [1997] 1 WLR 1162, [1997] Imm AR 568; Horath v. Secretary of State for the Home Department [2000] Imm AR 205 (Ward LJ).

⁸³ See: UN High Commissioner for Refugees, *Report on International Protection* UN Doc. A/AC.96/527 (1996).

There are two significant sources of soft law guidance, which have responded over the years to children's rights law and refugee law together. The first source is UNHCR. UNHCR has issued guidance and guidelines and produced research addressing the particular needs of child refugees. The second source is the Committee on the Rights of the Child. The Committee monitors the implementation of the CRC and three Optional Protocols on the involvement of children in armed conflict, on the sale of children, child prostitution and child pornography and on a communication procedure.⁸⁴ The Committee issues General Comments which provided guidance to States Parties on the interpretation of the CRC. The Committee has mentioned refugee children in a number of General Comments. The Comments serve as a primary source for the interpretation of the CRC. They have also impacted upon the interpretation of other areas of law where children are concerned. However, neither source produced binding guidance. This section looks at the contributions made by UNHCR and the Committee towards bridging the gap between refugee law and children's rights law. This section seeks to ascertain to what degree UNHCR and the Committee have provided guidance which would suggest that a children's rights approach is possible and indeed necessary.

5.8.1 UNHCR

UNHCR's *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (Guidelines) was published in December 2009. The Guidelines, like all guidelines published by UNHCR, provided

⁸⁴ United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of the Child' <www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> accessed 15 July 2016.

*‘legal interpretive guidance for governments, legal practitioners, decision makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field’.*⁸⁵

The Guidelines mentioned the CRC in the introduction, noting that ‘a child-sensitive application of the refugee definition would be consistent with the [CRC]’.⁸⁶ UNHCR reiterated the Committee’s (discussed in Section 5.7.2) guidance on interpreting the refugee definition, which stated that it

*‘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. Persecution of the kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status determination procedures’.*⁸⁷

In 1987, UNHCR’s Executive Committee published a Conclusion on Refugee Children. The Committee noted that children ‘constitute approximately one half of the world’s refugee population’ and reiterated their position that children need special protection and assistance. In this Conclusion, the Committee ‘called upon’ the High Commissioner to develop guidelines ‘in consultation with concerned organizations’ to promote co-operation to improve the protection, security, well-being and psychological development of refugee children. The Committee also

⁸⁵ *Supra* note 1, para 1.

⁸⁶ *Supra* note 1, para 5.

⁸⁷ *Supra* note 11, para 74.

called upon the High Commissioner to establish a working group on child refugees.⁸⁸ The Guidelines on Refugee Children were then published one year before the adoption of the CRC in 1988, followed by a reviewed version, updated and published in 1993 as the UNHCR Policy on Refugee Children.⁸⁹ The 1993 Policy referred to the CRC noting that it ‘codified standards for the rights of all children, including those who are refugees’.⁹⁰ The Policy also noted that the CRC

‘provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including those who are of concern to UNHCR. Moreover, as a United Nations convention, it constitutes a normative frame of reference for UNHCR’s action. The policy which follows, therefore, is consistent with the Convention on the Rights of the Child. It also provides parameters for action which supplement those contained in this Convention and which aim to ensure appropriate protection and assistance of children of concern to the High Commissioner’.

This development indicated that the CRC is relevant in the context of refugee law and that the UNHCR viewed the CRC as a normative instrument that should be used when developing laws and policies. This also showed that immediately following the adoption of the CRC, UNHCR began to respond (and even during its drafting, see above 1987 Conclusion on Refugee Children). This supports the idea that the CRC as a ‘United Nations convention’⁹¹ forms part of the broader human rights framework.

⁸⁸ UNHCR Executive Committee Conclusion No. 47 on Refugee Children (XXXVIII) 1987.

⁸⁹ UNHCR Executive Committee, October 1993 as Document EC/SCP/82, in UN High Commission for Refugees, *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994) Preface, Introduction and Annex A.

⁹⁰ *Ibid*, para 8.

⁹¹ Taken from above quote.

The 1994 *Refugee Children: Guidelines on Protection and Care* continued in this vein and stated from the outset that the book ‘came to be written’ on the basis of historical developments including the ‘most recent forebear’ of human rights, the CRC.⁹² In fact, the first substantive chapter of the Guidelines was entitled ‘Refugee Children and the Rights of the Child’. The authors referred to the CRC as important to refugee children as ‘it sets comprehensive standards’ and it has ‘gained importance’ to refugee children due to ‘it’s near universal ratification’⁹³ and thus universal standards.⁹⁴ This further supported UNHCR’s view that the CRC provided a universal standard in relation to children’s rights and that those rights are relevant to the work of UNHCR. However, these insights do not suggest that the CRC can be used as an interpretive tool as to children’s eligibility for protection, just that the CRC articulated a host of rights relevant to refugees.

UNHCR in 1997 expanded upon their guidance in relation to refugee children with the publication of their *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*. The 1997 Guidelines referred to the CRC reiterating that ‘in the treatment of issues concerning unaccompanied children seeking asylum’ the CRC should be taken into account as one part of the framework of international standards. In addition to describing the ways in which the CRC was relevant for procedures, the Guidelines also provided a clear statement on the way the CRC is relevant in the determination of child asylum claims

‘It should be borne in mind that, under the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different

⁹² UN High Commission for Refugees, *Refugee Children: Guidelines on Protection and Care* (UNHCR 1994) 11.

⁹³ Refers to the figure to 155 States parties by March 1994.

⁹⁴ ‘Because the standards are universal, the CRC can be used as a powerful tool for advocacy: a country cannot claim its uniqueness as an excuse for not living up to universal standards’.

from those that may occur in the case of adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the Scope of the Refugee Convention. Examples of such policies and practices are the recruitment of children for regular or irregular armies, their subjection to forced labour, the trafficking of children for prostitution and sexual exploitation and the practice of female genital mutilation’.

The 1997 guidance therefore suggested, nine years on, that the CRC is an instrument through which the Refugee Convention should be interpreted ‘under certain circumstances’. This brings this discussion up-to-date with the 2009 UNHCR Guidelines discussed at the introduction to this section.

The 2009 Guidelines have been referred to in higher courts in respect of child asylum seekers, for example in the case of *DS (Afghanistan) v. Secretary of State for the Home* as discussed above and in detail in Chapter Six. Lord Justice Pill referred to the Guidelines in response to the submission of various passages⁹⁵ by the Queen’s Counsel (QC) for the appellant.⁹⁶

There is extensive guidance on the relevance and the application of the CRC in the field of refugee protection provided by UNHCR. The reference to UNHCR guidelines in case law indicates an acknowledgment by decision makers of the relevance of the CRC in the interpretation of the Refugee Convention, and the relevance of the guidelines, despite the fact that they are non-binding. The 2009

⁹⁵ *DS (Afghanistan) v SSHD* [2011] EWCA; *LQ (age: immutable characteristics) Afghanistan* [2008] UK AIT 00005 referring to United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees’ HCR/GIP/09/08 22 December 2009 paras 65 (age and procedural and evidentiary safeguards); 68 (separated children and the initiation of family tracing efforts); 73 (burden of proof).

⁹⁶ *Ibid.*

Guidelines are referred to throughout Chapter Six alongside children's rights discussed in the context of refugee law. The Guidelines act as a conduit between the two areas of law in comes cases.

Before moving on to the Committee, it is important to note that there are limitations to the UNHCR guidance. In the first instance, the materials stem from the definition of refugee as we are accustomed to it in an adult context. Although attempts were made to reduce the threshold and provide for certain extra safeguards, the UNHCR guidance materials do not originate from a children's rights perspective. Furthermore the guidance materials are heavily focused on protection-based rights, which is not reflective of the three categories of rights that children have under the CRC or indeed the characteristics that we typically attribute to childhood, such as the right to positive development. This research seeks to provide further insight into a children's rights approach to the interpretation of the Refugee Convention by starting from an analysis of the rights children possess and identify which rights are so fundamental that when they are breached may amount to persecution. Although it is not proposed that the any violation of a children's right amounts to persecution, it is suggested that the efforts taken by the UNHCR were refugee law centric and not children's rights centric and that there is indeed scope for a widening of the approach taken in the case of child applicants to reflect the Three Ps and the right to *life, survival and development*. This is developed in Chapter Six.

5.8.2 Committee on the Rights of the Child

The Committee also began referring to the case of refugee children soon after the publication of the CRC.⁹⁷ The first comprehensive example of guidance to this effect was in General Comment No. 6 *on the treatment of unaccompanied and separated children outside their country of origin* (Comment No. 6). However, General Comment No. 5 *General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*⁹⁸ assisted in making the argument that there is a relationship between the CRC and the Refugee Convention. Comment No. 5, reiterating CRC Article 41(b),⁹⁹ stated:

‘As part of its consideration of general measures of implementation, and in the light of the principles of indivisibility and interdependence of human rights, the Committee consistently urges States parties, if they have not already done so, to ratify the two Optional Protocols to the Convention on the Rights of the Child (on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography) and the six other major international human rights instruments. During its dialogue with States parties the Committee often encourages them to consider ratifying other relevant international instruments. A non-exhaustive list of these

⁹⁷ The three earliest General comments refer to refugee children: General Comment No. 2 (2002) The role of independent national human rights institutions in the promotion and protection of the rights of the child CRC/GC/2002/2 in the context of encouraging national human rights institutions to reach out to vulnerable children, including refugees, General Comment No. 3 HIV/AIDS and the rights of the child CRC/GC/2003/3 in the context of the particular vulnerability of children in refugee camps, paras 30 & 37 and General comment No. 4 (2003) Adolescent health and development in the context of the Convention on the Rights of the Child CRC/GC/2003/41 in the context of data collection. Refugee children are also mentioned in various comments after Comment No. 6: General Comment No. 7 *Implementing child rights in early childhood* CRC/C/GC/7/Rev.120 September 2006 which emphasises the need to pay special attention to vulnerable groups of children including refugees; General Comment No. 10 Children’s rights in juvenile justice CRC/C/GC/10 in relation to fair trials.

⁹⁸ General comment No. 5 General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) CRC/GC/2003/527 para 12.

⁹⁹ CRC, Article 41 Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State party; or (b) International law in force for that State.

*instruments is annexed to the present general comment, which the Committee will update from time to time’.*¹⁰⁰

The Committee emphasised the interdependence of human rights and encouraged States to ratify other human rights instruments. This is an important statement as it came from the Committee with responsibility for the CRC - the most ratified UN convention.

Comment No. 6 went into the most detail on interpreting the CRC in light of the situation of unaccompanied and separated children. Comment No. 6 reiterated the principle articulated in Comment No. 5 and CRC Article 41(b) (as above).¹⁰¹ Although the Comment did not frame itself as an interpretation of the Refugee Convention, it is a useful tool through which to do so. The failure to refer directly to the Refugee Convention in the ‘objectives’¹⁰² on the one hand does not support the contention that the CRC is a framework to apply in the interpretation of the Refugee Convention. On the other hand, it indicated that the rights of unaccompanied children and separated children exist in a space bigger than the narrow refugee framework. Sir Goodwin-Gill also referred to this paradox in his assessment of the utility of the CRC in the context of durable solutions for refugee children:

*‘Here, the Convention on the Rights of the Child (CRC) offers substantial general support for a comprehensive approach to durable solutions, but in a sense wider than is normally understood with respect to refugees’.*¹⁰³

The other reason the Refugee Convention is not referred to, to the exclusion of other international treaties, in the ‘objectives’ relates to the simple fact that not all unaccompanied and separated children are

¹⁰⁰ The annex includes the Convention and Protocol relating to the Status of Refugees 1951 and 1967.

¹⁰¹ *Supra* note 11, para 15.

¹⁰² *Supra* note 11, paras 1 – 4.

¹⁰³ *Supra* note 6, 406.

refugees or persons seeking international protection.¹⁰⁴ The Refugee Convention is nevertheless referred to alongside various other relevant international legal instruments under the section titled ‘Applicable Principles’.¹⁰⁵

Comment No. 6 referred to the Refugee Convention on eight occasions.¹⁰⁶ Most significantly, the Comment included the principle of *non-refoulement* as contained within Article 33 of the Refugee Convention (and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment)¹⁰⁷ within the list of 6 General Principles. The other five are those designated General Principles by Comment No. 5: best interests, non-discrimination, the right to be heard, the right to survive and develop (as discussed in Chapter Three)¹⁰⁸ and the right to confidentiality, another principle arising from the CRC.¹⁰⁹ This indicates the Committee’s view that a principle most often attributed to refugee law is as important as the General Principles identified initially by the Committee in the application of the CRC at least in the case of separated and unaccompanied children.

¹⁰⁴ Separated Children in Europe Programme, *SCEP Statement of Good Practice* (4th edn, Save the Children 2010).

¹⁰⁵ *Supra* note 11, para 15.

¹⁰⁶ The Refugee Convention is referred to in the context of: applicable international legislation (para 15); *non-refoulement* (para 26); in the context of prevention of trafficking (para 53); child specific persecution (para 59); prevention of deprivation of liberty (para 62); child-sensitive assessment of protection needs (para 74); full enjoyment of all international refugee and human rights by children granted refugee status (para 76) and children benefiting from complimentary forms of protection (para 77).

¹⁰⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1). Article 3: 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

¹⁰⁸ See also Chapter Three discussions on ‘General Principles’.

¹⁰⁹ CRC, Article 16; *Supra* note 11, paras 29 -30.

Following the publication of Comment No.6, the Committee discussed child refugees in a more substantive way.¹¹⁰ General Comment No. 9 *the rights of children with disabilities*, for example, referred not only to the Refugee Convention, but to the various UNHCR child-specific guidance as well as Comment No. 6 in the context of refugee children.¹¹¹ General Comment No. 17 *on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)* referred heavily to refugee children and the particular challenges they face in accessing CRC Article 31. These comments, among others, indicate that efforts were made by the Committee to suggest ways to interpret the Refugee Convention and to influence treatment of child refugees globally in light of developments in the area of children's rights.

Most recently, the Committee on the Elimination of Discrimination against Women and the Committee published a joint 'general recommendation/general comment'¹¹² 'on harmful practices'.¹¹³ The Joint Recommendation/Comment provided guidance to assist States in their efforts to eliminate harmful practices. It referred directly to the qualification of children as refugees,¹¹⁴ noting that 'asylum officials should be aware that women and girls may be fleeing their country of origin to avoid undergoing a harmful practice'.¹¹⁵ This example shows that not only are two human rights bodies collaborating thus showing the

¹¹⁰ Comment No. 11 (2009) Indigenous children and their rights under the Convention CRC/C/GC/11; GENERAL COMMENT No. 12 (2009) The right of the child to be heard CRC/C/GC/12; General comment No. 13 (2011) The right of the child to freedom from all forms of violence CRC/C/GC/13; General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) CRC/C/GC/14; General comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31) CRC/C/GC/17.

¹¹¹ Committee on the Rights of the Child, General Comment No. 9 (2006) The rights of children with disabilities CRC/C/GC/9, Section IX. Special Protection Measures (arts. 22, 38, 39, 40, 37 b-d and 32-36), para F.

¹¹² 'General Recommendation' is the term used by the Committee on the Elimination of Discrimination against Women and 'General Comment' is the term used by the Committee on the Rights of the Child in their guidance.

¹¹³ Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices CEDAW/C/GC/31-CRC/C/GC/18.

¹¹⁴ *Ibid*, para 54(m).

¹¹⁵ *Ibid*, para 53.

interconnectivity of human rights instruments and fields, the two regimes pointed to their direct relationship with the Refugee Convention. In other words, the Joint Recommendation/Comment provided guidance for the interpretation of the Refugee Convention through the lens of two other human rights instruments: the CRC and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

The Committee stated that the obligation to ensure access to the asylum procedure, legal safeguards and rights in asylum begin with Article 22 of the CRC which required States to take ‘appropriate measures’ to ensure eligible children receive appropriate protection.¹¹⁶ The Committee argued that States should take into account existing international standards including those deriving from international refugee law when implementing Article 22. The Committee therefore acknowledged that those interpreting the CRC must consider the refugee framework. However, Article 22 did not refer to the qualification of children as refugees. This is one challenge to the children’s rights approach. However, developments in courts have shown that it is not insurmountable (See also Chapter Six). This is evidenced by the fact that the Comments of the Committee have been referred to in case law around the world,¹¹⁷ including in the case of refugee law.¹¹⁸

The Committee provided a wealth of guidance in respect of child refugees and children engaged in the asylum process. The fact that the Committee’s comments, including Comment No. 6, have been used in legal submissions in applications for international protection and appeals and are sometimes referenced in judgments arising from higher courts¹¹⁹ indicates the CRC’s relevance in the interpretation of the Refugee Convention. However, much like the UNHCR guidance, the

¹¹⁶ CRC, Article 22.

¹¹⁷ See, for example: *S.L. and J.L. v. Croatia* - 13712/11 - Legal Summary [2015] ECHR 540 (07 May 2015) (refers to Comment Number 14).

¹¹⁸ See, for example: *A,B,C and Norwegian Organization for Asylum Seekers (NOAS) v. The State*, HR-2012-2399-P (Case No. 2012/1042), Norway: Supreme Court, 21 December 2012.

¹¹⁹ See *AA (unattended children) Afghanistan CG* [2012] UKUT 00016 (IAC).

Committee's efforts to elaborate on child refugees, in particular in relation to their qualification, do not provide all the answers. No 'comment' was drafted to specifically address the issues related to qualification as a refugee and in what instances a violation of a CRC right might amount to persecution or have a nexus with the Refugee Convention. Most of the guidance provided by the Committee in respect of child refugees and asylum seekers relates to procedural rights and safeguards and care.

Section 5.10 in Part II looks to the detail of persecution and how UNHCR, the Committee and the CRC have influenced the qualification of children-as-refugees. Before discussing developments in respect of child persecution, Section 5.9 looks at the challenges inherent in applying the children's rights regime in the context of refugee law. Section 5.9 also looks at the limitations associated with the guidance discussed in this section.

5.9 Challenges in the interpretation of the Refugee Convention in respect of children's rights

A 'children's rights approach' to the interpretation of the Refugee Convention is not explicitly mentioned or defined in the literature. The literature, guidance, law and case law, however, indicate that in interpreting the Refugee Convention in the case of children, a different approach is required. The abovementioned sources outlined the ways in which CRC and children's rights more generally impact upon the Refugee Convention. The Committee has also consistently recommended to States to give legal effect to the CRC.¹²⁰ This means that there is a framework for the interpretation of the Refugee Convention considering child specific rights. However, a number of issues remain to be resolved.

¹²⁰ See, for example: Committee on the Rights of the Child, *Concluding Observations on Ireland's record on children's rights* 1 March 2016 CRC/C/IRL/CO/3-4.

Firstly, not all State Parties have transposed or given legal effect to the CRC and other relevant human rights treaties. In addition, some States or courts may be reluctant to engage with the CRC due to the fact that it is not transposed into their national law.¹²¹ This is typically explained away as CRC rights are widely considered to be normative in nature, as discussed in Chapter Three. Nevertheless, the different approaches nationally to transposing or relying upon the CRC has resulted in its inconsistent application, including in the context of refugee law.

Secondly, it is not clear which children's rights are applicable in the context of refugee law. Identifying these rights and analysing the law in practice to-date is the focus of Chapter Six. Chapter Six revisits the Three Ps approach and the rights identified in Chapter Three and their application in refugee law.

Thirdly, the guidance mentioned above is considered to be soft law. Soft law guidance, though useful, is not binding on States. It can therefore be seen merely as an interpretive tool States or decisions makers *may* use.¹²² The absence of binding guidance has also contributed to the inconsistent approach to the interpretation of the Refugee Convention in considering the contributions to international law made by the children's rights movement, in particular the CRC. This is of particular concern as there is no international treaty which deals with the specific circumstances of child refugees. There are, however, some regional examples of law, which have included child specific forms of persecution as part of the definition of persecution.¹²³ European Union law, for example, provides for the inclusion of 'acts of a gender-specific or child-specific nature' within the definition of 'acts of persecution' in Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 *on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international*

¹²¹ Law Society Law Reform Committee, 'Rights-based Law: The case of reform' (Law Society 2006) 7.

¹²² *Ibid.*

¹²³ See: *Supra* note 8.

*protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).*¹²⁴

This section shows that guidance and the modern interpretation of the rules of treaty interpretation support the potential for a children's rights approach to the interpretation of the Refugee Convention. However, this chapter has not answered the question: Is the Refugee Convention a sufficient framework for determining child refugee claims? The following chapter looks at this question and revisits the question of consistency given the absence of legal and binding guidance dealing with child refugee claimants. Chapter Six also looks at how the law is applied in practice to examine to what extent the CRC has influenced refugee decision making and if a children's rights approach is possible and whether or not it is needed.

The litmus test for tracking the progress of the children's rights approach lies with persecution. Persecution is central to the definition of refugee as established in the previous chapter and developed below. Through the lens of persecution, we can see how children's rights have been considered and to what extent they form part of assessments for refugee protection. The following section therefore takes a closer look at persecution and the other key elements of persecution. This assists in our effort to elaborate on the possibility of a children's rights approach while keeping in mind the secondary objective which is to establish a conceptualisation of the child refugee. The following section serves to look briefly at the definition of persecution and the ancillary elements of persecution as a backdrop to be built upon in Chapter Six.

¹²⁴ *Supra* note 8, Article 2(f). The Qualification Directive in the Preamble (Recital 28) also notes that 'It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution'.

Part II

5.10 A brief introduction to persecution

The question of persecution is central to refugee determinations.¹²⁵ However, persecution was not defined in the Refugee Convention. The definition has been left to decision makers and courts to interpret.¹²⁶ Given the centrality of the discussions and debate around persecution, the way it is defined in the case of children is critical to the analysis herein. The term persecution has been grappled with in guidance and jurisprudence over the years, leading UNHCR to note:

*‘There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success’.*¹²⁷

There have nevertheless been attempts to define it in law and literature. In 1953 Vernant described persecution as akin to

*‘severe sanctions and measures of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights’.*¹²⁸

From as early as 1953, it was suggested that the framework for human rights be the ‘barometer’,¹²⁹ for determining whether or not harm experienced amounts to persecution.¹³⁰ In 1991, Hathaway described persecution as the ‘sustained or systemic violation of a basic human right

¹²⁵ For further reading on the definition of persecution, see: James Hathaway, ‘The Rights of Refugees under International Law’ (CUP 2005) and Sir Guy Goodwin-Gill and Jane McAdam, ‘The Refugee in International Law’ (3rd edn OUP 2007).

¹²⁶ *Supra* note 9.

¹²⁷ UNHCR (re-issued 2011) Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, para 51.

¹²⁸ Jacques Vernant, *The Refugee in the Post-War World* (YUP 1953) 8, quoted in A. Grahl-Madsen, *The Status of Refugees in International Law* (A.W. Sijthoff 1996) 193 in *See Supra* note 9.

¹²⁹ *See Supra* note 9, 16.

¹³⁰ *See Supra* note 9.

demonstrative of a failure of state protection'.¹³¹ He also proposed that the IBR inform the examination of the nature and seriousness of the harm experienced or feared by an applicant to assess whether or not it amounted to persecution.

In 2012, the Court of Justice of the European Union Advocate General in *Germany v Y and Z* defined persecution as an

*'[...] act of the utmost gravity, because it sets out flagrantly and persistently to deny the most essential rights of the human person, on the basis of skin color, nationality, gender, sexual orientation, political beliefs or religious convictions'.*¹³²

In 2006, UNHCR in their *Master Glossary of Terms*, described persecution *'to comprise human rights abuses or other serious harm, often, but not always, with a systematic or repetitive element'*.¹³³

The CRC was not mentioned in the analysis by Hathaway or others. Children were not extensively referred to in any seminal literature on refugee law as highlighted in Chapter One. However, the approach put forward generally by Vernant, Hathaway and Foster highlighted the importance of considering the human rights framework. This is relevant in the case of children's claims in two respects. Firstly, some children's rights are included in the IBR and the CRC is informed by those rights. Secondly, the CRC is arguably considered another human rights treaty, as discussed in the previous section, and can therefore be assumed to play a role in the persecution barometer.¹³⁴ In general, the acceptance of

¹³¹ James Hathaway, *The Law of Refugee Status* (Butterworths 1991) 104-105.

¹³² 1 C-71/11, C-99/11 *Bundesrepublik Deutschland v Y and Z* (CJEU, 5 Sept 2012) para 56. This was the first case which dealt with the interpretation of the term persecution in the context of the Qualification Directive. See J. Lehmann (2014) Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum law – The Case of *Germany v Y and Z* in the Court of Justice of the European Union *International Journal of Refugee Law* 26:1 65-81.

¹³³ UN High Commissioner for Refugees (UNHCR), *UNHCR Master Glossary of Terms*, June 2006, Rev.1 p 16.

¹³⁴ See *Supra* note 9, 16.

the Hathaway approach has resulted in an expansion of the scope of persecution to include child-specific persecution as well as other types of persecution embedded in human rights law that also benefits children, such as gender-based persecution.¹³⁵

5.10.1 Persecution and children

Children are considered to be of the most vulnerable of the refugee population.¹³⁶ The existing literature referred to children fleeing for the same reasons as adults, for example from war, conflict and civil unrest.¹³⁷ However, the literature also noted that children are subjected to other violations of human rights and child-specific rights, including: trafficking, bonded labour, forced military conscription, child abuse, gender-based violence, child prostitution and pornography and other forms of exploitation, forced marriage, religious servitude and female genital mutilation.¹³⁸ Bhabha and Young argued that children are *increasingly* ‘themselves targets for human rights abuses’.¹³⁹ They characterised child refugee claims as either: ‘(1) Situations which amount to ‘persecution’ for adult asylum seekers and for children, (2) Situations which are of a child-specific persecution that only arise in relation to children and (3) Situations which when applied to children (but not adults) amount to persecution’.¹⁴⁰

The above guidance, literature and case law suggested that not only are there examples of persecution that are child-specific, the severity of the harm or ill-treatment does not need to reach the same threshold in the

¹³⁵ See, for example: Jacqueline Bhabha, ‘Boundaries in the Field of Human Rights’ (2002) 15 *Harvard Human Rights Journal* 157.

¹³⁶ E.F.Abram (1995) The Child’s Right to Family Unity in *International Immigration Law Law & Policy* 17:4, 397-439, 398.

¹³⁷ *Supra* note 29, 86; K. Halvorsen (2002) Separated Children Seeking Asylum: The Most Vulnerable of All *Forced Migration Review* 34:12 in Danuta Villarreal, ‘To Protect the Defenceless: The Need of Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers’ (2004) 26(3) *Houston Journal of International Law* 744.

¹³⁸ *Supra* note 29, 86; Danuta Villarreal, ‘To Protect the Defenceless: The Need of Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers’ (2004) 26(3) *Houston Journal of International Law* 745.

¹³⁹ *Supra* note 29, 86.

¹⁴⁰ *Supra* note 29, 104.

case of children as their adult counterparts to amount to persecution, reflecting the views of protectionists, Locke, Rousseau and others that children are inherently vulnerable (See Chapter Two). One example of applying a lower threshold¹⁴¹ and a form of child-specific persecution referred to by UNHCR is the *witnessing* of violence, including domestic violence, considering the possibility of psychological harm.¹⁴² UNHCR and others have contended that children are more sensitive to acts that target close relatives, including witnessing violence and experiencing fear even if the act was not perpetrated against them.¹⁴³ As Bhabha noted, ‘There may be situations where children should be considered victims of persecution though they have suffered *less harm* than would be required for an adult’, including separation from family in war, conflict or displacement, trafficking, gang violence and homelessness.¹⁴⁴ These examples are expanded upon in Chapter Six, but we can already see a strong protectionist presence in the literature and case law. Absence of family is also prominent and as discussed the role of family in the context of Article 6 is an important consideration in rights generally and refugee law specifically (also revisited in Chapter Six).

The abovementioned rights violations, for example separation from family, displacement generally and homelessness, primarily fall within the provision and protection categories of the Three Ps approach. Experiences arising from conflict, war, exploitation, violence, trafficking and gang violence also fall within the protection rights category. These are examples of child specific forms of persecution discussed in the literature reinforcing the tendency to view children as victims and not persons with the capacity to exercise their agency (as discussed in Chapter Three).

5.10.1.1 Persecution in UNHCR Guidance

¹⁴¹ *Supra* note 1, para 15.

¹⁴² *Supra* note 1, para 16.

¹⁴³ *Supra* note 1, para 17.

¹⁴⁴ (emphasis added) Jacqueline Bhaba and Mary Crock, *Seeking Asylum Alone – a Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press 2007) 161.

UNHCR, as discussed in Chapter Four, also acknowledged that persecution experienced or feared by children may differ from the experiences or fears of adults *and* that the scope of persecution should be widened by encouraging the consideration of the CRC. UNHCR in their Guidelines stated that ‘persecution’ in respect of children:

*‘can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm or intolerable situations as assessed with regard to the age, opinions, feelings, psychological make-up of the applicant. Discrimination may amount to persecution in certain situations where the treatment feared or suffered leads to consequences of a substantially prejudicial nature for the child concerned. The principle of the best interests of the child requires that the harm be assessed from the child’s perspective. This may include an analysis as to how the child’s rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child’.*¹⁴⁵

UNHCR suggested that persecution must consider the child's rights reflected in the CRC and the child's interest in accordance with the best interests principle. UNHCR also noted that ‘a contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations, including violations of child-specific rights’ arguing that it is essential in analysing the standards of the CRC.¹⁴⁶ This is reinforced by the Committee. States are advised to

*‘take into account the development of, and formative relationship between, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention’.*¹⁴⁷

¹⁴⁵ *Supra* note 1, para 10.

¹⁴⁶ *Supra* note 1, para 13.

¹⁴⁷ *Supra* note 11, para 74.

The Committee emphasised that in interpreting persecution within the context of the Refugee Convention, the State must consider the differences in the experiences and manifestations of persecution in the case of children. The Committee listed a number of examples which are also grounded in protection rights, where children are more often considered as objects of law: ‘persecution of the kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation’.¹⁴⁸ UNHCR noted that these reasons must have a link to one of the five convention grounds.¹⁴⁹

Kilkelly noted that

*‘The CRC, rather than contributing to the disaggregation of international human rights law, has led to a cross-fertilisation of children’s rights within and between differing domestic, supra-national and international legal systems’.*¹⁵⁰

This cross-fertilisation also applies to persecution. There is a wealth of guidance, literature, legislation and case law reflecting the developments in the interpretation of the term persecution in the case of children. Indeed, some of these developments reflected guidance of the CRC. Some countries have introduced child-specific guidelines. And in some countries these developments are reflected in a body of case law.¹⁵¹

5.10.1.2 Persecution in practice

In *AA (unattended children) Afghanistan* for example, the UK Upper Tribunal found that a child applicant who left Afghanistan at 14 was

¹⁴⁸ *Supra* note 11 para 74.

¹⁴⁹ *Supra* note 1, para 74.

¹⁵⁰ Ursula Kilkelly quoted in Alice Diver, Eugene McNamee, Liam Thornton, ‘21 Years of the Convention on the Rights of the Child: A Coming of Age?’ *The Children’s Convention at 21: The Rights of the Child Come of Age? Conference*, Derry/Londonderry, 19 and 20 June 2010, University of Ulster.

¹⁵¹ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 223.

entitled to recognition as a refugee due to the child's well-founded fear of being persecuted on the basis of his membership of his family and being associated with their political opinions (discussed in further detail in Chapter Six). The applicant challenged the original decision to refuse refugee protection and grant discretionary leave on the basis that there were no suitable care arrangements available for the child if returned.¹⁵² The Tribunal therefore had to consider whether or not the persecution feared rose to the level of persecution, referred to as an 'up-grade appeal'.¹⁵³ The Tribunal concluded that the applicant's political opinion ('whether actual, or imputed by reason of family membership')¹⁵⁴ did indeed rise to the level of persecution and the appeal was successful.

In relation to the CRC, the Upper Tribunal in *AA (unattended children) Afghanistan* held that in determining the viability of internal relocation they had an obligation to consider the provisions of the CRC in accordance with recital 20 to the Qualification Directive:

*'It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution'.*¹⁵⁵

The Tribunal also referred to *R (on the application of Howard League for Penal Reform) v Secretary of State for the Home Department & Anor* and the observations made by Munby J:

'The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention [on the Rights of the Child] nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the

¹⁵² *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC).*

¹⁵³ *Ibid*, para 3.

¹⁵⁴ This point is discussed further in Chapter Six, Section 6.5 in the context of participation rights and their nexus with the political opinion ground.

¹⁵⁵ *Supra* note 153.

*strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.*¹⁵⁶

This section highlights the existing discourse on child specific persecution. This brief introduction to persecution and child-specific forms of persecution indicates the willingness of the international community, legislators and decision makers to interpret the Refugee Convention differently in the case of children's claims as compared against their adult counterparts including by referring to the CRC and other guidance. The developments in relation to persecution are discussed at length in Chapter Six. Child specific forms of persecution and persecution in general are dealt with in detail in Chapter Six. Chapter Six seeks to establish a conceptualisation of the child refugee, among other objectives described throughout this book, and persecution is central in doing so. The following sections look at other elements of the definition of persecution which aid us in conceptualising child refugees. Procedural aspects of child refugee claims are outside the scope of this research.

5.10.2 Actors of persecution and protection and the role of the family

The agents or actors of persecution are typically conceived of as State actors – either agents of the State or agents acting on behalf of the State. However, under the Refugee Convention, actors of persecution may also be individuals with no affiliation to the State itself.¹⁵⁷ Child applicants must nevertheless prove that the feared or experienced persecution would be/was at the hands of the government, or an agent of the

¹⁵⁶ R (on the application of Howard League for Penal Reform) v Secretary of State for the Home Department & Anor [2002] EWHC 2497 (Admin) in AA (*unattended children*) Afghanistan CG [2012] UKUT 00016 (IAC) at 55.

¹⁵⁷ Refugee Convention, Article 1A(2).

government or another person or persons.¹⁵⁸ The applicant must show that they sought protection unless seeking protection from the government would have put the applicant at risk or would have been futile based on a history of inaction.¹⁵⁹ Assessments therefore include looking at the existence of legal systems that criminalise and provide sanctions for the persecutory conduct and evidence to suggest acts would be prosecuted.¹⁶⁰ The applicant must also be able to demonstrate that the State facilitates, encourages or tolerates the persecutory actions in question or is unable or unwilling to intervene on behalf of the persecuted.¹⁶¹ For example, the State may not be in a position to protect the individual if the country is in the middle of civil-conflict or civil-unrest or where the State lacks the infrastructure to protect the applicant. Both the actors of persecution and the applicants' inability or unwillingness to seek protection from the State must relate to one of the five convention grounds.¹⁶² This also applies in the case of children.¹⁶³

A child's access to State protection may also depend on the ability and willingness of the child's parents or other caregivers to intervene on behalf of the child and/or seek protection from the State on behalf of the child.¹⁶⁴ It is also possible that the home may be the locus of the persecution. Typical examples of the parent-as-persecutor dynamic is female genital mutilation, forced child marriage or domestic abuse.¹⁶⁵ In any of these examples, the family may act as a barrier to accessing

¹⁵⁸ Refugee Convention, Article 1A(2).

¹⁵⁹ Matter of Juan Carlos Martinez-Mejia, A 76 312 250-6 (BIA Jan. 20 1999) (unpublished) in *Supra* note 152, 107.

¹⁶⁰ UNHCR, *Guidelines on Gender-Related Persecution*, para. 11. Para 38

¹⁶¹ Refugee Convention, Article 1A(2).

¹⁶² 1951 Convention relating to the Status of Refugees, Article 1A(2).

¹⁶³ See CRC Article 3, which imposes a duty on States Parties to ensure the protection and care of children in respect of actions by both State and private actors. See also: American Convention on Human Rights 1978, Articles 17 and 19; African Charter on Human and People's Rights, Articles 1(3), 81. See also UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011) para 65; UN High Commissioner for Refugees, *Guidelines on Gender-Related Persecution* (UNHCR 2002) para 19; *Advisory Opinion on Juridical Condition and Human Rights of the Child*, No. OC-17/02, IACtHR, 28 Aug. 2002 para 37.

¹⁶⁴ Also mentioned in *supra* note 152, 107.

¹⁶⁵ See: *Supra* note 1.

adequate protection. This is particularly true in countries where States do not intervene in family affairs.¹⁶⁶ Parents or carers may also fail to seek protection on behalf of their children. In these circumstances, Bhabha argued that parents' or other adults' inaction should not be held against the child.¹⁶⁷ This dilemma is central to debates around the child-as-rights-holder. This relationship dynamic impacts upon children's access to all three categories of rights. National laws, international laws and the majority of the discourse on children and childhood identify the parents or responsible adults as the main source of protection (as developed in Chapters Two and Three). It is when this relationship does not serve to protect children and/or harms children, and thus their development in line with Article 6 as discussed in Chapter Three, that is of interest to this book. Chapter Six also discusses parents as persecutors and parents as protectors.

5.10.3 Children who are not eligible for protection: exclusion

Exclusion forms part of the determination process – once an applicant is found to qualify as a refugee, grounds for exclusion are then also considered as part of the qualification process. The Refugee Convention does not apply to three categories of persons. Article 1D states that persons already in receipt of protection through the United Nations Relief and Works Agency for Palestine are excluded from the provisions contained within the Convention.¹⁶⁸ Additionally, Article 1E excludes persons who can avail of protection in another jurisdiction other than their country of origin where they are already resident.¹⁶⁹ Lastly, Article 1F excludes any person believed to have: committed a war crime or a crime against peace or humanity; committed a serious non-political crime prior to applying for protection or been found guilty of committing acts contrary to the principles of the UN.¹⁷⁰

¹⁶⁶ The role of the family in both scenarios: forced marriage, given away by fathers, state will not interfere with private family matters - *Shah and Islam* identified Pakistan does not provide adequate protection to women and children.

¹⁶⁷ *Supra* note 152, 107.

¹⁶⁸ Refugee Convention, Article 1D.

¹⁶⁹ Refugee Convention, Article 1E.

¹⁷⁰ Refugee Convention, Article 1F.

The same exclusions apply to children¹⁷¹ in particular where they have attained the age of criminal responsibility and are established to have capacity to commit the crimes and understand the consequences of their actions. Exclusion therefore has a link to child agency and participation rights. An assessment of the child's capacity is often an attribute of cases where exclusion is invoked. Recently, case law relating to exclusion and former child soldiers has emerged. The UK Border Agency, for example, rejected an application from a sixteen-year-old boy from Afghanistan who killed a family member in self-defence. However, the High Court found that

*'the primacy of welfare consideration should be manifest... What might be regarded as the right approach for an adult is not always the right approach for a child or young person'.*¹⁷²

The UK Border Agency was found to have erred in their decision.¹⁷³ More exclusion cases are discussed in Chapter Six.

UNHCR in a letter to legal counsel regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers noted:

Any exclusion analysis regarding the acts of child soldiers must be undertaken with great care. The use of child soldiers in armed conflict is a practice of increasing international concern and has been condemned by the international community on legal, moral and ethical grounds. Children are often targeted for forcible conscription into military service due to their young age and vulnerability. Many are forced to commit

¹⁷¹ Detailed guidance on the application of Article 1F in cases involving children can be found in: *Supra* note 1.

¹⁷² *ABC (A Minor) (Afghanistan) v. Secretary of State for the Home Department* [2011] EWHC 2937.

¹⁷³ *Ibid.*

crimes, as well as witness the crimes of others, and as a result are left psychologically and emotionally scarred for years. Access to rehabilitation and social services once a conflict ends is often limited, if not non-existent.

...In the case of child soldiers, issues such as age, mental and emotional maturity, voluntariness of service, and treatment by other military personnel, all factor heavily in determining whether exclusion from refugee protection is appropriate'.¹⁷⁴

The role of the right to participation, or the exercise of choice or agency (as discussed in Chapters Two and Three), has arisen in child refugee cases dealing with engagement in gang, military or other illicit activities. There is very limited case law dealing with exclusion and very infrequent mention of exclusion in the literature on child refugees, but it is, as said, an emerging issue and one worthy of further comment (See Chapter Six, Section 6.5).

5.10.4 Convention grounds

5.10.4.1 Children as a particular social group

Theorists and child and refugee rights commentators often capture the conceptualisation of a legal framework for the refugee child within the minority construct.¹⁷⁵ Locke, Rousseau, Ariès and contemporary theorists and academics, as well as international law, identify children and the period of childhood as distinct from adulthood. The literature and law also attribute characteristics specific to children, such as a difference in 'capacity' when compared to adults. Lastly, it was also largely agreed that children depend on adults to ensure their rights and livelihoods during this period are protected and promoted. Children are

¹⁷⁴ UNHCR letter to legal counsel regarding the International Standards for Exclusion from Refugee Status as Applied to Child Soldiers, 12 September 2005 Washington.

¹⁷⁵ Josée Archambault, 'The Status Shift of Refugee Children in Settlement: An Analysis of the Norwegian Context' (2010) 18 *International Journal of Children's Rights* 440; Louis Wirth 'The Problem of the Minority Groups' in Ralph Linton (ed.), *The Science of Man in the World Crisis* (Columbia University Press 1945) 347 – 372.

considered in the sociological discourse to represent a unique social group in society based on the aforesaid characteristics.¹⁷⁶ Bhabha and Young, in their article 'Not adults in miniature: unaccompanied child asylum seekers and the new U.S. guidelines', also argued that children can form a particular social group on the basis of a shared 'child-specific' form of persecution.¹⁷⁷ The development of guidance and law in the area of asylum have reflected Bhabha and Young's view.

5.10.4.1.1 Childhood as an immutable characteristic and refugee law

Children and the attributes and experiences of childhood are considered to reflect the general meaning and current understanding of the concept of the particular social group as set out in *LQ (age: immutable characteristics) Afghanistan* [2008] UK AIT 00005:

'...age is immutable. It is changing all the time but one cannot do anything to change one's own age at any particular time. [Membership of a particular social group depended on his being a child]. At the date when the appellant's status has to be assessed he is a child and although, assuming he survives, he will in due course cease to be a child, he is immutably a child at the time of assessment'.¹⁷⁸

UNHCR noted that membership of a particular social group

'normally comprises persons of similar background, habits or social status. A claim of a fear of persecution under this heading may frequently overlap with a claim of a fear of persecution on other grounds, i.e. race, religion or nationality'.¹⁷⁹

¹⁷⁶ See, for example: David Archard *Children: Rights and Childhood* (2nd edn, Routledge 2004).

¹⁷⁷ *Supra* note 29, 766.

¹⁷⁸ *LQ (age: immutable characteristics) Afghanistan* [2008] UK AIT 00005.

¹⁷⁹ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011) para 77.

The Guidelines emphasised that being a child is ‘directly related’ to the child’s identity and the way their identity is perceived by society.¹⁸⁰ The Guidelines characterised children by their ‘innocence, relative immaturity, impressionability and evolving capacities’, reminiscent of early theorising and underscored by protection rights. Additionally the Guidelines noted that children can be identified as a social group by their shared experience of childhood: ‘children share a common socially-constructed experience, such as being abused, abandoned, impoverished or internally displaced’.¹⁸¹ The Guidelines also noted that children can be considered a member of a particular social group not related to childhood, or being children, but as a result of another common experience or aspect of their identity for example, ‘former child soldiers’.¹⁸² In *MJZ*, the Canadian Convention Refugee Determination Division in 1999 considered abandoned children from Mexico as a particular social group under international law.¹⁸³

There are now innumerable examples of child applicants’ cases being considered in the context of the particular social group or groups all over the world. In the US in *Matter of S-E-G*, the BIA stated that

*‘the mutability of age is not within one’s control and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable’.*¹⁸⁴

There are examples of national guidance which describe instances where children may be considered as members of a particular social group as well. The UK, for example, provided some clarification for case owners

¹⁸⁰ *Supra* note 1, para 49.

¹⁸¹ *Supra* note 1, para 49.

¹⁸² *Supra* note 1, para 51.

¹⁸³ *MJZ*, V97-03500, 1999 CRDD 118 (Can.).

¹⁸⁴ *Matter of S-E-G*-, 24 I&N Dec. 579, 583-584 (BIA 2008)

responsible for determining children's cases. The guidance entitled 'Processing an asylum claim from a child' noted that:

'Age groupings such as 'children' or 'young men', or 'young girls' may constitute a particular social group; depending on the specific country context and the treatment of this group and how they are perceived within that society and the laws of the relevant country. Case owners should bear in mind that at any given point, a child's age may be considered an immutable characteristic (for example, notwithstanding the fact that the child will ultimately grow out of his/her present age grouping).'

It further noted that

*'Case owners should also be aware that other particular social groups may be identifiable, such as street children, HIV / AIDS-affected children, children in armed forces or lesbian, gay, bi-sexual and transgender children'.*¹⁸⁵

UNHCR also highlighted that an adult applicant may still invoke the particular social group ground as its relevance does not necessarily cease when childhood ends. Past shared experiences that are unchangeable and historic may also fall within the scope of the ground, for example: former child soldiers or persons who were trafficked as children.¹⁸⁶

Villarreal in 2004, drawing on the findings in *Sanchez-Trujillo*, considered a landmark case in interpreting the particular social group at the time, and *Matter of Sanchez and Escobar*, also noted, however, that

'Possession of broadly-based characteristics, such as youth, is usually insufficient for a classification in a social group. This is because the term "particular social group" does not "encompass

¹⁸⁵ Home Office, 'Processing children's asylum claims' Version 1.0 (Home Office 2016) 42.

¹⁸⁶ *Supra* note 1, para 51.

*every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance”’.*¹⁸⁷¹⁸⁸

In other words, although childhood indicates membership of a particular social group, there must also be a reason for migration which is based on an experience or a well-founded fear of persecution.

The particular social group is the most developed ground in refugee law in the context of children. UNHCR in their *Guidelines on International Protection No. 2: ‘Membership of a Particular Social Group’ within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* published in 2009 noted that ‘children’s claims to refugee status most often have been analysed in the context of the Convention ground of “membership of a particular social group”’, while also acknowledging that other grounds may be relevant or invoked.¹⁸⁹

The case law and guidance established the particular social group ground as the most relevant as it is linked directly to age and to the characteristics associated with age. The social group ground is therefore linked to childhood. This reflects the general developments in child, childhood and children’s rights discourses discussed in Chapters Two and Three – childhood is marked by innocence and vulnerability. It demonstrates the prominence of protection rights in the refugee discourse. The analysis in this book up to this point uncovers an overlap between childhood discourse and the Refugee Convention. It is

¹⁸⁷ Danuta Villarreal, ‘To Protect the Defenceless: The Need of Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers’ (2004) 26(3) *Houston Journal of International Law* 771.

¹⁸⁸ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) at 1576; *Matter of Sanchez and Escobar*, 19 I. & N. Dec. 276, 285-86 (rejecting as overly broad a social group consisting of young Salvadoran men, ages eighteen to thirty, who were urban, working class males of military age) in Danuta Villarreal, ‘To Protect the Defenceless: The Need of Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers’ (2004) 26(3) *Houston Journal of International Law* 771.

¹⁸⁹ UN High Commissioner for Refugees, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugee* (UNHCR 2002) para 48.

envisaged that provision, protection and participation rights could fall within the remit of the particular social group ground. However, the focus in guidance and literature is largely on protection rights consistent with findings in Chapters Two and Three. This is supported by the case law discussed in Chapter Six. Some characteristics, experiences and rights related to childhood are also linked to other convention grounds. They are introduced below in the context of refugee law and guidance and they are also discussed further in Chapter Six.

5.10.4.2 Race and nationality

Persecution based on race is a common reason for seeking international protection, including in the case of children. Goodwin-Gill and McAdam argue that persecution on grounds of race should take account of Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination.¹⁹⁰ Article 1.1 provided

*‘the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.*¹⁹¹

UNHCR in the Handbook contended that persecution on grounds of race, in the broadest sense including ethnicity and other minority categorisations, occurs when ‘a person’s human dignity is affected to such an extent as to be incompatible with the most elementary and inalienable human rights, or where the disregard of racial barriers is subject to serious consequences’.¹⁹²

¹⁹⁰ Sir Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn OUP 2011) 70.

¹⁹¹ Convention on the Elimination of All Forms of Racial Discrimination, Article 1.1.

¹⁹² *Supra* note 128, para 69.

According to UNHCR, nationality does not only relate to citizenship, but it has also been interpreted to include other minority groups. Goodwin-Gill and McAdam highlighted that this ground may apply in a given State where distinctions are drawn on ethnic, religious, cultural or linguistic lines.¹⁹³ For this reason, UNHCR stated that nationality may overlap with the race ground. Additionally, UNHCR acknowledged that the nationality ground may overlap with the political opinion ground in circumstances where two nationality groups in a given country are in conflict and the conflict also manifests in political movements. By this argument, there may also be an overlap with the religion ground. The Handbook clarified that persecution on nationality grounds

*‘may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution’.*¹⁹⁴

The Guidelines categorised race, ethnicity and nationality together. The Guidelines described a number of scenarios where the race or nationality ground may be relevant emphasising, the relevance of policies that prohibit children of a particular race from registering at birth or being deprived of nationality.¹⁹⁵ Additionally, it elaborated on policies that block children from a particular race from accessing education¹⁹⁶ or health services¹⁹⁷ as having the potential to amount to persecution. For example, in *D. v Refugee Appeals Tribunal*, (introduced in Chapter One a discussed in detail in Chapter Six) where the the Irish High Court heard a case submitted on behalf of a child who would be denied access to education due to his ethnicity. Justice Hogan noted that the applicant would ‘effectively be excluded from any meaningful participation’ in

¹⁹³ *Supra* note 200, 73.

¹⁹⁴ *Supra* note 128, para 74.

¹⁹⁵ CRC, Article 7.

¹⁹⁶ CRC, Article 28.

¹⁹⁷ CRC, Article 24.

society.¹⁹⁸ The Guidelines also highlighted the systematic targeting of girls from particular race or ethnic groups or nationalities for the purposes of trafficking or exploitation.¹⁹⁹

The race and nationality grounds are discussed further in the following chapter. The discussions surround children's rights as they relate to provision, protection and participation rights and the interactions these rights have with refugee law in particular as they arise in the context of discrimination. The relationship between these convention grounds and the CRC based rights is also discussed in Chapter Six.

5.10.4.3 Religion and political opinion

Religious persecution has been a central feature throughout history on every continent. The ubiquitous persecution of the Jews in Europe leading up to and during World War II, the Ahmadis in Pakistan and various other Muslim countries and the Baha'is in Iran are just a few examples of wide-spread religious persecution.²⁰⁰ Based on the presumption that all human rights treaties influence each other, Goodwin-Gill and McAdam argued that decision makers should take account of Article 18 of the ICCPR²⁰¹ which provided that 'Everyone shall have the right to freedom of thought, conscience and religion'.²⁰² This has also been interpreted to mean that a religion cannot be forced upon someone, nor can a person's right to adopt a religion be violated.²⁰³

The Handbook provided that 'prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or

¹⁹⁸ *D. [a minor] v Refugee Appeals Tribunal & Anor* [2011] IECH 431 at 23.

¹⁹⁹ See *Supra* note 1, para 41.

²⁰⁰ For up-to-date information on religious persecution around the world see: US Department of State, Country Reports on Human Rights Practices, <http://www.state.gov/j/drl/rls/hrrpt/>.

²⁰¹ International Covenant on Civil and Political Rights 1966, Article 18.

²⁰² In addition, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted in 1981 which sets out the need for protection against the same. The drafting of this Declaration began in 1962.

²⁰³ See *Wang v MIM* (2000) 105 FCR 548; [2000] FCA 1599, the High Court of Australia held that fear of persecution or punishment for a breach of a law which sought to regulate the practice of religion may give rise to a well-founded fear of persecution.

serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community' may amount to persecution.²⁰⁴ The Handbook emphasised the relevance of the rights to freedom of thought and to practice one's religion, as set out in the UDHR. The Guidelines commented that this convention ground also applies to children in the same way as adults, however, noting that children are not always able to influence their religion. This ground may also relate to circumstances where children do not adhere to set gender roles or fulfill gender-based obligations, discussed below and in Chapter Six.²⁰⁵

One point worth brief discussion is the mention of religious education in the Refugee Convention (and the UDHR²⁰⁶ and the CRC).²⁰⁷ The Refugee Convention provided that it is the right of the parent to determine the religious education of their children once recognised as refugees. This does not sit easily with a claim from a child based on religious persecution where the locus of the persecution is the home, or where guardians limit access to protection from persecution. For example, where a girl child refuses to wear a burqa due to her religious or political opinion and as a result suffers abuse amounting to persecution in the home. This example does not refer to education, but it highlights the conceptual conflict inherent in Article 4 of the Refugee Convention and how it might influence the child's right to exercise agency in respect of religion or politics. It points to a wider conceptual challenge in the application of refugee law. Some cases of this nature are discussed in Chapter Six.

The right to one's political opinions exists in international law in the UDHR and the ICCPR. The UDHR in Article 19 and Article 19 of the ICCPR provided that everyone has the right to 'freedom of opinion and

²⁰⁴ *Supra* note 128, para 72. See *NABD v. MIMA* (2005) 79 ALJR 1142, the High Court of Australia.

²⁰⁵ See *Supra* note 1, paras 42-44.

²⁰⁶ Universal Declaration of Human Rights 1948 (UDHR), Article 18.

²⁰⁷ CRC, Article 14.

expression'. The CRC provides this right in Article 14 (freedom of thought and religion).²⁰⁸ The political opinion ground relates to opinions held or attributed to, or actions taken by, the applicant 'critical of polices, traditions or methods', which are 'not tolerated by the authorities or society'. Goodwin-Gill and McAdam described political opinion as 'any opinion on any matter in which the machinery of State, government, and policy may be engaged'.²⁰⁹ The Handbook noted that persecution on this ground may also include opinions relating to gender roles or (and perhaps linked to) non-conformist behaviour.²¹⁰ It may also arise in the context of an opinion that was not voiced, but was attributed based on family, race or nationality.²¹¹

The Guidelines also provide for a multitude of situations and circumstances where the religious and political opinion grounds may become relevant in the case of children. On the one hand, children may be perceived to hold religious beliefs or political opinions based on the views of their parents or their ethnic or racial group. On the other hand, children may in fact hold their own views which come into conflict with the views of society, the government or even their own community and family. Regardless of the way this form of persecution may manifest, UNHCR recognised that these convention grounds apply to children in the same way as adults.

The religion and political opinion grounds are discussed in the following chapter in sections dealing with provision, protection and participation rights. The discussions in the provision and protection rights sections surround instances where religion and/or political opinions, which are *imputed* onto the child, affect the child's access to rights and engage the Refugee Convention. The religion and political opinion grounds are then discussed in the context of participation rights and how they relate to the

²⁰⁸ CRC, Article 14.1 States Parties shall respect the right of the child to freedom of thought, conscience and religion.

²⁰⁹ They note that his wording was endorsed by the Supreme Court of Canada in *Attorney General v. Ward* [1993] 2 SCR 689.

²¹⁰ *Supra* note 128, para 32.

²¹¹ *Supra* note 200, 87.

Refugee Convention through the exercise of agency. This is the main space of refugee law in which participation rights operate. The religion and political opinion grounds are discussed in Chapter Six.

The guidance and the case law that has developed support the contention that the Refugee Convention is capable of accommodating claims from children. Chapter Six moves on from this discussion and asks is the Convention capable of accommodating cases involving violations of child-specific rights.

5.11 Children as a vulnerable group and the convention grounds

Many argue that the concept of vulnerability is not clearly defined.²¹² Peroni and Timmer describe vulnerability in international human rights law as paradoxical.²¹³ The literature suggests that the human within human rights is inherently vulnerable and that human rights were drafted to serve those considered to be the most vulnerable on the one hand. On the other hand, some conceive of the beneficiaries of human rights as liberal legal subjects – the empowered.²¹⁴ The research that emerged addressing this paradox identified groups that fall outside the empowered, the disempowered women, minorities and asylum seekers and children – in other words vulnerable groups.²¹⁵ This suggests that the UDHR was written with people empowered to seek to access their rights and that certain marginalised groups would naturally find that more difficult. As a result, treaties such as the CRC sought to establish rights specific to the vulnerable groups.²¹⁶

²¹² Mary Ruof, Vulnerable Populations, and Policy, *Kennedy Institute of Ethics Journal* (2004) 14, 411.

²¹³ Lourdes Peroni and Alexandra Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law *International Journal of Constitutional Law* (2013) 11, 1061-1062.

²¹⁴ Anna Gear, *Redirecting Human Rights: Reflecting the Challenge of Corporate Legal Humanity* (Palgrave 2010) 132-133.

²¹⁵ Lourdes Peroni and Alexandra Timmer, Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law *International Journal of Constitutional Law* (2013) 11, 1062.

²¹⁶ *Ibid.*

The same paradox exists in children's rights law, as discussed throughout. Children in liberal theory are considered to have the ability to access rights and to act autonomously – as subjects of law. However as Chapters Two and Three highlight, children face a number of barriers in accessing their rights. The barriers and the universal view that children are inherently vulnerable at least as compared to their adult counterparts, has resulted in the expansion of research and guidance relating to children as vulnerable, including in the area of refugee law.²¹⁷

The concept of vulnerability has also developed through the courts. In the context of European Union law, unaccompanied minors have been characterised by their 'extreme vulnerability'.²¹⁸ In 2011 in *M.S.S. v. Greece* for example, the European Court of Human Rights held that:

'On the contrary, in the light of the available information on the conditions at the holding centre next to Athens International Airport, the Court considers that the conditions of detention experienced by the applicant were unacceptable. It considers that, taken together, the feeling of arbitrariness and the feeling of inferiority and anxiety often associated with it, as well as the profound effect such conditions of detention indubitably have on a person's dignity, constitute degrading treatment contrary to Article 3 of the Convention. In addition, the applicant's distress was accentuated by the vulnerability inherent in his situation as an asylum seeker'.²¹⁹

In another example in *Tarakhel v. Switzerland* the European Court of Human Rights elaborated on the meaning of the vulnerability in the case of children and the source of law from which it derives. This court thus referred to the CRC:

²¹⁷ See Chapter Three.

²¹⁸ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* App no. 13178/03 [ECtHR 12 Oct. 2006] at para 55.

²¹⁹ *M.S.S. v. Belgium and Greece*, App no. 30696/09 [ECtHR, 21 January 2011] at 233.

‘With more specific reference to minors, the Court has established that it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant (see Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, no. 13178/03, § 55, ECHR 2006-XI, and Popov v. France, nos. 39472/07 and 39474/07, § 91, 19 January 2012). Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status. The Court has also observed that the Convention on the Rights of the Child encourages States to take the appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents (see to this effect Popov, cited above, § 91)’²²⁰.

These cases do not, however, relate to the applicant’s qualification as a refugee and thus fall outside the scope of the present research. They nevertheless demonstrate how European Court of Human Rights’ approach to child asylum seekers and its use of the concept of vulnerability. This contrasts somewhat with the case law emerging around agency in the context of refugee protection, dealt with in Chapter Six, part III.

The suggestion that can be drawn here from the European Union example is that cases where vulnerability is to the fore, so perhaps by extension violations of protection rights, may be more successful in determination procedures. This is discussed in detail in Chapter Six.

5.12 Conclusion

This Chapter discussed UN soft law guidance which indicated that there is scope for the CRC to influence the treatment of children seeking

²²⁰ *Tarakhel v. Switzerland* App no. 29217/12 [ECtHR, 4 November 2014] at 99.

refugee protection *and* qualification of child refugees. Additionally, case law has developed which references the provisions of the CRC as having an impact on the outcome of refugee decisions. Case law has also emerged that shows that provisions of the CRC have formed part of the analysis of persecution. This is discussed in detail in Chapter Six.

As discussed in the previous chapter, children were largely invisible in refugee discourse before the publication of the CRC and the guidance that followed. This chapter demonstrates that there is considerable justification for the creation, of a children's rights approach. The developments relating to treaty interpretation also support this. Although the children's rights regime emerged decades after the publication of the Refugee Convention, guidance considering the contributions made by the CRC on child refugees followed shortly thereafter. The considerable amount of guidance provided by the Committee and UNHCR on the application of the CRC at all levels of the process of seeking refuge, qualifying as a refugee and the needs of child refugees after formal recognition provides a clear indication that children's rights are influencing refugee law and therefore that there is scope for a formalised children's rights approach.

The literature, guidance, law and case law show that persecution, the central element of determining eligibility for refugee protection, is different in the case of children. The expansion of the interpretation of the term persecution to include breaches in children's rights is gaining ground. UNHCR made clear that the definition for persecution is different for children. It encompasses a wider array of abuses and forms of harm than that experienced by adults. UNHCR provided a requirement that the State determination body apply a lower threshold when considering what amounts to persecution in the case of children. UNHCR also argued that persecution must be considered in line with the standards established by the CRC. These insights indicate the possibility that a violation of CRC-based rights may amount to persecution and that

a children's rights approach can develop within the framework for the Refugee Convention.

However, this chapter, in discussions on persecution, also brought out the prominence of protection based rights in particular when captured within the particular social group which has developed with the idea that children are inherently vulnerable in mind. This illustrated the continued tendency to see children as vulnerable and a reluctance to attribute rights, in particular participation rights, to children (developed in Chapter Six).

Chapter Six reflects on these discussions and looks at examples in case law where violations of the children's rights identified in Chapter Three have been found to amount to persecution. Persecution and within that the convention grounds, actors of persecution and protection and other relevant elements are remarked and expanded upon. Chapter Six, however, is structured in line with the framework established in Chapters One, Two and Three. Chapter Six follows a children's rights approach to refugee law rather than a refugee law approach to children's rights. Chapter Six looks to bring together discussions on children's rights set out in Chapters Two and Three and discussions on refugee law in Chapter Four and herein to analyse the extent to which the two legal regimes have influenced each other and to take stock of where we are now in the application of children's rights in the context of refugee law.

The Three Ps approach is not developed in this chapter, but it is the framework for the analyses in Chapter Six. This chapter indicates that a children's rights approach is possible and Chapter Six builds upon this work to measure the impact children's rights has had in the context of refugee law, where we are now in terms of the potential for a children's rights approach, what that approach might look like based on existing case law and hypothesising around children's rights generally where case law is not available.

Chapter Six Constructing a children's rights approach: The application of children's rights in refugee law

6. Introduction

The notion of *child refugee claimants* is not new. Children have benefitted from refugee protection prior to the Refugee Convention. However, the ways in which children have qualified and the reasons for granting international protection have evolved. The key development in respect of children within refugee law has been a shift from considering children as either beneficiaries within families or children indiscriminately affected by war, to children being targets of persecution themselves, in their own right. This shift owes itself to the general evolution in children's rights and child and childhood theorising and studies. Children in all areas of study, society and law are increasingly seen as subjects, agents or rights holders, including in the context of international protection.

In the past, children were seen as bystanders in war and conflict. Conflict was seen as directed at others, namely the adult population.¹ However, as the UN reported in 1996, the nature of conflict began to change, with children more frequently being the target of persecution and harm, or indeed participants in conflict,² subjected to *inter alia* genocide, forced military conscription, gender based violence, torture

¹ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 208.

² Graca Machel, *Impact of Armed Conflict* (UN 1996) paras 1 & 250. <www.un.org/ga/search/view_doc.asp?symbol=A/51/306> accessed 15 July 2016.

and exploitation. In addition, there is increasing acceptance that children are capable of forming views and opinions and thus behaving in a way that is contrary to State or religious institutions that may place them *individually* at risk of persecution. This chapter looks at the influence the children's rights regime has had on refugee law, looking at international case law available on the qualification of child refugees.

This chapter also suggests where breaches of rights not dealt with in refugee law may or should amount persecution. The purpose of this chapter is to conceptualise children within refugee law and further develop a conceptual framework for a children's rights approach to the interpretation of the Refugee Convention. These discussions assist in the assessment of the ability of the Refugee Convention to accommodate a children's rights approach or child claims more generally. This chapter suggests where a children's rights approach may be beneficial in determining child claims, while recognising that a violation of a children's right does not automatically amount to persecution. The rights violations must not only amount to persecution, but must be characterised by differential impact on the basis of discrimination.

6.1 Challenges to consistency in the interpretation of child refugee claims

Three main challenges to designing a children's rights approach are: the limited number of applications made by children, the tendency for children's applications to be subsumed within head-of-household

applications, and the trepidation with which determination bodies approach claims from children. These three points are introduced here and discussed throughout the remainder of this chapter.

The increase in separated children seeking asylum globally has led to an increase in case law and guidance, despite still only amounting to approximately 4 per cent of the total global number of persons seeking asylum in 2010.³ This has increased again in recent years. In Europe, for example, applications from separated children reached 7 per cent (93,925) of the total number of asylum applications submitted in the EU Member States and Norway (1,321,600) in 2015. The share is even larger in some countries. In Sweden, for example, separated children accounted for 38 per cent of the total.⁴ Bhabha argued that invisibility, as mentioned above, is no longer the principal issue.⁵ Bhabha, like Foster in the case of the human rights approach,⁶ argued that inconsistency in the application and interpretation of refugee law in the case of children is now a ‘major part of the problem’.⁷

Accompanied children’s claims can often be subsumed within the family application.⁸ Children have often been conceived of as beneficiaries of

³ Jacqueline Bhabha, ‘Demography and rights: women, children and access to asylum’ (2004) 16 *International Journal of Refugee Law* 227.

⁴ European Migration Network, *EMN Annual Report on Immigration and Asylum* (EMN 2016) 5 and 27.

⁵ *Supra* note 1, 207.

⁶ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007) 35.

⁷ *Supra* note 1, 207.

⁸ See *INS v. Cardoza-Fonseca* 480 U.S. 421, 49 at note 22 (1987). See also: *Supra* note 3.

head-of-household applications. For example, in Ireland, the International Protection Act 2015 provides:

‘a person who makes an application under subsection (1)(a) shall be deemed to also have made an application for international protection on behalf of his or her dependent child where the child is not an Irish citizen’⁹

These practices may be one reason for the low number of cases which are submitted by or on behalf of children in their own right. The way children have been dealt with within head-of-household claims compounds this challenge. In Ireland, for example, decisions which relate to a negative determination have often dealt with the adult claimant comprehensively and only included a brief analysis of the situation of dependent children.¹⁰

Bhabha described child persecution as a contradiction in terms as children may not be perceived as political actors significant enough to be persecuted *or* that persecution is a child welfare issue and of domestic rather than international concern.¹¹ Bhabha described two conceptualisations of child refugees. The first was the traditional child-welfare approach where children are seen as passive victims of harm

⁹ International Protection Act 2015 Section 15.3 Application for Protection (Ireland).

¹⁰ See, for example: Catherine Cosgrave and Liam Thornton, ‘Immigration and Asylum Law’ in Children’s Rights Alliance and the Law Centre for Children and Young People, *Making rights real for children: A Children’s Rights Audit of Irish Law* (Children’s Rights Alliance 2015) 175.

¹¹ *Supra* note 1, 210.

inflicted by others. Children meeting this description may be perceived as needing protection on account of their vulnerability. Bhabha referred to this as the ‘child as victim’ approach. The other approach Bhabha referred to was the ‘child as juvenile’ approach to describe ‘nonconforming adolescents’.¹² This was developed further on in her book to include transgressions of norms relating to *inter alia* political views and religion.¹³ Bhabha described ‘child-specific attitudes’ as relating to: ‘suspicion, condescension, and a patriarchal perspective that denies the significance of children as political agents while highlighting their culpability as irresponsible and irregular migrants’.¹⁴ Bhabha also refer to the low recognition rate concerning unaccompanied minors.¹⁵ Unaccompanied minors, as noted by Singh Juss in the case of Afghan unaccompanied minors, also found that they ‘have been finding it particularly difficult to secure protection’.¹⁶

Although procedural aspects of refugee status determination are not discussed in this book, the insights mentioned briefly in this section highlight some of the reasons there is limited higher courts case law which deals specifically with the interpretation of persecution in child cases. There is however a wealth of case law and some literature dealing with procedural elements such as credibility and burden of proof.¹⁷

¹² *Supra* note 1, 224.

¹³ *Supra* note 1, 228-229.

¹⁴ *Supra* note 1, 207.

¹⁵ *Supra* note 3..

¹⁶ Satvinder Singh Juss, ‘Refugee Law and the Protection of Children fleeing Conflict and Violence in Afghanistan’ (2013) 18 (2) *Journal of Conflict & Security Law* 303.

¹⁷ See, for examples of child cases and literature: UN High Commissioner for Refugees, *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union* (UNHCR 2014).

Part I

6.2 Provision rights and refugee protection

Chapters Two and Three described childhood as a period where the human person is an *adult in becoming*.¹⁸ The literature dating back to the seventeenth century described certain conditions that must be in place to ensure development. These conditions were reflected in Article 6 of the CRC. These conditions included: the role of the parent as protector, educator and provider of emotional support;¹⁹ health;²⁰ and standard of living²¹ as prerequisites to accessing other rights and opportunities for growth and education as an avenue through which vocational, academic and citizenship opportunities present.²² All of these rights were set out in the CRC and various other international treaties as discussed in Chapter Three. These are all provision rights which paint a Rousseauian, or romanticised, picture of childhood. They also relate mostly to social and economic rights. The abovementioned rights clusters are discussed below as they have developed in refugee case law.

6.2.1 Family

The role of the family has been both instrumental and contentious in the development of children's rights. In the on-going debates, the family has at sometimes been invisible, or assumed, and at times considered as the sole provider and protector of children's rights. The role of the family in

¹⁸ Anne Marie Ambert, 'Sociology of sociology: The place of children in North American sociology' in Patricia Adler and Peter Adler, *Sociological Studies of Child Development* (Vol 1, JAI Press 1986) 11-31.

¹⁹ Convention on the Rights of the Child 1989 (CRC), Preamble and Articles 20 and 22.

²⁰ CRC, Article 24.

²¹ CRC, Article 27.

²² CRC, Article 28.

the context of protection is discussed in Part II. This section looks at the role of the family as a provision right and as a source of the realisation of Article 6, the right to survival and development, which, when satisfied, facilitates access to other rights. Children are both subject and object in the context of the right to protection and care provided by a family environment. Children are subjects insofar as the right to family is a vessel through which they may develop and self-actualise (discussed below and in Part III) and they are objects insofar as this right provides a vehicle for protection from harm (discussed in Part II).

Although the conceptual evolution of children's rights within the liberationist discourse was to focus more on the child as an agent of rights, international children's rights law still identified families and the wishes of the parents as paramount, unless, as introduced in the CRC, actions were not consistent with the child's best interests.²³ The UDHR, ICCPR, ICESCR and the CRC all recognised the family unit as 'the natural and fundamental group unit of society... entitled to protection by society and the State' (as discussed in Chapter Three).²⁴

In the context of children on the move, the Committee on the Rights of the Child *General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin* (Comment No. 6) also dealt with the right to family from the understanding that the child

²³ CRC, Article 3.1.

²⁴ Universal Declaration of Human Rights 1948 (UDHR), Article 16.3. See also: International Covenant on Civil and Political Rights 1976, Article 23; International Covenant on Economic and Social Rights 1976, Article 10; Convention on the Rights of the Child 1989, Preamble.

concerned is at least temporarily ‘deprived of their family environment’ and therefore requires an alternative care arrangement. Comment No. 6 describes alternative care as: inter alia, foster placement, kafalah in Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children as defined in Article 20.3 of the CRC. However, Comment No. 6 also stated that

*‘When selecting from these options, the particular vulnerabilities of such a child, not only having lost connection with his or her family environment, but further finding him or herself outside of his or her country of origin, as well as the child’s age and gender, should be taken into account. In particular, due regard ought to be taken of the desirability of continuity in a child’s upbringing and to the ethnic, religious, cultural and linguistic background as assessed in the identification, registration and documentation process’.*²⁵

The abovementioned guidance demonstrate the importance of family in respect of the child’s development, whether biological or otherwise. The above example also shows that the child, although an object to be protected by a family environment, is the subject of rights relating to identity deriving from such an environment. The child as subject or object is thus applied somewhat fluidly within this right.

²⁵ UN Committee on the Rights of the Child, *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* CRC/GC/2005/6 para 40.

Chapter VI of the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Handbook) dealt with family unity noting that the Refugee Convention did not include this principle in the definition of ‘refugee’.²⁶ However, it was referred to in the recommendations which prefaced the Refugee Convention.²⁷ The purpose of Chapter VI was to reiterate the importance of maintaining family unity for those recognised as refugees, relating to other rights, such as family reunification.²⁸ It does not equate to a right to family unity in the context of qualifying as a refugee. The content in the Handbook is useful in that it emphasised the fundamental right of family unity, without references to family as a children’s right in and of itself.

The Guidelines, on the other hand, outlined the ways in which the status, circumstances, beliefs or activities of the family may put children at risk of persecution. Additionally, the Guidelines describe instances where the family might be the locus of persecution,²⁹ as discussed in Part II. However like the Handbook, it did not deal with the child’s *right* to their family or ‘a family environment’.

²⁶ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (UNHCR 2011) para 183.

²⁷ 1951 Convention and 1967 Protocol relating to the Status of Refugees (Refugee Convention), IV. B.

²⁸ Bhabha noted that it is just that principle which has resulted in a tendency for accompanied children’s asylum claims to be subsumed within family applications. *Supra* note 1, 221.

²⁹ United Nations High Commissioner for Refugees, ‘Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees’ HCR/GIP/09/08 22 December 2009.

No international law or guidance in the area of asylum attributed the right to family or a family environment to children, with the exception of Comment No. 6. Comment No. 6 reiterated that the right to family is enshrined in the CRC and brings it into the rights discussion in relation to unaccompanied and separated children. However, it referred to this right in the context of finding suitable accommodation and care for those already ‘deprived of their family environment’.³⁰ There is therefore no specific refugee guidance referring to the positive right to family that would assist in bridging the gap between children’s rights law and refugee law – in terms of the qualification of children as refugees. However, all guidance recognised the importance of family unity, including the Refugee Convention. Family unity is therefore still relevant and important in the context of refugee qualification.

In refugee case law, the right of the child to a family environment relates to two scenarios: (1) a structural barrier, or unjust State intervention which creates circumstances preventing children from remaining with their families, for example in the case of children who are recruited into the military or (2) an individual barrier such as when children face return to their country of origin without the possibility to be cared for in a family environment. For example, in the United Kingdom protecting Afghan children from returns which would place them at risk of ‘irreparable harm’ is a trend.³¹ These cases arise where the relevant persons in the receiving State, and or the child themselves, are unable to

³⁰ *Supra* note 25, para 39.

³¹ *Ibid*, para 27.

locate family in the country of origin.³² These cases are discussed in Part II in the context of protection rights, though they also relate to this particular provision right. Another example might be the case of children born in contravention of China's one child rule who might be separated from their family and/or face risk of infanticide.³³ However, these cases tend to focus on other provision rights such as the right to an adequate standard of living, see below.

In some jurisdictions there is an over-reliance on secondary forms of protection or regularisation in this area.³⁴ For example in *AA (unattended children) Afghanistan*, the UK Home Office originally granted an unaccompanied minor applicant 'discretionary leave to remain' in accordance with the Home Office Policy Instruction on Discretionary Leave – an example of an alternative and temporary form of protection that often expires at 17.5 years³⁵ – on grounds that the minor did not have a secure family environment to return to.³⁶ The applicant challenged this decision and was ultimately granted refugee protection. This case is discussed in Part III, as the applicant was recognised as a refugee on the basis of political opinion.

³² Alice Farmer, 'A Commentary on the Committee on the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights' (2011) 80 *Res Gestae* 45.

³³ *Chen She Hai (an infant) by His Next Friend Chen Ren Bing v. Minister for Immigration and Multicultural Affairs* [2000], 201 CLR 293 (Austl.).

³⁴ See, Jacqueline Bhabha and Mary Crock, *Seeking Asylum Alone – a Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (Themis Press 2007).

³⁵ Home Office, *Asylum Policy Instruction: Discretionary Leave* (Version 7, Home Office 2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf>.

³⁶ *AA (unattended children) Afghanistan CG [2012] UKUT 00016 (IAC)*.

A children's rights approach, as argued throughout, would rely upon the CRC (and other children's rights in international law) as a tool to interpret the Refugee Convention. This book has shown that not only are family rights dominant in the discourses (legal and otherwise), often the right to a family environment underscores *every* children's right as the family is the conduit to access and realise rights and developmental potential. Given the primacy of the role of the family in international law it is difficult to see how a violation of the right to a family environment would not amount to persecution, given also that the child could be (and has been in the case of AA (*unattended children*) Afghanistan) considered to form a particular social group on the basis of being an unattached child or child deprived of a family environment. Yet, in refugee case law, this rights violation is underdeveloped.

A children's rights approach to the interpretation of the Refugee Convention could thus not ignore the weight placed on this right across all sectors and all disciplines, but in particular international law and should form part of the 'persecution barometer'. It is likely that where a child would not be able to access (or be provided with) a surrogate family environment due to the inability or unwillingness of the State that the experiences attached to a violation of this right may amount to persecution where there is a link with a convention ground. This is developed throughout this chapter as the right to family is revisited in the context of protection and participation rights as well. The role

development plays in these cases is discussed in subsequent sections and in Part II.

6.2.2.1 Right to the highest attainable standard of health

In international law, health was a key feature from the 1920s. The right to health is embedded in the ILO Conventions,³⁷ the ICESCR,³⁸ the UDHR³⁹ and the CRC⁴⁰ as influenced by its predecessors (the 1924 and 1959 Declarations). The right to health is therefore enshrined in international law, generally, and international children's rights law, specifically. The CRC requires States to provide services to *all* children where services or interventions exist within the country. It has been established that when services or treatments are not accessible as a result of a form of structural discrimination on the basis of race or religion, for example, refugee law may become engaged. However this right also leads us to wonder: How do refugee determination bodies deal with this right when the services in the country of origin merely do not exist? These two examples are dealt with below.

The Guidelines emphasise the right of the child to health in a number of different contexts. The guidelines reiterated the comment made by the Committee, relating the right to health to Article 6:

³⁷ See Chapter Three.

³⁸ International Covenant on Economic and Social Rights 1976 (ICESCR), Article 12.

³⁹ UDHR, Article 25.

⁴⁰ CRC, Article 24.

*‘... the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play’.*⁴¹

The Guidelines note that health is a factor which may increase children’s vulnerability to persecution.⁴² UNHCR gave the example of children with a disability who may be denied necessary treatment or may be ostracised by family.⁴³ The Handbook also notes that discrimination on the basis of religion may include barriers, or ‘serious restrictions’ to accessing health care, while reiterating the requirement that discrimination must rise to the threshold of persecution in respect of the Refugee Convention. The Guidelines cite some examples of health and access to health services considered to amount to a threat to life,⁴⁴ but

⁴¹ Committee on the Rights of the Child, General Comment No. 7 *Implementing child rights in early childhood* CRC/C/GC/7/Rev.120 September 2006 para 34.

⁴² *Supra* note 29, para 12.

⁴³ See *Case of the Yean and Bosico Children v. The Dominican Republic*, IACtHR, 8 sep. 2005 where two girls of Haitian origin were denied the right to nationality and education because, among other matters, they did not have a birth certificate.

⁴⁴ For example *Case of the “Juvenile Reeducation Institute” v. Paraguay*, IACtHR, 2 sep. 2004. In this case, the Inter-American Court of Human Rights found that failure to provide basic health services to marginalised groups amounted to a breach of the right to life as articulated in Article 4 of the American Convention on Human Rights. American Convention on Human Rights 1969, Article 4.1 Right to Life: Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. This case also reflected the use of the CRC. A former advisor to UNICEF and an expert on children’s rights was consulted and the CRC was referred to throughout. The rights relevant to children and this case as contained in the American Convention on Human Rights, in particular Article 19 (Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state), were also referred to in testimony. The CRC was not referred to in the decision, but it was in the Concurring Opinion of Judge A.A. Cançado Trinidad (para 9).

not refugee protection.

The Guidelines also⁴⁵ recognised the role the CRC has in defining child-specific rights, referring to Article 24 ‘protection from traditional practices prejudicial to the health of children’.⁴⁶ The Guidelines also reiterate that the denial of access to health services for children from ‘particular ethnic groups’ may amount to persecution. The underlying feature of the right to health in the context of the Guidelines, and perhaps by extension refugee law, is that it is secondary to the reason of persecution, and not necessarily a reason in and of itself. Or, in other words, is considered persecution but it is linked with non-discrimination based on a social category such as race, nationality or religion.

The right to health and other rights and protections which impact upon a person’s health can be found in refugee in case law in the case of adult applicants. For example, in *RRT Case No. N94/04178*, the Australian Refugee Review Tribunal found that the adult applicant, who was diagnosed with an AIDS defining illness on arrival to Australia, would face persecution if returned home due to the lack of expert medical care in the area of HIV:⁴⁷

‘access to medical care and treatment is a fundamental human right and that active denial, or actions amounting to an effective

⁴⁵ *Supra* note 29, 13.

⁴⁶ CRC, Article 24.

⁴⁷ *RRT Case No. N94/04178*, N94/04178, Australia: Refugee Review Tribunal, 10 June 1994.

denial, may constitute persecution. This is particularly so, in my view, in the Applicant's case in which he is suffering from a progressive, ongoing and life-threatening illness for which ongoing medical care is needed to maintain life itself'.

The threshold was therefore interpreted in this case, as equating to threat to the right to life and inhuman and degrading treatment.⁴⁸ However, there are many other cases where the court did not find in the applicant's favour.⁴⁹

An example of a health-related child-specific form of persecution, as identified by UNHCR in the Guidelines, that has presented in case law is female genital mutilation (FGM).⁵⁰ It is linked with the right to the highest attainable standard of health, but it also relates to protection rights as it is a harmful practice, or as provided by the CRC, 'a traditional [practice] prejudicial to the health of children'.⁵¹ There may also be a link with the political opinion ground or religion ground and thus may be considered a participation right - objecting to FGM may be seen as a political or religious⁵² transgression. Despite the fact that it may come under a variety of headings, due to its close relationship with

⁴⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

⁴⁹ See: Katharine Williamson, 'AIDS, Gender and the Refugee Protection Framework' (2004) RSC Working Paper No. 19 *Refugee Studies Centre*. *N v Secretary of State for the Home Department* [2005] 4 All ER 1017 (this case dealt with ECHR Article 3).

⁵⁰ *Supra* note 29, 31.

⁵¹ CRC, Article 24.3.

⁵² *Supra* note 26, details a number of circumstances where health may play a role in defining persecution. The first instance relates to the 'religion' ground.

health, it is discussed here and revisited only briefly in the context of participation rights in Part III.

There are a number of refugee cases which have dealt with young girls facing persecution in the form of FGM.⁵³ For example, in 2011 the Australian Refugee Review Tribunal found that two female applicants from Uganda should be granted refugee protection based on their fear of FGM upon return. The Tribunal took the view that they were members of a particular social group. In this case, *RRT Case No. 1101038*, the Tribunal described the group as uncut ‘female members of the Sabiny tribe’. The right to health was mentioned in the ‘Findings and Reasonings’. The Tribunal accepted

*‘the individual evidence that Female Genital Mutilation exposes a woman to health hazards, including excessive bleeding, death, birth complications and exposure to illness’.*⁵⁴

No international treaties were referred to in respect of children’s rights in this case.

In 1994, the Canadian Immigration and Refugee Board (Refugee Board) in *Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh*,

⁵³ *Matter of Dennis Reyes-Diaz* (EOIR Aug. 2, 2001) (unpublished); *Matter of Brus. Wilson Fuentes-Ortega*, A78-677-043 (BIA Nov. 6 2002); *Matter of Santos Ramon Zepeda Campos* (IJ Dec. 28,2000) (Phoenix, Arizona) *Matter of Aurelio Mauricio Lopez* A78-677-018 (BIA Nov. 28 2001) (unpublished) in Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 227.

⁵⁴ *RRT Case No. 1101038*, [2011] RRTA 307, Australia: Refugee Review Tribunal, 14 April 2011 at 79.

held that a female child who was part of a family's asylum claim should be recognised as a refugee as it was likely that she would experience persecution in the form of FGM, outlining the short and long term health difficulties which typically follow the procedure. They cited the CRC as an instrument which the court was obliged to consider as the child was a minor, specifically Article 3. However this case also referred to health difficulties *and* the potential long-term impact of the procedure. The right to health, as discussed throughout, is also considered within the canon of rights we now associate with Article 6. The Refugee Board found that the practice of FGM was not consistent with Article 3 of the CRC and that the minor was a member of two particular social groups characterised by gender and age. In this case, the Refugee Board found that the female applicant was a refugee owing to her fear of persecution.⁵⁵ The Refugee Board in this case used the CRC in the interpretation of the Refugee Convention and referred to the adverse impact FGM has on health. A number of cases developed in this vein all over the world.⁵⁶

It is difficult to analyse the way in which children are conceived of in the application of this provision right and its nexus with refugee law. On the one hand, the case law mentioned in this section relating to FGM shows that it is perhaps the State's tolerance of the procedure, which is known

⁵⁵ Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh, Canada Immigration and Refugee Board 10 May 1994.

⁵⁶ For a compilation of recent FGM cases, see: International Refugee Rights Initiative Rights in Exile Programme, 'FGM/C Case Law and Other Legal Documents' <www.refugeelegalaidinformation.org/fgm-c-case-law-and-other-legal-documents> accessed 16 July 2016.

to have negative health impacts, that indicates that the child is more an object of the right to the highest attainable standard of health. On the other hand, due to the often community (religious or cultural) nature of FGM it is possible that the child is also exercising their agency as a subject within this right by objecting to FGM. In the context of provision rights, children are perhaps more likely to be conceived of as objects. Part III revisits this form of persecution in cases where children are seen as asserting a political or religious opinion. Cases where the protection of children is at the fore are more commonly referred to in the literature, including in the context of protection from harmful traditional practices, and they are discussed, briefly, in Part II.

Further challenges associated with defining persecution in light of the right to the highest attainable standard of health are discussed below alongside discussions on the same in relation to the right to adequate standard of living. In this context, the right to a basic standard of health which includes adequate nutrition, for example, is discussed.

6.2.2.2 Adequate standard of living

The right to an adequate standard of living is also core to child development and the work of organisations such as Save the Children⁵⁷ and UNICEF.⁵⁸ The CRC provides that every child has the right to an adequate standard of living ‘for the child's physical, mental, spiritual,

⁵⁷ See: Save the Children, *Outcomes for Children from Household Economic Strengthening Interventions: A Research Synthesis* (Save the Children 2015); Save the Children, *Towards the end of child poverty* (Save the Children 2015).

⁵⁸ See: UNICEF, *The State of the World's Children 2016: A fair chance for every child* (UNICEF 2016).

moral and social development'.⁵⁹ This right is therefore linked not only to Article 6, but also to the right to health. Poverty and social exclusion are common themes in childhood literature.⁶⁰ There is a wealth of work and research available by advocates and global non-governmental organisations and inter-governmental organisations that seek to narrow the gap between the experiences of children in the developed world and those not in the developed world.⁶¹ However differences in the experiences of childhood or childhoods due to economic conditions in respect of health and standard of living and development persist. The literature on refugee law emphasised that social and economic deprivation places children at greater risk of violations of other rights, in particular protection rights, such as protection from trafficking and other illicit activities (discussed in Part II).

To take an example, the Committee on the Rights of the Child in 2011 published *Concluding Observations of the Committee on the Rights of the Child: Afghanistan*,⁶² which provided a summary of the challenges

⁵⁹ CRC, Article 27.

⁶⁰ See: Tess, Ridge, 'Childhood poverty and social exclusion' (2004) 14 (2) *Children, Youth and Environments*; Phil Agulnik, *Understanding social exclusion* (OUP 2002); Tim Butler and Paul Watt, *Understanding Social Inequality* (Sage 2007); Alberto Minujin and Shailen Nandy (eds), *Global Child Poverty and Well-being: Measurement, concepts, policy and action* (Policy Press 2012).

⁶¹ Malcolm Langford et al (eds), *The Millennium Development Goals and Human Rights: Past, Present and Future* (CUP 2015); Luis Ongay, 'Glocalists in Tijuana: youth, cultural citizenship and cosmopolitan identity' (2010) 8 (4) *Children's Geographies* 373; Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge, 'Constructing childhood: global-local politics and practices' in Marilyn Fleer, Marianne Hedegaard and Jonathan Tudge (eds) *Childhood Studies and the Impact of Globalisation: Practices at Global and Local Levels* (Routledge 2009); Jo Boyden and Joanna de Berry, 'Introduction' in Jo Boyden and Joanna de Berry, *Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement* (Falmer 1997); Tim Butler and Paul Watt, *Understanding Social Inequality* (Sage 2007).

⁶² UN Committee on the Rights of the Child, 'Fifty sixth session Consideration of Reports Submitted by States Parties Under Article 44 of the Convention Concluding

faced by children in countries in conflict and where large parts of the population experience economic deprivation. It found that due to population displacement and settlement in Kabul, large numbers of ‘unattached’ or ‘separated’ children became ‘street children’. It found that 54 per cent of the internally displaced persons were children and the report showed that ‘young, displaced and unemployed men are particularly vulnerable to recruitment to the insurgency’.⁶³ In addition, an NGO shadow report to the Committee report found that 60 per cent of families in Afghanistan depended on their children for household income, noting that there were

*‘tens of thousands of homeless children aged between five and 18 in Kabul... The children work up to 16 hours a day selling anything from newspapers to plastic bags’.*⁶⁴

These reports showed that children living in these circumstances (characterised by a violation of the provision right to an adequate standard of living) were not only vulnerable to exploitative and/or harmful labour practices, they were also at risk of becoming street children, losing the support of their family due to separation and risked being recruited into guerrilla and other militarised forces. This example showed the interconnectedness of all areas of exploitation that may

Observations of the Committee on the Rights of the Child: Afghanistan’ CRC/C/AFG/1 4 February 2011.

⁶³ UN Committee on Rights of Child, ‘The Consortium for Street Children & War Child, NGO Shadow report for Afghanistan’ 59 in AA (*unattended children*) Afghanistan CG [2012] UKUT 00016 (IAC) paras 57 – 59.

⁶⁴ *Ibid.*

affect children living in a country experiencing conflict and social stratification. The reports also highlighted the link between the right to an adequate standard of living and protection rights. Afghanistan was chosen as an example as there is a wealth of case law available dealing with Afghan children, as discussed below.

There is case law which has dealt with this particular experience of hardship,⁶⁵ but due to the overlap with other categories of rights, they are primarily discussed in Part II. There are nevertheless examples in case law where the standard of living was so dire that it amounted to persecution. For example in *Cheung v. Canada*, which asked *inter alia* if a child born in contravention of China's one child policy may qualify for refugee protection,⁶⁶ the Canadian Federal Court of Appeal found that if the minor child, Karen Lee,

'were sent back to China, she would, in her own right, experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution. She was poignantly described as

⁶⁵ In *Fadele Emanuel, Fadele Kehinde, Fadele Taiwo, Fadele Victor v. United Kingdom and Nona v. Netherlands* No. 113078/87 1990 ECtHR, the ECtHR dealt with children being returned to living conditions that were not deemed sufficient for the child's safety and well-being. The applicants referred to various rights including the child specific right, Article 2 of Protocol 1 to the ECHR on the right to education. *Z and others v United Kingdom* Application no. 29392/95 ECtHR 2001 also dealt with children living in inadequate conditions (and abusive conditions), the Court found that States must 'provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge' (para 73). However, these assessments dealt with Article 3 of the ECHR and not refugee protection.

⁶⁶ *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, Canada: Federal Court of Appeal, 1 April 1993.

a "black market person," denied the ordinary rights of Chinese children. As such, she is a member of a particular social group, that is, second children, Karen Lee has already experienced certain deprivations and may be subject to further persecution should she be returned to China'.⁶⁷

Perhaps unsurprisingly, the right to develop and Article 6 were not mentioned in the judgment. However, like the FGM cases, survival and development were implicitly referred to. The judgment dealt with various elements of childhood and development that were likely to be impacted by destitution and limited access to education and medical care. This case arguably dealt with a breach of the child's Article 6 right in particular as illuminated by Comment No. 5. 'optimal development' could not be achieved under these circumstances.

In order to apply the notion of 'optimal development' in the context of refugee law, it is necessary to delineate parameters as the scope could be extensive considering the differences in development opportunities worldwide. The parameters must relate to the threshold and definition for persecution. In a children's rights approach, the 'persecution barometer' referred to in Chapter Five merely include assessing persecution considering the CRC and other relevant children's rights embedded in international law in particular the well-developed right to develop. *Cheung v. Canada* illustrates how this might work in practice.

⁶⁷ *Ibid.*

The child in this case would be denied optimal development *relative* to the wider population who were not born in contravention of the one-child policy. The nexus to the convention is still therefore relevant even in the case of Article 6. The nexus in *Cheung v. Canada* was with the particular social group ground.

Provision rights, as one side of the Article 6 triangle of rights, as illustrated by this case and the FGM cases discussed in the previous section provides a baseline, as described in Chapter One, and a road map to a children's rights approach to interpreting the Refugee Convention, but it must nevertheless work within the existing parameters of refugee law, such as the requirement for the persecution feared and/or suffered to have a link with a convention ground as illustrated in this case.

In a similar case in Australia, the High Court in *Chen Shi Hai* found that the minor applicant would be subjected to severe economic deprivation and various violations of fundamental rights including access to healthcare and food due to his unlawful birth.⁶⁸ Edstrom wrote that despite the precedent set in *Chen*, children claiming asylum on the basis of the one-child rule have not often been granted protection.⁶⁹ Applying a children's rights approach might assist in ensuring decisions in this particular area are more consistent. There are nevertheless instances where a violation of the right to an adequate standard of living may

⁶⁸ *Chen Shi Hai* 201 C.L.R. 297.

⁶⁹ Brian Edstrom, 'Assessing Asylum Claims from Children Born in Violation of China's One-Child Policy: What the United States can Learn from Australia' (2009) *Wisconsin International Law Journal* 169.

amount to persecution where there is a convention nexus, namely the particular social group.

This right is revisited in Part II in the context of the right to an adequate standard of living may amount to persecution where there is a convention nexus, namely the particular social group. e Refugee Convention, but it m the right to an adequate standard of living overlaps with participation rights (discussed in Part III). Part II further develops this point - that social and economic disadvantage places children at greater risk of other rights violations.

The child is both object and subject within this provision right as well. Children born in contravention of the one-child rule, for example, were seen as objects experiencing fundamental violations of rights that should have been provided by the others, such as medical care or subsistence. In addition, the case law highlighted that not having access to this provision right may impact upon the child's access to other rights including those relating to their identity and future development (ie education and employment) therefore crossing over into rights where children are often conceived of as subjects (See Part II and Part III). The following section looks at another facet of provision rights related to development – education.

6.2.3 Education

The right to education is firmly enshrined in international law and in the wider rights discourse as a development right. Education is often also considered to be an avenue through which other rights are accessed. Education is often held up as an intervention which assists in reducing the risk of experiencing other forms of persecution, for example child marriage and forced labour.⁷⁰ This right is therefore not only important as a child-specific right belonging to all children universally (at least to some degree),⁷¹ but it is also an important protection mechanism that assists in bringing all children around the world closer to a universal understanding of childhood. Education is, as mentioned, at the crux of the modern conceptualisation of childhood and being a child.

The CRC recognises that the right to develop must involve other rights, including education which assists in the mental and social development of children.⁷² Developments in this stream of refugee law have also emerged in guidance and recent case law. The Handbook states that discrimination that amounts to persecution would occur

‘if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to

⁷⁰ See Chapters Two and Three.

⁷¹ The CRC primarily protects the right to *primary* education. See Chapter Two.

⁷² Glenn Mower, Jr., *The Convention on the Rights of the Child: International Support for Children* (Greenwood Press 1997) 34.

*practise his religion, or his access to normally available educational facilities’.*⁷³

The Handbook clarifies that the lack of an educational infrastructure, however, does not amount to persecution.⁷⁴ Instances whereby policy, whether written or effected, discriminates against *some* children in accessing the educational infrastructure may amount to persecution. This is consistent with the other provision rights discussed herein.

UNHCR elaborates upon their position on education in their Guidelines noting that the level of education that the child has may indicate whether or not the child is more vulnerable to persecution.⁷⁵ The UN Committee on Economic, Social and Cultural Rights also notes:

‘The lack of educational opportunities for children often reinforces their subjection to various other human rights violations. For instance, children who may live in abject poverty and not lead healthy lives are particularly vulnerable to forced labour and other forms of exploitation. Moreover, there is a direct correlation between, for example, primary school

⁷³ *Supra* note 26, para 54.

⁷⁴ *Ibid.*

⁷⁵ *Supra* note 29, para 12 ‘Alongside age, other identity-based, economic and social characteristics of the child, such as family background, class, caste, health, education and income level, may increase the risk of harm, influence the type of persecutory conduct inflicted on the child and exacerbate the effect of the harm on the child’.

*enrolment levels for girls and major reductions in child marriages’.*⁷⁶

The Guidelines also reiterate the child’s right to be protected from labour practices that may interfere with their right to education. This is discussed in Part II in the context of labour and protection rights.

UNHCR upheld the general and normative view that the right to education is a fundamental right and a well-developed one. Refugee case law in this vein has also developed since the 1990s. The UNHCR Guidelines referred to two important cases which interpreted this right in the context of refugee protection. In *RRT Case No. V95/03256*, the Australian Refugee Review Tribunal in this case found that ‘discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution’.⁷⁷ The Review Tribunal first established the applicant child as a member of the particular social group ‘family members of HIV sufferers’ as a member of a family forming the particular social group ‘people with HIV and AIDS’⁷⁸ noting that in that society the disease was still seen as ‘bewitchment’.⁷⁹ It was based on the child’s affiliation with family with HIV that the applicant argued he would not be able to access primary

⁷⁶ UN Committee on economic, social and Cultural Rights, General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant), e/1992/23, 10 May 1999 guidelines para 14.

⁷⁷ see *RRT Case No. V95/03256*, [1995] RRTa 2263, australia, RRT, 9 Oct. 1995, <http://www.unhcr.org/refworld/docid/4b17c13a2.html>, where the Tribunal found that “discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution.” at 47.

⁷⁸ *Ibid* at 41.

⁷⁹ *Ibid* at 37.

education. The Tribunal was of the view, given the evidence provided, that he would not be able to access education. The Tribunal noted that the right to education was a basic human right, citing Article 13 of the ICESCR.⁸⁰

In Canada, the Refugee Board also held that ‘education is a basic human right’.⁸¹ In *Ali v. Minister of Citizenship and Immigration*, a case which dealt with an Afghan family’s claim for international protection, it was submitted that the girl child in the family could only ‘avoid being persecuted’ by not going to school.⁸² The Refugee Board did not cite any international treaties, but acknowledged that the right to education is fundamental and a legal norm.⁸³

Neither development nor Article 6 were referred to in either *RRT Case No. V95/03256* or *Ali v. Minister of Citizenship and Immigration*. However, in line with the other provision rights discussed in Part I, education has a clear link with development, in particular optimal development which satisfies the child’s ‘mental, spiritual, moral, psychological and social development’.⁸⁴ A children’s rights approach to refugee law must also consider the right to education as a pathway to

⁸⁰ *Ibid* at 36.

⁸¹ See *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada, iRB, 23 sep. 1996, which concerned a 9 year-old girl from Afghanistan in a judicial review of a decision made by Convention Refugee Determination Division of the Immigration and Refugee Board. There were a number of applicants involved in this family claim. The Court concluded that “education is a basic human right and I direct the Board to find that she should be found to be a Convention refugee.”

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) para 12.

develop into active citizens. However, as these cases noted, the right to education in the context of refugee law is limited by a link with a convention ground, such as the particular social group, race, nationality, etc, where it can be shown that a child is individually denied access to normally available educational services on account of their background.

In 2012, the Irish High Court in *D v. Refugee Appeals Tribunal* heard a challenge which dealt with a child's right to education.⁸⁵ The initial application was submitted on behalf of a child whose parents were from Serbia and of the Ashkali ethnicity. It was asserted on behalf of the applicant that he would not be able to access education in Serbia as those considered to be Ashkali were discriminated against. The Refugee Appeals Tribunal found that although the applicant was likely to face discrimination, it did not amount to persecution. When the challenge reached the High Court, Judge Hogan found, however, that a breach of the right to education did in fact amount to persecution. Hogan J argued that persecution comprised 'something in the nature of systematic and pervasive infringements of a basic human right'.⁸⁶ Hogan J, on reflecting on the wealth of country of origin reports on Ashkali children who were considered Roma in Serbia, stated that it 'painted a picture of pervasive discrimination against Roma children *sic* with regard to access to even basic education'.⁸⁷ He added that by denying access to education, the applicant would 'effectively be excluded from any meaningful

⁸⁵ Judicial review of negative decision delivered by the Refugee Appeals Tribunal.

⁸⁶ *D. [a minor] v Refugee Appeals Tribunal & Anor* [2011] IECH 431 at 7.

⁸⁷ *Ibid* at 17.

participation in Serbian society’,⁸⁸ reflecting the intention of the principle right of development (Article 6) and Locke’s view that education served to prepare children for future participation in society. Hogan J also noted that the right to education was ‘reflected in international agreements, such as Article 28 of the Convention on the Rights of the Child’.⁸⁹ The decision of the Tribunal was quashed.

The High Court decision referred explicitly to development, but not Article 6, in citing the infamous US education case *Brown v. Board of Education*.⁹⁰ The passage cited related to the compatibility of segregated education and the equality principle of the 14th Amendment to the US Constitution:

‘...Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system...’

Development was also referred to in the judgment as contained within a Committee report on Serbia in 2008. The Committee expressed concern:

‘...at the negative attitudes and prejudices of the general public and at the overall situation of children with minorities and, in particular, Roma children. The Committee is concerned at the

⁸⁸ *Ibid* at 24.

⁸⁹ *Ibid* at 23.

⁹⁰ *Brown v. Board of Education of Topeka* 347 US 483 (1954) in *Ibid* at 18.

effect this has with regard to discrimination and disparity, poverty and the denial of their equal access to health, education, housing, employment, non-enrolment in schools, cases of early marriage and decent standard of living. The Committee is also concerned at the very low levels of participation in early childhood development programmes and day care and the deprivation of education.'

This case therefore established a link between development and the right to education.

This judgment provided four important contributions to this discussion: (1) it reiterated the effect the right to education, or the denial of that right, has on accessing other rights, (2) it assisted in defining persecution in relation to breaches in civil liberties, noting that the breach must be 'systematic and pervasive' (3) it highlighted the relevance of the right to education as enshrined in the CRC, even if it was not relied upon as anything more than an 'international agreement' and (4) it made a direct link with development even if it did not refer to Article 6. This case therefore demonstrated the potential for the application of a children's rights approach. A children's rights approach would involve considering the right to education and development as part of the 'persecution barometer' – in other words it would consider children's rights when assessing whether or not the rights violation under review amounts to persecution.

Despite the positive contribution this case has made to this field, it was challenged to the Supreme Court and was overturned. This shows that there is a reluctance to set this precedent, at least in Ireland.

This case and the cases highlighted above nevertheless show willingness amongst decision makers to engage with the right to education in respect of persecution. And indeed all three decisions referred directly to the right as contained within the CRC or other human rights instruments – in this case the ICESCR. Or in the least, as was the case in *Ali v. Minister of Citizenship and Immigration*, it was referred to as a human rights norm (thus deriving from international law). It might also be noted that the right to education may have a nexus with a number of convention grounds including the particular social group, race, nationality, religion or even political opinion. Violations of this right, perhaps more than other examples of provision rights, are more clearly linked with policies which are discriminatory in nature or where States are complicit in the denial of education as established in the case examples above.

It must be acknowledged that the right to education in the CRC strictly speaking only applies to primary education. The case law therefore would likely be limited to children considered to be between the categories of infancy to pre-teen. The proportion in this age range would be very small amongst separated children (the largest group of child asylum applicants who submit applications in their own right) who

might invoke this right in their application for refugee protection.⁹¹ This may account for the limited number of cases available via asylum law databases. In addition, cases dealing with this right may be found within head-of-household claims in respect of a secondary child applicant.

Although this is a provision right and a right that is prescribed in law as obligatory and thus choice on the part of the child is minimised, it is possible to view children as subjects of this right as it is part of the process of realising potential. Participating in education can be voluntary, can be political and can be forced. In the case of the former two options, it is possible to see children as subjects of the law and indeed this is the approach most often seen in refugee case law as the judgments mentioned above refer to positive development and future participation in society (although this is a third party assessment which assumes that education is a wish of the child). Therefore, the ‘subject’ within these assessments is the ‘future adult’ within the child applicant. Due to the age profile of those who come under this right (primary school age), it is also possible to conceive of children as objects of the right to education based on a presumed lack of capacity. This is another case where a fluid approach to conceptualising children as objects and/or subjects of law is observed.

⁹¹ See: Separated Children in Europe Programme, ‘Newsletter No. 43 - Summer 2015’ (Defence for Children, NL 2016) 50-51.

6.2.4 Conclusion on provision rights

There is a reluctance to provide protection to applicants on the basis that their State has not satisfied their obligations in accordance with provision rights generally. The provision rights relate often to public services and resources that have long been considered to be the competence of the sovereign State. One argument is that failure to provide public services may indicate social or economic deprivation rather than persecution, reflecting the historical divide between political and economic migrants and refugees.⁹² This is reinforced by the education case. Child applicants must show that they are discriminated against in accessing education rather than merely showing that educational opportunities are not available in their country.

Health, standard of living and education are all subjective and differ from country to country and culture to culture. However, where violations of these rights reach a certain threshold and amount to persecution and where there is a link with a convention ground, there is still scope for refugee protection. The threshold as evidenced by some of the case law is set very high as captured in *RRT Case No. N94/04178* where it was recognised that the applicant had a ‘life-threatening illness for which ongoing medical care is needed to maintain life itself’.⁹³ In the cases mentioned throughout relating to children, the threshold does not seem to be as high as a threat to life, necessarily, as we can see in the

⁹² *Supra* note 6. See also: Inter-American Commission on Human Rights *Andrea Mortlock Case* in Human Rights Watch, *Returned to Risk: Deportation of HIVE-positive Migrants* (Human Rights Watch 2009) 10.

⁹³ *Supra* note 77.

FGM case, education and perhaps in the case of a lack of a family environment. Nevertheless, the threshold seems to sit closer to the survival end of the spectrum, if we consider Article 6 as representing a spectrum of rights which begins with survival and ends with optimal development.

The notion of an Article 6 spectrum is reinforced to some degree by the case of education as well. Education, given its primacy in our minds in respect of children's rights and its position as the cornerstone of civilization, sits apart from survival rights and is deemed a slightly more sacred right. It is also, as mentioned in Chapter Three, a right that is mentioned in all primary human rights treaties (UDHR, ICCPR, ICESCR and the CRC). Depriving a child of an education may result in hardship in the future, but not to an immediate threat to life.⁹⁴

Article 6 was not referred to in any case discussed above. However, the right to development was either mentioned (for example in the Irish case) or it was implicit in the context of other rights which can be captured within a holistic interpretation of Article 6 as provided for by the Committee as defined in Comment No. 5. Part I also argued that Article 6 must become more visible for a children's rights approach to refugee law to function. The right to development is core to our understanding of childhood and should provide the lens through which

⁹⁴ *Supra* note 86.

refugee law is applied in child cases. Research and guidance is needed on Article 6 and its relationship with refugee law specifically.

The best interests principle has been the main focus of research, policy and practice in the area of child refugee law and perhaps as a result other rights, such as Article 6, did not develop to the same extent. One reason for this could be that most of the research and policy on child refugee relates to matters of procedure. It is arguable that the best interests principle has mainly been utilised as a tool in the context of procedures as it requires a third party assessment (with participation from the child) and as a catch-all for all other rights, thus making the other rights, including the principle of survival and development, less visible.

Children within provision rights can be seen as both objects and subjects of each provision discussed above. The right to participate, or have one's voice heard,⁹⁵ allows for the child to be considered a subject of all laws in the CRC. The approach in respect of the limited developments in the area of provision rights indicates a fluid conceptualisation, children considered at times objects, at times subjects and at times both.

This section showed that there are few higher court child refugee cases dealing with violations of provision rights. The violations of provision rights often have a link with violations of other rights. For example, FGM invokes a number of other rights with nexuses with other

⁹⁵ CRC, Article 12.

convention grounds. As a result, many of these rights arise in the context of protection and participation rights (discussed in Parts II and III).

This section highlighted the possibility of violations of provision rights to amount to persecution, but also reluctance to engage with provision rights on their own (or to the exclusion of other categories of rights, in particular protection rights) by determination bodies. Part I nevertheless suggested that violations of the right to a family environment, to the highest attainable standard of health and adequate standard of living and to education, as fundamental children's rights, may amount to persecution where there is a convention nexus and where it is sanctioned, encouraged or facilitated by the State. These rights should form part of the 'persecution barometer', or the assessment of persecution. The following section outlines rights which relate to protection. Final conclusions on all three categories of rights are drawn in the conclusion to this chapter.

Part II

6.3 Protection rights and refugee protection

Childhood, as discussed in Chapters Two and Three, was described as a permanent structure in society, a period characterised by learning, development *and* vulnerability. Chapter Two established that childhood, as a period of development *en route* to adulthood, requires protection. Children require protection from harm, abuse, neglect etc in order to ensure their experience of childhood aids their development into productive adults. These rights relate to the provision rights discussed in the previous section insofar as breaches of protection rights may also breach one or more provision rights. For example, labour exploitation may affect the child worker's right to access education. Both sets of rights, provision and protection, associated with childhood fall under the umbrella of Article 6 as childhood and the right to develop are inextricably linked, as discussed in Chapters Two and Three. Protection rights also, like provision rights, relate mostly to social and economic rights.

Protection rights relate to protection from *inter alia*: exploitation including labour and trafficking; forced military recruitment and participation in armed conflict; involvement in illicit activities; and other forms of harm, including indiscriminate violence and torture. This section elaborates on forms of persecution based on a violation of a protection right with a refugee nexus. The role of the family as-protector and as-persecutor is also discussed. The purpose of this exercise,

consistent with the rest of this chapter, is to identify which rights violations deriving from children's rights law amount or may amount to persecution in the context of refugee law and how these cases relate to development. Part II, like Part I, seeks to show how the case law to date may assist in formulating a children's rights approach to refugee law.

6.3.1 *Exploitation*

Chapter Three established that the earliest developments in children's rights law related to protecting children from exploitation. The prominence of the need to protect children from exploitation grew and expanded over the years, culminating in various provisions in the CRC and the ILO's Worst Forms of Child Labour Convention (WFCLC) (discussed in Chapter Three). In the context of refugee law, the Committee and the Guidelines included sexual abuse and exploitation in their definition of child-specific forms of persecution.⁹⁶ Protection from sexual abuse and exploitation is mentioned throughout the Guidelines in respect of forced marriage,⁹⁷ military recruitment,⁹⁸ labour and trafficking,⁹⁹ domestic violence against children¹⁰⁰ and in the context of persecution on the basis of religion¹⁰¹ or membership of a particular social group (such as street children, who may be more at risk of sexual

⁹⁶ *Supra* note 25; *Supra* note 29, para 12.

⁹⁷ *Supra* note 29, para 20.

⁹⁸ *Ibid* para 23.

⁹⁹ *Ibid* paras 26, 27.

¹⁰⁰ *Ibid* para 32-33.

¹⁰¹ *Ibid* para 44.

abuse and exploitation due to their precarious situation and poverty).¹⁰²

6.3.2 Labour and trafficking

It is easy to see a link between the provisions contained within the ILO Conventions and also the CRC in respect of ‘other forms of exploitation’ and refugee law, in particular where the CRC and the ILO refer to inter-country transfers of children for the purposes of exploitation. This area of children’s rights elucidates some of the most fundamental examples of child-specific persecution.

Children in economically deprived circumstances may be required to work by family or they may opt to work in order to survive. For example, children growing up in rural India¹⁰³ might access the labour market at a much earlier age than children in the UK. Accessing the labour market does not necessarily mark the end of childhood, but the characteristics of childhood change from being perhaps focussed exclusively on education to either education and earning a living or merely earning a living. In the context of refugee law, it must be established that the work amounts to persecution by looking at, for example: the type of work, the age of the labourer and the hours of work (see Chapter Three for guidance in international law).

The outcome of these cases varies in refugee law. For example, in *Gomez-Guzmen v. Holder*, the US Court of Appeals upheld a decision by

¹⁰² *Ibid* para 52.

¹⁰³ Myron Weiner, *The Child and the State of India: Child Labour and Education Policy in Comparative Perspective* (PUP 1991).

the Board of Immigration Appeals (BIA) in respect of an applicant who sought asylum on the basis of membership of a particular social group, ‘Guatemalan children under age fourteen’. The applicant testified that he was forced to work in a job that was dangerous. His stepfather would beat him or withhold food if he did not go to work. He described one occasion where his stepfather ‘beat him so badly that he could not breathe or go to work the next day’. The applicant earned two to three dollars per day and it was paid directly to his stepfather. He also testified that he never had any free time for friends as he had to do housework after work. The applicant’s claim for refugee protection was premised on *Matter of Chen*, which held that ‘in rare instances, an applicant may be eligible for asylum where he ‘has suffered under atrocious forms of persecution,’ even where there is little likelihood of future persecution’.¹⁰⁴ However, the Court of Appeals upheld the original decision finding that the applicant did not demonstrate ‘that his persecution was so severe as to warrant asylum’.¹⁰⁵

Although cases with a link to economic exploitation are inconsistently determined, it is nevertheless established that work that affects a child’s positive growth and development is a breach of a fundamental children’s right. It is arguable then that a violation of this protection right should amount to persecution where development is adversely impacted, it reaches a sufficient threshold, there is a convention nexus and there is no

¹⁰⁴ *Matter of Chen*. 20 I. & N. Dec. 16, 19 (BIA 1989).

¹⁰⁵ *Gomez-Guzmen v. Holder*, no. 11-3006, 2012 WL 2161636, at *3 (6th Cir. June 15 2012).

available recourse to protection. *Gomez-Guzmen*,¹⁰⁶ for example, may in another court or time be considered to amount to persecution. The appellant was considered to be a member of the particular social group ‘Guatemalan children under age fourteen’. He was also known to have been forced into labour. Without even looking to the WFCLC, the ILO in 1973 prohibited young people under the age of 15 to enter into the labour force:

*‘The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years’.*¹⁰⁷

In addition, it was submitted that the work was hazardous, thus invoking some of the rights discussed in Chapter Three within the WFCLC. However, labour was just one aspect of *Gomez-Guzmen*. The appellant also testified that he suffered domestic abuse and could not enjoy leisure activities, both are aspects of childhood, and within that development, that are protected by the CRC.¹⁰⁸ This case therefore included violations of several children’s rights. This is an instance where the determination of a child’s refugee claim would have benefitted from a formalised children’s rights approach where children’s rights violations were explicitly considered in the assessment of persecution.

¹⁰⁶ *Ibid.*

¹⁰⁷ International Labour Organization, Minimum Age Convention 1973 (No. 138), Article 3.

¹⁰⁸ CRC, Article 19.

Harmful child labour practices have fallen within the scope of the Refugee Convention. However, there is more literature and case law where there is also a link with trafficking, and in particular the possibility of re-trafficking. In the US, a child asylum applicant from India who was beaten by parents and sold to traffickers for domestic service in the US was found to belong to a particular social group of ‘Indian children sold or abandoned by their parents’.¹⁰⁹

There is growing momentum in respect of cases dealing with persecution and trafficking. This is evidenced not only by case law, but also the uptake of the issue in asylum institutions such as the European Asylum Support Office¹¹⁰ and UNHCR with the publication of their 2006 Trafficking Guidelines.¹¹¹ UNHCR in their Trafficking Guidelines describe the following serious violations of human rights which generally amount to persecution: abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, and the deprivation of medical treatment.¹¹² A number of jurisdictions have recognised trafficking as a form of persecution.¹¹³ The risk of re-trafficking has also been accepted

¹⁰⁹ *Matter [name not provided]* (IJ Mar. 13, 1998) (Chicago, Ill.) (IJ Zerbe) in Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 225.

¹¹⁰ European Asylum Support Office, *Newsletter- March 2014* 7 <www.easo.europa.eu/sites/default/files/public/EASO-Newsletter-March1.pdf> accessed 10 September 2016.

¹¹¹ UNHCR, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* HCR/GIP/06/07 7 April 2006.

¹¹² *Supra* note 29, para 15.

¹¹³ See: *SZBFQ v. Minister of Immigration* [2005] FMCA 197 and *Matter of M-J*, CGRS Case No. 364 (China), BIA 30 March 2001.

as a form of persecution.¹¹⁴

In *Bian v. Canada*,¹¹⁵ the Federal Court of Canada held that a 13 year old boy from China along with some 200 other unaccompanied minors who were smuggled into Canada

*‘had a well-founded fear, both subjectively and objectively, that they would again be trafficked if they were returned to China, and are thus “Convention refugees”’.*¹¹⁶

This decision focussed on the debt that his family owed and the fact that the child would be put to work to repay that debt. The court found that the child was at risk of future trafficking and thus at risk of persecution.¹¹⁷ The court also found that he was not able to consent to trafficking.¹¹⁸ This is an example where capacity was involved in the decision making process. The conclusion was that the child lacked capacity to give consent, favouring a more paternalistic approach to this particular trafficking case, considering the child more as an object of law.

¹¹⁴ *Supra* note 29, 11.

¹¹⁵ *Bian v. Canada (Minister for Citizenship and Immigration)*, IMM-1640-00, 11 Dec. 2000.

¹¹⁶ *Ibid* at 46.

¹¹⁷ *Ibid*.

¹¹⁸ See also: *Zhu (L.W.) v. Canada (Minister of Citizenship and Immigration)*, IMM-2746-00, 13 Aug. 2001.

Trafficking is also relevant in the case of sexual exploitation and a similar approach has developed.¹¹⁹ For example, a 16-year-old child who was trafficked from Nigeria to the UK for the purposes of sexual exploitation was recognised as belonging to a particular social group ‘young girls from Nigeria whose economic circumstances are poor’.¹²⁰ This case made a link with the provision right to an adequate standard of living. The Canadian Convention Refugee Determination Division also recognised an applicant as a refugee belonging to the particular social group ‘impoverished young women from the former Soviet Union recruited for exploitation in the international sex trade’, emphasising the link between the right to an adequate standard of living and protection rights.¹²¹

Not having an adequate standard of living places children in a more vulnerable position in society - this line of cases reflects this. As stated in Part I standard of living is frequently a factor in persecution, but infrequently the sole basis for protection.

This section highlighted that the child was largely considered to be an object to protect within this category of rights. It was not argued in any case that the child exercised their agency in either fleeing economic

¹¹⁹ See: *A B v. Secretary of State for the Home Department*, no. CC/64057/2002, 18 Dec. 2003; ...

¹²⁰ *Ogbeide v. Secretary of State for the Home Department* (Unreported, IAT, Appeal No. HX/08391/2002, 10 May 2002) in Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007) 285.

¹²¹ *Y.C.K. (re)* [1997] CRDD No. 261 No. V95-02904.

exploitation or choosing to engage in exploitative or indeed illegal labour (in the case of *Bian v. Canada*).

This section also established that there is limited case law, despite the abundance of international law relating to child labour and exploitation. This area of refugee law is surprisingly underdeveloped given the volume of labour laws relevant to children. However, it may also be the case that labour exploitation finds its way more often into criminal law spheres, where there is legislation protecting victims of organised crime, rather than the protection sphere.¹²² Refugee case law on trafficking with a particular social group nexus nevertheless represents a slightly more optimistic prospect.

The paucity of case law relating to child labour must be considered in the context of a children's rights approach. Children under the age of 15 who are economically exploited whether or not it is in an area of work considered to be one of the 'worst forms of child labour', may, where a link with a convention ground can be established, come within the scope of a children's rights approach to the interpretation of the Refugee Convention. The significant volume of law relating to child labour indicates that a children's rights approach would be possible and that labour laws would form part of the 'persecution barometer'.

¹²² See for extensive analysis of human trafficking in international law including in the context of criminal law: Anne Gallagher, *The International Law of Human Trafficking* (CUP 2010) 122, 184, 209, 270, 358.

6.3.3 *Forced military recruitment and protection of children during conflict*

As described throughout, poverty, conflict or family separation can place children at risk of various forms of exploitation, including in the context of armed conflict. Article 38 of the CRC establishes that children should be protected from involvement in the military and protected from the effects of armed conflicts.¹²³ Children are nevertheless involved in military activities across the world. Machel in the UN study in 1996, *Impact of Armed Conflict on Children*,¹²⁴ documented instances of ‘calculated’ genocide specifically targeting children during armed conflict, for example in *Srebrenica*.¹²⁵ In 2011, Human Rights Watch reported a sharp rise in the use of children, some as young as 7 years old, in suicide bombings by the Taliban.¹²⁶

In the aforementioned UN study, Machel documented and described instances of the use of child soldiers, largely in the case of boy children, and the recruitment of girl children for the purposes of sexual exploitation or for other duties such as food prep or cleaning.¹²⁷ She noted that it was generally the poorest children who were at risk of recruitment, referring to the role ‘standard of living’ plays in established forms of persecution. Children or families may volunteer their services

¹²³ CRC, Article 38.

¹²⁴ *Supra* note 2.

¹²⁵ *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro* [2007] ICJ Rep. 43, para 291.

¹²⁶ Human Rights Watch, ‘Afghanistan: Taliban Should Stop Using Children as Suicide Bombers’ 31 August 2011 <www.hrw.org/news/2011/08/31/afghanistan-taliban-should-stop-using-children-suicide-bombers> accessed 4 May 2016.

¹²⁷ *Supra* note 2, paras 44-48.

as a way to escape poverty or hunger, or as a means of generating income.¹²⁸

The Guidelines include under age recruitment into the military as a child-specific form of persecution in the context of refugee law.¹²⁹ A number of cases involving recruitment or fear of recruitment into armed groups have been brought before higher courts, but the outcomes have varied.¹³⁰ The Quaker United Nations Office in a 2013 report, *Former Child Soldiers as Refugees in Germany*, estimated that there were 300 to 500 unaccompanied minors who were former child soldiers in Germany (at the time of the research). For the report, they interviewed 11 young people who identified as former child soldiers. They noted, however, that all applications for refugee protection from those interviewed were refused on the basis of the ‘unfoundedness’ of their claim.¹³¹ This study indicated that ‘child-specific attitudes’ played a role in these cases, to the disadvantage of the applicant children.¹³²

In many countries, children are recruited and then forced to commit crimes and human rights abuses against their families or communities.¹³³ It is for this reason that cases in this particular area of refugee law may

¹²⁸ *Ibid.*

¹²⁹ *Supra* note 29, paras 19-23.

¹³⁰ See, for example: *O (a minor) v. Refugee Appeals Tribunal and Minister for Justice, Equality and Law Reform* [2010] IEHC 151.

¹³¹ Quaker United Nations Office, *Former Child Soldiers as Refugees in Germany* (Quaker United Nations Office and terre des homes 2013) 22.

¹³² See: *Supra* note 1, 207.

¹³³ *Supra* note 140.

be dealt with in the context of Article 1F¹³⁴ of the Refugee Convention, or exclusion (See Chapter Five).¹³⁵ The Refugee Convention does not distinguish between adults and children.¹³⁶ The drafters may not have foreseen that Article 1F would have been applied to children, yet it has arisen in asylum determinations involving children.¹³⁷ Goodwin-Gill argued that neither the Refugee Convention nor the CRC provides an adequate legal basis for the interpretation of Article 1F.¹³⁸

In one case Article 1F was referred to in a positive decision of the National Asylum Court of France (CNDA). The applicant was from the DR Congo. At 15, he was forced to fight in the national armed forces and committed crimes against civilians. Two years later, he fled to France. The CNDA found that he had a well-founded fear of being persecuted based on imputed political opinions linked to being a former child soldier. The CNDA also found that Article 1F did not apply given

¹³⁴ The 1951 Convention relating to the Status of Refugees does not apply to three categories of persons. Article 1D states that persons already in receipt of protection through the United Nations Relief and Works Agency for Palestine are excluded from the provisions contained within the Convention. Additionally, Article 1E excludes persons who can avail of protection in another jurisdiction other than their country of origin where they are already resident. Lastly, Article 1F excludes any person believed (where there are serious reasons to believe) to have: committed a war crime or a crime against peace or humanity; committed a serious non-political crime prior to applying for protection or been found guilty of committed acts contrary to the principles of the United Nations.

¹³⁵ See: *Moreno v. Canada (Minister of Employment and Immigration)* [1994] 1 FC 298; *Negusie v. Holder*, 555 U.S. 511(2009).

¹³⁶ See: United Nations High Commissioner for Refugees, *The Exclusion Clauses: Guidelines on their Application*, December 1995, reprinted in, *Refugee Law in Context: the Exclusion Clause* 19, 22 (Peter J. van Krieken, ed., 1999); United Nations High Commissioner for Refugees on Child-Soldiers, reprinted in *Refugee Law in Context: the Exclusion Clause* 43, 44 (stating that "[t]he exclusion clauses do not distinguish between adults and minors").

¹³⁷ See Sir Guy Goodwin-Gill, *The Refugee in International Law* (2nd Edn OUP 1996) 18-20.

¹³⁸ *Ibid.*

his vulnerability and the forcedness of his actions.¹³⁹

This case showed that the court engaged with the debate around criminal responsibility and exclusion in such a way that took account of the child's innate vulnerability, reflecting the views of Locke, Rousseau and others. In this way, despite being an actor in the armed group, due to the forcedness of his actions, the child was seen as an object within this protection right.

As a form of economic exploitation and as a practice accepted to be harmful to children, underage military conscription may breach various protection rights including the right to be free from harm and the right to family unity. This practice would also breach Article 6 as illustrated by the Committee, by breaching children's rights relating to their 'physical, mental, spiritual, moral, psychological and social development'.¹⁴⁰ The one case example mentioned above did not refer to development or Article 6. The CRC, specifically Article 6, read along with Article 38, would however be a useful tool for interpreting the Refugee Convention from a children's rights perspective as argued in Part I. This section mentioned a procedural barrier to the assessment of these claims however. The Quaker study and Bhabha¹⁴¹ argued that child soldiers' and former child soldiers' cases were often unsuccessful for reasons unrelated to an assessment of the substantive elements of the refugee

¹³⁹ France - CNDA, 20 December 2010, Mr. N., n°10004872. <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-20-december-2010-mr-n-n%C2%B010004872>

¹⁴⁰ *Supra* note 84.

¹⁴¹ Child as juvenile approach as discussed in *Supra* note 1, 227.

application – namely, credibility. This research therefore needs to be read alongside contributions to children’s rights approaches to the *processing* of asylum claims in order to achieve full CRC compliance. Nevertheless, the aim of a children’s rights approach would be to provide more consistency in child refugee determinations.

6.3.4 Involvement in illicit activities – gangs

Illicit activities such as the drugs trade are established enterprises involving children. The Guidelines also referred to the use of children in illicit activities as something that ‘would be considered persecution, whether perpetrated independently or as part of a trafficking experience’.¹⁴² Children often become subject to such activities on the basis of gang recruitment. Recruitment is conceptually similar to conscription into armed forces¹⁴³ and the trafficking industry. It is therefore possible to suggest that children who join gangs are unable to do so voluntarily. However, as mentioned above, young people may also be excluded where crimes were committed, satisfying the criteria set out in Article 1F of the Refugee Convention.¹⁴⁴ This is particularly true where the crime was committed at an age that is consistent with the age of criminal responsibility in the receiving country.¹⁴⁵

¹⁴² *Supra* note 29, para 29.

¹⁴³ See *Supra* note 1, 233.

¹⁴⁴ See also: Galya Ruffer, ‘Gang-Based Asylum Claims’ <www.refugeelegalaidinformation.org/gang-based-asylum-claims> accessed 16 July 2016.

¹⁴⁵ Mathew Happold, ‘Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention’ (2002) *American University International Law Review* 17 (6) 1131.

Children may be recruited to join gangs in situations of prolonged civil war and/or experience of social and economic deprivation. Gangs may coerce or entice children to join by offering protection or material goods.¹⁴⁶ Persecution in this context may arise when a child either refuses to join a gang or when a child decides to leave a gang.¹⁴⁷ There is documented evidence of persecution that occurs within the gang, leading to persons escaping. Gangs are endemic in countries like: Guatemala, Honduras, Mexico and El Salvador.¹⁴⁸

However, as Bhabha described, determinations in this area have been ‘disappointing’.¹⁴⁹ This is a sentiment shared by critics of adult claims of a similar description.¹⁵⁰ Bhabha referred to two cases dealt with by the US Board of Immigration Appeals. In one case, *S-E-G*, two sixteen year-old boys and their 19-year-old sister who resisted joining a gang were denied asylum on the basis that they could not show that they were any different to any other person in El Salvador who had crossed the gang. Furthermore, the BIA was not satisfied that the reason for resisting was due to an anti-gang political opinion.¹⁵¹ The BIA held that there was no evidence of political or public activism.

¹⁴⁶ USAID, *Central America and Mexico Gang Assessment Report* (Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development 2006) 15.

¹⁴⁷ Refugee protection requires the person in need of protection to be out of the country. This means children *in-country* and *in* gangs would not qualify as refugees.

¹⁴⁸ Jeffrey Corsetti, ‘Marked for Death: The Maras of Central America and Those who Flee Their Wrath’ (2006) 20 (3) *Georgetown Immigration Law Journal*.

¹⁴⁹ *Supra* note 1, 235.

¹⁵⁰ Nicolás Rodríguez Serna, ‘Fleeing Cartels and Maras: International Protection Considerations and Profiles from the Northern Triangle’ (2016) 28 (1) *International Journal of Refugee Law*.

¹⁵¹ *Matter of S-E-G* 24 I&N Dec. 579 (BIA 2008).

The BIA in the second case referred to by Bhabha, *Matter of E-A-G*, reversed a decision to grant asylum to a young boy from Honduras whose brothers had been killed by gangs and resisted joining himself on the basis that resisting recruitment did not constitute a political opinion and that the social group to which he belonged was not visible.¹⁵² The threshold is therefore quite high in that the child must express disdain for the gang and therefore become both political and visible. Bhabha argued that the threshold is therefore ‘tantamount’ to death.¹⁵³

In *Canada (Minister of Citizenship and Immigration) v. X*, the Refugee Board found that children who lack maturity and capacity would normally not be considered to have voluntarily joined a gang.¹⁵⁴ However, the child, although 14 at the time of joining the gang, was determined to have understood the decision and a deportation order was issued against him:

In summary, he knew before he joined that the gang was involved in violent and illicit activities and that these activities were wrong. He joined voluntarily and he joined against the advice of adults.

In my opinion, these findings support my determination that even at age 14, Mr. XXXXX had the knowledge and mental capacity

¹⁵² *Matter of E-A-G* 24 I&N Dec. 591 (BIA 2008).

¹⁵³ *Supra* note 1, 235.

¹⁵⁴ *Decision A7-00299*, 2007 CanLII 47735 (IBR), Canada: Immigration and Refugee Board of Canada 31 May 2007.

*to understand that he was joining the gang and that there were obligations and consequences that would flow. Obviously, the extent of those obligations and consequences were not fully known to him.*¹⁵⁵

The political opinion ground was invoked in these cases. As mentioned above, gang recruitment is similar to military recruitment and trafficking and other forms of exploitation. However, the approach relied upon in the previous section was largely to invoke the particular social group ground, viewing the child as vulnerable and in need of protection. The trafficking cases showed that the child could not give consent. From a children's rights perspective, the two violations of rights are somewhat similar, they are protection based and involve coercion, such as promises of a route out of poverty. However, they are dealt with differently in refugee law as discussed throughout.

Cases in the area of gang recruitment may benefit from adopting the approach used in trafficking cases; that is viewing the child as an object in need of protection rather than a subject in the context of political opinion requiring the applicant to exercise agency. This may indicate that within the protection rights category that portraying the child as an object of the law requiring protection may be more successful in attaining recognition as a refugee than portraying the child as a political actor, expressing or acting on their views or opinions. This is revisited in

¹⁵⁵ *Decision A7-00299*, 2007 CanLII 47735 (IBR), Canada: Immigration and Refugee Board of Canada 31 May 2007 p 5-6.

Part III and in the conclusion to this chapter.

However, in utilising a children's rights approach it may be possible for a child to be a subject of the law and exercise their agency by expressing their political opinion relating to joining or leaving a gang *and* for that child to be considered in need of protection based on their vulnerability. The child could be seen as an object in need of protection due to the likelihood (dependent on individual circumstances) of the child to be coerced or forced into the gang or indeed persecuted for not joining the gang. The assessment would be based on their vulnerability and need to be protected from harm, considering the potential impact of their social and economic position in society. This line of cases therefore draws on a number of children's rights, including provision, protection and participation rights. A children's rights approach may allow for a more nuanced assessment of the protection needs of the child.

6.3.5 Other forms of harm: Indiscriminate violence and torture

As discussed in Chapter Three, protecting children from indiscriminate violence was part of the vision of Eglantyne Jebb¹⁵⁶ and the work of Save the Children. It was the backdrop of the international children's rights movement culminating in the 1924 Declaration. However, like all refugee applicants, children have to show that they are individually at risk in order to qualify for refugee protection. That is not to say that a person who suffers indiscriminate violence is not eligible for protection,

¹⁵⁶ Clare Mulley, 'The Woman who Saved the Children: A Biography of Eglantyne Jebb, Founder of Save the Children' (Oneworld Publications 2009, 2011 ebook reprint).

but as *Elgafaji* showed, subsidiary protection¹⁵⁷ at least in the European Union is beginning to fill this space – a space that used to belong to refugee protection during the times of the category approach:¹⁵⁸

*‘the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason or factors particular to his personal circumstance’.*¹⁵⁹

Due to the fact that more and more indiscriminate violence is conceived of within the subsidiary or complimentary protection sphere and it is not mentioned in the Guidelines, it is not dealt with in any more detail in this chapter.

Freedom from torture is another example of a protection right provided for in the CRC,¹⁶⁰ the UDHR¹⁶¹ and the ICCPR¹⁶² which has had

¹⁵⁷ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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) A ‘person eligible for subsidiary protection’ is defined in Article 2: ‘a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless persons, to his or her country of former habitual residence, would face a real risk of serious harm...’ Serious harm is defined in Article 15: Serious harm consists of: (a) the death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

¹⁵⁸ As discussed in Chapter Four.

¹⁵⁹ *Elgafaji v. Staatssecretaris van Justitie* (C-465/07; 17 February 2009) [2009] 1 WLR 2100.

¹⁶⁰ CRC, Article 37.

implications in refugee law. Torture is an established form of persecution¹⁶³ and freedom from torture is an established children's right.¹⁶⁴

Like military conscription, there is a wealth of guidance and jurisprudence. However, it is less prevalent in the literature in respect of child refugees, despite being mentioned throughout the UN study on children in armed conflict. This may be due to the perception, as Bhabha noted, that children are not considered as political actors¹⁶⁵ and thus not at risk of torture on that basis. In addition, cases involving health may relate to inhuman and degrading treatment as established in Part I. There are nevertheless some examples of refugee case law where torture forms part of the decision.

In *GH v Refugee Appeals Tribunal*, the court reiterated the Guidelines',¹⁶⁶ position on the impact of torture on children and its relationship with persecution:

'Another principle is that actions which may not constitute persecution when experienced by an adult could satisfy the

¹⁶¹ UDHR, Article 5.

¹⁶² International Covenant on Civil and Political Rights 1966 (ICCPR), Article 7.

¹⁶³ See, for example: Quentin Dignam, 'The Burden and the Proof: Torture and Testimony in the Determination of Refugee Status in Australia' (1992) 4 (3) *International Journal of Refugee Law* 343. However, recently there has been a move towards considering torture within complementary regimes, see: Jane McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 28 (2) *International Journal of Refugee Law* 461.

¹⁶⁴ CRC, Article 37.

¹⁶⁵ *Supra* note 1, 210.

¹⁶⁶ *Supra* note 29, para 33.

persecution element of the refugee definition when experienced by a child. Minor applicants are necessarily more vulnerable to the effects of torture and other forms of serious harm, in particular physical and psychological harm, and the principle of the best interests of the child require that the harm feared upon return be assessed from the child's perspective'.¹⁶⁷

This case dealt with an infant child and persecution based on her status as an Ahmadi in Pakistan. The decision of the Refugee Appeals Tribunal was quashed and sent back to be reconsidered. The child was considered in this case to be an object of law. She witnessed her mother being harassed and threatened. The mother submitted on behalf of her child that she would be discriminated against in school and in the community.¹⁶⁸ There was therefore consideration of other children's rights including the right to education and development.

In *Juan Carlos Martinez-Mejia* the BIA granted protection to a child who was subjected to abuse at the hands of his stepfather, it was seen as amounting to torture. The child would have been faced with returning to live as a street child in Honduras. The findings were based on a well-founded fear of persecution at the hands of the police in Honduras who were known to torture and kill street children, while considering the fact that the child had no family environment to return to.¹⁶⁹ This can be seen as fitting within Bhabha's child welfare approach and the protectionist

¹⁶⁷ GH v RAT [2015] IEHC 583 at 21.

¹⁶⁸ *Ibid* at 11.

¹⁶⁹ *Matter of Juan Carlos Martinez-Mejia* A 76 312 250, 5-6 (BIA Jan. 20, 1999).

approach. It is also an example of the right to be free from torture applied in a case where the child was seen as an object of protection. Therefore, the right to be free from torture has also been used as a mechanism through which to determine the severity of the persecution suffered in the case of children as well.

There is nevertheless limited case law dealing with torture and children, but when this right is breached it may amount to persecution and should therefore form part of the framework for a children's rights approach to the Refugee Convention, reflecting the developments relating to lowering the persecution threshold in the case of children (revisited in Part III in relation to participation rights). Uniquely, for the protection rights category, children are referred to as subjects who must exercise their agency to become at risk of persecution rather than assumed to be objects in need of protection.

6.3.6 Family as persecutor and protector – unattached children

Chapters Two and Three identified the family unit as the main protector and promoter of children's rights. Given that the parents are the primary vehicle through which children's rights are realised, they can be seen as the facilitator of development. Right to a family environment and the right to an adequate standard of living are both fundamental children's rights. If these rights are breached and it is not possible (or the government are unable or unwilling) to provide a surrogate family environment in the home country and/or it is not possible to protect the

child from abject poverty it is possible that the harm experienced by the child as a result would amount to persecution where there is a link with a convention ground.

Bhabha noted that ‘poverty, homelessness and youth’ have been deemed by US courts to be too vague and universal to be considered to be persecution in the context of refugee law.¹⁷⁰ As discussed in Part I, a children’s rights approach would allow for a more nuanced analysis of the children’s right to be protected from abject poverty, in particular in instances where children are deprived of a family environment. In this case the ‘vague and universal’ concept of ‘youth’ may provide a link with a convention ground, namely the particular social group. This was discussed in the provision rights section and is discussed below.

Case law, literature and guidance has suggested that when the family is absent from the child’s life, the child would be at greater risk of harm *and* less likely to access their rights. This strand of cases emphasised the role of the family in protecting the child from external harms, identifying the family as the primary access point to all other children’s rights.¹⁷¹ There are a number of decisions which have dealt with children who are in the receiving country and unaccompanied and thus without the protection of their family. For example, the Upper Tribunal

¹⁷⁰ *Escobar v. Gonzales* 417 F. 3d 363 (C.A. 3 2005) in Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 225.

¹⁷¹ See, for example: Sweden – Migration Court (Administrative) 17 Mar. 2011, UM 206-11 and *LQ (Afghanistan) v. Secretary of State for the Home Department* [2008] UKAIT 00005.

(Immigration and Asylum Chamber) in the United Kingdom in *HK and Others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan*)¹⁷² held that

‘children are disproportionately affected by the consequences of the armed conflict in Afghanistan’ yet ‘a distinction has to be drawn between children who were living with a family and those who are not. That distinction has been reinforced by the additional material before this Tribunal’.

Although the Tribunal noted that:

‘there are some risks to which children who will have the protection of the family are nevertheless subject, in particular the risk of land mines and the risks of being trafficked, they are not of such a level as to lead to the conclusion that all children would qualify for international protection’

The Tribunal, despite dismissing the appeals, concluded that the evidence did not show that the appellants faced a real risk on return,¹⁷³ it found that children who were ‘unattached’ in Afghanistan

‘depending on their individual circumstances’ ‘may be exposed to risk of serious harm, inter alia from indiscriminate violence,

¹⁷² *HK and Others (minors - indiscriminate violence - forced recruitment by Taliban - contact with family members) Afghanistan CG [2010] UKUT 378 (IAC).*

¹⁷³ *Ibid.*

forced recruitment, sexual violence, trafficking and a lack of adequate arrangements for child protection’.

In *HK and Others*, various UNICEF reports on the situation of minors in Afghanistan were referred to in submissions. UNHCR in their *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* in 2010 found that unaccompanied children, among other vulnerable persons in households with no adult male protection, would not be able to ‘lead a life without undue hardship in areas with no social support networks, including in urban centres’.¹⁷⁴

In a more recent case, *AA (unattended children) Afghanistan*, the UK Upper Tribunal found that the applicant unaccompanied minor was a refugee on grounds of his political opinion (this case is discussed in more detail in Part III), but also on the grounds that he would not have the protection of his family

*‘We are further satisfied that the appellant would be at real risk of persecution as an unattached child from his particular home area who has lost all contact with his family, so that family protection will not be available to him’.*¹⁷⁵

¹⁷⁴ UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* HCR/EG/AFG/10/04 (UNHCR 2010) 39. Updated in 2013: UN High Commissioner for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* HCR/EG/AFG/13/01 (UNHCR 2013).

¹⁷⁵ *Supra* note 36, at 133.

These cases show a willingness on the part of decision makers and courts to interpret the Refugee Convention utilising this children's rights norm. There is therefore scope for the application of a children's rights approach in the context of unattached children. However there is a trend to invoke other forms of protection, such as subsidiary protection or humanitarian permissions in these cases.¹⁷⁶

Unattached children cases are also determined inconsistently, even within one jurisdiction as shown by the UK example. This line of cases might therefore be buttressed by a children's rights approach which, would provide a *persecution barometer* using development as the baseline. The result of which might be more predictability, or consistency, in the use of refugee protection and complementary forms of protection.

Another aspect of the role of the family is ensuring the child is protected from harm both domestic¹⁷⁷ and from the outside world,¹⁷⁸ which Rousseau argued was part of protecting the experience of childhood.¹⁷⁹ Domestic violence and forms of harm at the hands of family members are associated with protection rights in the CRC. As discussed in Part I, the family should serve as the protector and enforcer of children's rights

¹⁷⁶ See, for example: Home Office, *Asylum Policy Instruction: Discretionary Leave* (Version 7, Home Office 2015) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf>. See also: Samantha Arnold, et al, *Durable Solutions for Separated Children in Europe* (Irish Refugee Council 2016) 43.

¹⁷⁷ CRC, Article 9.1; Article 19.

¹⁷⁸ CRC, Article 19 read in line with Article 5.

¹⁷⁹ As discussed in Chapter Two.

, yet there has been some family-as-persecutor case law relating to child abuse at the hands of relatives,¹⁸⁰ incest is one example.¹⁸¹

The child is largely conceived of as an object in the consideration of their right to the protection of the family or to be free from persecution arising from the family environment. The right to family in the context of provision rights highlighted the implications a lack of a family environment may have on the child and their future outcomes, or development. As established throughout, protection rights must be satisfied to access other rights and all three categories of rights represent one side of the development, or Article 6, triangle.

6.3.7 Conclusion on protection rights

There are a number of examples of protection rights with a Refugee Convention nexus mentioned herein. Examples discussed above range from labour exploitation to gangs to domestic violence. The approaches in the decisions in relation to this category, and the others, were inconsistent, however. This analysis did establish, however, that there is a relationship between CRC-based protection rights and refugee determinations, despite not having a formal framework for determining

¹⁸⁰ *Bueckert v. Canada* (Minister of Citizenship and Immigration) [2011] FC 1042; *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001) (opinion vacated on rehearing en banc and remanded, 273 F.3d 1220 (9th Cir. 2001)); and *Secretary of State for the Home Department v. Fatemah Firouz Rinjbar*, Immigration Appeal Tribunal, no. HX/70912/94, 28 June 1994.

¹⁸¹ *[Names Not Provided] v. Minister* [2011] Immigration Board of Canada – Refugee Protection Division, RPD File No. VA9-01475, VA9-01476, VA9-01477, VA9-01478, VA9-01479, para 13 (Can.).

child claims.

The fact that these types of cases are more prevalent in the literature, guidance and in case law databases than cases involving provision and participation rights also suggests that cases which relate to the child as an object of law to be protected – characterised by youth and vulnerability were somewhat advantaged. It also suggests that social and economic rights, such as those considered in Part I, and rights which relate to the child's agency, discussed in Part III, were not as well integrated into refugee law. However, the same can be said of adult cases, in respect of social and economic rights. Part II, however, demonstrated that not satisfying the provision rights to the highest attainable standard of health, an adequate standard of living or a family environment makes children more vulnerable to persecution. These rights were seemingly secondary to the analysis of persecution. In addition, Parts I and II showed that complementary forms of international protection have been relied upon to accommodate violations of provision and many protection rights, such as the right to a family environment or protection from indiscriminate harm.

Part II suggested that violations of protection rights where the child is conceived of as vulnerable and without agency or capacity are dominant in refugee case law. Protection rights are indeed most prominent in the UNHCR Guidelines as discussed in Chapter Five. The issue of children being conceived of as either objects or subjects in the context of

protection rights and their nexus with refugee law seems to exist on a spectrum. Children are sometimes considered as not ‘fully-formed’; reminiscent of the views of Locke and Rousseau and also sociologists who argued that the child is an adult-in-becoming, or capable of consent, for example in the case of trafficking or sometimes in the case of child soldiers. In these cases, this has been shown to work to the advantage of the child applicant. In the examples discussed in this section, the child was an object to be protected.

In other cases, children were seen as unable to form political views, for example, as a result of their status as not-fully-formed and therefore were not perceived as persons who could be subjected to torture, for example, on the basis of their political opinions. In this example, children are objects of the law and thus unable to invoke protection on this particular ground. In this line of cases, the conceptualisation of the child as an *adult-in-progress* worked to their disadvantage.

Lastly, this section discussed cases where children were seen to exercise their agency in respect of involvement in gangs or other illicit activities. In some of these cases, children were seen as responsible for their actions, cognisant of the impact of their actions. In these cases, where children were viewed as subjects of the law, the attribution of participation or agency rights onto the child worked to their disadvantage. Despite the similarities between trafficking and gang cases, the outcomes have been different. This demonstrated a preference

for protection rights cases where the child applicant was an object in need of protection. This is consistent with the current and inherent conflict in international children's rights as discussed in Chapters One through Three.

Part III

6.4 Participation rights and refugee protection

The international children's rights movement¹⁸² has reinforced the consensus that children are not only seen as rights holders, but agents in reference to their rights, including rights to self-determination.¹⁸³ This includes the area of refugee law.¹⁸⁴ The way children are conceived of has an impact on many of their rights and their ability to access those rights. This includes their right to seek and access refuge in another country. In the case of international refugee law, agency is a crucial element of any protection claim. The applicant must prove that he or she has or is individually likely to suffer persecution for reasons of race, nationality, religion, membership of a particular social group or political opinion. They must also demonstrate that they cannot access, or are unwilling to seek, the protection of their own State.¹⁸⁵ Children therefore must not only have agency to be perceived as a subject of persecution, they must also have the capacity to seek protection and articulate their fears. As already mentioned, this book does not look at procedural elements, but the issue of agency is relevant in that applicants are presumed to be able to exercise it in the pursuit of international protection. Part III and this book only look at the persecution of children

¹⁸² Discussed in Chapter Three.

¹⁸³ Self-determination is defined in International Covenant on Civil and Political Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49 in *Article 1.1* All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

¹⁸⁴ See: Heaven Crawley, 'No one gives you a chance to say what you are thinking': finding space for children's agency in the UK asylum system' (2009) *Area* 1.

¹⁸⁵ Refugee Convention, Article 1A(2).

based on exercising their agency rather than the way they exercise it in the context of making an application for asylum, however.¹⁸⁶

Part III departs somewhat from the structure of this chapter and book. Parts I and II have used general children's rights subheadings to ensure that the analysis looks to children's rights first in an effort to analyse the current point of development of children's rights in the context of refugee law. However, and as Bhabha argued, children who act with their own agency are often typified as transgressors.¹⁸⁷ It is therefore common to categorise children who transgress a societal norm, such as resisting child marriage, as children who are expressing an opinion that is either political or religious in nature. Cases which involve child agency, and where the exercise of agency is at the fore, are discussed therefore under two convention ground headings: religion and political opinion. Part III takes account of the possibility that other rights violations may be relevant including the example of involvement in illicit activities discussed in Part II. In addition, Part III takes into account the fact that religion and political opinion can be and are grounds cited in cases not involving children exercising their agency, including where religious or political beliefs or opinions are imputed onto them.

¹⁸⁶ Further reading on the right of the child to seek asylum, see Ciara Smyth, *European Asylum Law and the Rights of the Child* (Routledge 2014).

¹⁸⁷ See *Supra* note 1, 227.

The most relevant CRC rights are those which provide individual and autonomous rights, such as: freedom of expression,¹⁸⁸ thought, conscience and religion,¹⁸⁹ freedom of association and peaceful assembly,¹⁹⁰ privacy¹⁹¹ and the protection of the right to practice one's own religion and speak their one's language .¹⁹² These rights relate to the religion and political opinion convention grounds most closely. Part III therefore discusses these rights in the context of the two grounds. Section 6.4.2 looks first at imputed beliefs, though persecution on the basis of imputed beliefs most often invokes protection rights.

6.4.2 Imputed beliefs

The Handbook states that it is not necessary for a child to be an active participant to be at risk of persecution. It states that merely being perceived as holding certain opinions or beliefs or being a member of a particular religious or political group can result in persecution. This may be based on the beliefs or membership of the child's parents, community, race or ethnic group. UNHCR notes that this may be the case in circumstances where the child is not capable of articulating such views.¹⁹³ For example, in a case in Belgium, the *Council for Alien Law Litigation* reasoned that expressing a fear of FGM was considered a political opinion. The court found therefore that the nexus of the applicant's fear lay with the political opinion ground though it was

¹⁸⁸ CRC, Article 13.

¹⁸⁹ CRC, Article 14.

¹⁹⁰ CRC, Article 15.

¹⁹¹ CRC, Article 16.

¹⁹² CRC, Article 30.

¹⁹³ *Supra* note 26, paras 46-47.

attributed to the mother (the principal applicant).¹⁹⁴ The child was secondary to the application.

This case does not necessary conflict with a children's rights approach, despite failing to consider the child as a subject of the proceedings, rather it emphasised the innate vulnerability and at times incapacity to understand, or seek protection from, the harm that may be forced upon them. It also emphasised the role of the family in protecting the child from such harms. In this case, the mother argued that she would not be able to protect her child. Although this case does not deal with the child's expression of a political opinion, it does show that the protection rights prong of child development is invoked. Even if a children's rights approach to the interpretation of the Refugee Convention is applied, there will continue to be cases where the parent is the principal applicant, asserting their right to protect their children due to their inherent vulnerability as established in Chapters Two and Three. This line of cases does not fall within the context of participation rights, however, as the child is not the subject of the law nor is the child expressing their own views or beliefs.

UNHCR in their *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention*

¹⁹⁴ However the CALL could not establish whether or not the applicants were Somali. The decision was to quash the original CGRS decision and send it back to them for further investigation as to the applicants' nationality. *Council for Alien Law Litigation*, 24 June 2010, Nr. 45.395. Summary provided by the European Database of Asylum Law. <<http://www.asylumlawdatabase.eu/en/case-law/belgium—council-alien-law-litigation-24-june-2010-nr-45395>> accessed 17 September 2016.

and/or the 1967 Protocol relating to the Status of Refugees addressed the possibility that parents may also have a role in the child's transgressions and/or beliefs. These guidelines note that mandated religious education may not only come into conflict with the child's beliefs, but may also conflict with the beliefs of the parents. UNHCR reiterated the right of the parents to make decisions regarding the child's moral and religious education in the context of broader human rights. In this case it is possible that the parents may place the child at risk of persecution because of their choice to have the child educated in accordance with their own beliefs and values in cases where those beliefs come into conflict with that of the State or community, for example. This scenario was not addressed in UNHCR's guidelines relating to children, but they were addressed in the context of religious persecution more generally.¹⁹⁵ This omission in UNHCR's Guidelines on child claims, indicates that the parents' right to educate their child in the way that they wish is a right that is not attributable to children necessarily. Examples in this vein relate to provision rights, not participation rights. For this reason, this section does not deal with this category of rights. It is noteworthy, however, that the right of the child to be free from religious persecution and the right of the parents to educate their children in respect of their religion can come into conflict. The following sections look at rights, which are autonomous in nature, where the child is seen as a subject of the law.

¹⁹⁵ *Supra* note 26, para 42.

6.4.3 Religion

Article 14 of the CRC noted that: 'States Parties shall respect the right of the child to freedom of thought, conscience and religion'.¹⁹⁶ It can therefore be concluded that in the context of the CRC, children have the right to their beliefs and to practice their own religion. Children, as discussed above, may be subjected to persecution on the basis of their religious beliefs,¹⁹⁷ imputed religious beliefs, and as outlined in the Guidelines and Handbook behaviour determined by the religious community to which they are affiliated to be transgressive or their refusal to ascribe to religiously prescribed behaviours.¹⁹⁸

Although UNHCR noted that children have 'limited, if any, influence over which religion they belong to or observe',¹⁹⁹ the Guidelines highlighted that circumstances may arise where a child may not adhere to assigned roles or behaviours. For example, girls who try to escape forced marriage and who are then considered to 'dishonour' the family, for example in Kurdish communities in Turkey and Iran. This can also be the case if a girl is accused of sexual relations before marriage. In these circumstances, they may be at risk of persecution.²⁰⁰ Children may refuse to: participate in religious practices for example FGM²⁰¹ or

¹⁹⁶ CRC, Article 14.

¹⁹⁷ See, for example: D.A. (infant) (Pakistan) -v- Minister for Justice Equality and Law Reform [2015] IEHC 208. The Irish High Court arguably implicitly accepted that a claim on the basis of religious persecution can be advanced on behalf of minors.

¹⁹⁸ *Supra* note 26, para 42.

¹⁹⁹ *Ibid*, para 43.

²⁰⁰ *Ibid* para 42-44.

²⁰¹ International Refugee Rights Initiative: Rights in Exile Programme, 'FGM/Case law and other legal documents' <<http://refugeelegalaidinformation.org/fgm-case-law-and-other-legal-documents>> accessed 10 September 2016.

sati,²⁰² adhere to accepted codes of conduct such as wearing a veil, participate in forced military activities in the context of religious ideologies²⁰³ or ascribe to gender roles such as enslavement²⁰⁴ or forced marriage.²⁰⁵ The Guidelines give examples of serious restrictions on the right to earn a livelihood or to access normally available educational facilities or health care, ie provision rights, based on religious discrimination as well, all of these rights relate to the understanding of development discussed throughout this book. Some specific examples where children's rights and refugee law intersect are discussed below.

6.4.3.1 Female genital mutilation revisited

FGM was discussed in the context of health, but it has also been linked to religion as it is often carried out as a religious or cultural rite of passage, though it is not limited to one culture or one religion.²⁰⁶ Resisting or advocating for the eradication of FGM may therefore relate to a belief or opinion challenging the majority belief system, which could be considered within the frame of the religion or political opinion ground, and/or perhaps race, nationality and the particular social group grounds. In US courts, there has been a tendency, as Bhabha noted, to grant asylum on the basis of objecting to FGM due to the influence 'western freedom of conscience' has had upon the applicant. Regardless

²⁰² Jacqueline Bhabha and Wendy Young, 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New U.S. Guidelines' (1999) 11 (1) *International Journal of Refugee Law* 109.

²⁰³ *Supra* note 26, para 44. See also: UN High Commissioner for Refugees, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (UNHCR 2004) HCR/GIP/04/06.

²⁰⁴ *Supra* note 26, para 44.

²⁰⁵ *Supra* note 202, 109.

²⁰⁶ Comfort Momohed, *Female Genital Mutilation* (Radcliffe 2005) 5-7.

of how this example is categorised or discussed in this chapter they are nevertheless additional forms of harm against children and relate to various protection rights, in particular Article 19, *protection from all forms of violence*.²⁰⁷

6.4.3.2 Child marriage

Child marriage is more common among members of certain communities often characterised by race, ethnicity, religion or nationality.²⁰⁸ The UK Foreign and Commonwealth Office Forced Marriages Unit describe forced marriage as an arrangement where one or both parties do not give valid consent. They described it as 'an abuse of human rights, and a form of domestic violence and child abuse, when it involves young people'. The starting point for the UK guidance on child marriage is thus grounded in protection.

Child marriage may also relate to economic exploitation, a protection right,²⁰⁹ as there is often an economic benefit to child marriage either through a dowry,²¹⁰ or another form of payment from the groom's family to the bride's family, or it may serve to alleviate some financial pressure from the family who may have to support other children.²¹¹

However, there may also be a link with religion or political opinion, as

²⁰⁷ CRC, Article 19.

²⁰⁸ See, generally: Louis Mikhail, Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation (2002) 10 (1) *Gender and Development* 43-49.

²⁰⁹ CRC, Article 24(3); International Covenant on Civil and Political Rights 1966, Article 23; International Covenant on Economic, Social and Cultural Rights 1966, Article 10; Convention on the Elimination of All Forms of Discrimination Against Women 1979, Article 16.

²¹⁰ UNICEF, *Child Marriage and the Law: Legislative Reform Initiative Paper Series* (UNICEF 2008).

²¹¹ *Ibid.*

communities may justify child marriage through religious doctrine or cultural norms.²¹²

A 2004 study carried out in Norway found that 9 out of 26 refugee recognitions (of female applicants with the exception of one boy fearing persecution at the hands of his girlfriend's parents) were based on applicants fleeing forced marriages.²¹³ The majority were young girls being forced to marry older men and also experiencing abuse or threats from the community.²¹⁴ However overall the study found that instances of forced marriage in asylum claims were generally low.

In 2004 in the UK, it was submitted in *NS (social group) Afghanistan CG (forced marriage)* that forced marriage 'was something that occurred quite frequently to women and young girls in Afghanistan' (See below).²¹⁵ The Immigration Appeals Tribunal allowed an appeal from a woman who feared persecution on the basis of a threat of forced marriage on return to Afghanistan. In their determination they noted that the applicant's two daughters were also at risk of forced marriage:

Her daughters are themselves extremely vulnerable to being forced into marriage, as they approach puberty, and vulnerable to other sexual assault and abuse. In turn, their vulnerability

²¹² *Ibid.*

²¹³ Kate Halvorsen, 'Asylum Decisions on Child Applicants Report on 4-Country Pilot Project' (Ministry of Local Government and Modernisation 2004) 23.

²¹⁴ *Ibid.*

²¹⁵ *NS (social group) Afghanistan CG (forced marriage)* at 43.

*placed the Appellant at increased risk as the sole protector of the girls.*²¹⁶

There have been examples of child marriage forming the basis for positive refugee recommendations in the US. For example, in *Matter of [name not provided]*, an immigration judge granted asylum to a sixteen-year-old from China who fled a forced, arranged marriage by her parents in exchange for money.²¹⁷ Bhabha argued that this case hinged on the ‘family’s commodification of their daughter into a capital-generating asset’. It was on this basis that the child was granted asylum. Bhabha also noted that this example of persecution concerned both family and societal circumstances.²¹⁸

In the context of a children’s rights approach and the discussions in this chapter more generally, not only did the child exercise her agency, the social and economic circumstances of the child played a role. In other words, this form of violence is also linked to the child development prong of provision rights. Importantly, this case also looked at the role of the family and their failure to fulfill their duties as the protector of the child, also a provision right with links to protection rights. Here, in this case, we can see the intersection of all three categories of rights, all three which impact upon the child’s development. The period of childhood, which should seek to ensure ‘optimal development’, is undermined by

²¹⁶ *Ibid* at 45.

²¹⁷ *Matter of [name not provided]* A76-512-001 (Oct. 18, 2000) (Chicago, IL) (Zerbe, IJ) in Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 225.

²¹⁸ *Supra* note 1, 225.

forced marriage and the deprivation of the family environment. Furthermore, it undermines the child's right to participate in decision making about their future.²¹⁹

Other child marriage case law has indicated that children may be granted lesser forms of protection, such as subsidiary protection or leave to remain, rather than refugee protection.²²⁰ For example, in Sweden, the Migration Court of Appeal granted a young couple subsidiary protection based on the female's avoidance of forced marriage and the ensuing harassment both parties endured as a result. Low numbers in refugee status granted on this basis may also relate to low numbers of claims being submitted by children on their own as it is likely difficult to do so as a minor who is forced into this situation or it may relate to decision makers not taking cases involving children seriously and discriminating based on age, as Bhabha and others have argued, albeit not in the context of forced marriage.²²¹

6.4.3.3 Sexual orientation and gender identity

Another example of a transgression which may amount to persecution relates to sexual orientation and gender identity. Children and young

²¹⁹ *Supra* note 84, para 12.

²²⁰ For example: In Sweden, the Migration Court of Appeal in UM 3363-10 & 3367-10 (9 March 2011) granted a young couple subsidiary protection on the basis of the female's avoidance of forced marriage and the ensuing harassment both parties endured. Summary from the European Database of Asylum Law <www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-9-march-2011-um-3363-10-3367-10> accessed 10 September 2016.

²²¹ *Supra* note 202; *Matter of Timnit Daniel and Simret Daniel*, A70 483 789 & A70 483 774, U.S. BIA, 31 Jan. 2002 (unpublished, non-precedent setting decision). The Court found 'that the notion that the respondents were too young to have an actual political opinion is irrelevant; it is enough that the officials believed that they supported the EPLF'.

people, though frequently ignored in UNHCR guidance and national laws relating to sexual orientation and gender identity, may also fear or experience persecution on this basis.²²² Although the Refugee Convention does not explicitly refer to these reasons for persecution, evidence of its inclusion under the category of the particular social group exists in European law²²³ and case law²²⁴ from all over the world. However, the *Guidelines on International Protection No. 9 Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* note that sexual orientation and gender identity may also relate to the religion²²⁵ or the political opinion ground.²²⁶ A transgression of this societal norm may have a nexus with the religion ground where the religious community does not accept homosexuality. It may also have a nexus with the political opinion ground where there are anti-gay laws, policies or where public/governmental figures make anti-gay statements.²²⁷

²²² Spain - Supreme Court, 17 June 2013, No. 3186/2013.

²²³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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), Article 10.1(d).

²²⁴ See, for example: Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) *International Journal of Human Rights* 13 (2/3); Nicole LaViolette, 'Sexual Orientation, Gender Identity and the Refugee Determination Process in Canada' (2014) *Journal of Research in Gender Studies* 4 (2) 68; Mary Kapron and Nicole LaViolette, 'Refugee Claims Based on Sexual Orientation and Gender Identity: An Annotated Bibliography' (2014) *Ottawa Faculty of Law Working Paper* No. 2014-2015.

²²⁵ *Supra* note 26, paras 42 and 43.

²²⁶ *Ibid* para 50.

²²⁷ *Ibid* para 50.

Although many commentators have reflected on the paradox of children and sexual orientation in decision making,²²⁸ there are nevertheless examples where children have been recognised as refugees on the basis of sexual orientation or gender identity. Take the decision of *Hernandez-Montiel*, for example. At 16, Geovanni Hernandez-Montiel applied for asylum in the US. He identified as gay and as someone who expressed their gender identity by wearing clothing typically characterised as feminine. He claimed membership of the particular social group ‘gay men with female sexual identities’²²⁹ in Mexico. Despite being rejected by the BIA, the Ninth Circuit Court overturned the decision on appeal.²³⁰ The Ninth Circuit Court argued that the BIA had erred in their assessments of *inter alia* the particular social group ground and persecution. In the first instance, the Court found that dressing as a female was an expression of the applicant’s gender identity and that his gender identity and sexual orientation were considered to be immutable applying the reasonings of *Sanchez-Trujillo*, *Matter of Acosta* and others.²³¹ In addition, the Court deemed the discrimination and sexual abuse suffered at the hands of the police constituted persecution. The case was remanded to the BIA with instructions to grant his asylum.

²²⁸ Susan Hazeldean, ‘Confounding Identities: The Paradox of LGBT Children under Asylum Law (2011) 45 *University of California, Davis* 373.

²²⁹ The fact that he was a child was not part of the decision. This may be because he was over the age of 20 when the decision was finally successfully overturned.

²³⁰ *Hernandez-Montiel v. I.N.S.* 225 F.3d 1084 (9th Cir. 2000); Susan Hazeldean, ‘Confounding Identities: The Paradox of LGBT Children under Asylum Law (2011) 45 *University of California, Davis* 373.

²³¹ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) and *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) in *Hernandez-Montiel v. I.N.S.* 225 F.3d 1084 (9th Cir. 2000) at C. See Chapter Five. *Matter of Toboso-Alfonso*, 20 I. & N. Dec.) 819 (B.I.A. 1990) and *In re Tenorio*, No. A72 093 558 (EOIR Immigr. Court July 26 1993) were also referred to.

This was an important case in the context of sexual orientation and gender identity as it was the first instance that a US federal court of appeals had ‘recognized homosexuality or sexual identity as a basis for protection under the INA asylum Statute’.²³² However, what is interesting about this case in the context of child refugees is that age was not raised. In fact, capacity was assumed. On the one hand, this case could be seen as an example of children being recognised as having agency, as subjects of law. On the other hand, this could be seen as a case that ignored the fact that the applicant, who was a child at the time of the persecution, but not at the time of appeal, was a child and thus the decision makers treated him as an adult. A third possibility is that the court deemed the age of the applicant immaterial or insignificant. Many commentators have argued that children continue to be invisible in the legislation, guidance and case law in the context of sexual orientation and gender identity refugee claims.²³³ This case would support this argument. In the future, if a children’s rights approach were employed, the court in this case would have referred to the appellant as a child and as someone who was capable of exercising their agency and expressing their identity. In addition, the court would have acknowledged that child-specific rights were also breached, such as the right to be free from abuse,²³⁴ sexual violence²³⁵ and their right to their identity (among

²³² Lambda Legal Defense and Education Fund, *Hernandez-Montiel v. INS: Final Victory!* (July 5, 2001) in Julia Blanche Meister, ‘Orientation-based Persecution as Grounds for Refugee Status: Policy Implications and Recommendations’ (2014) 9 (1) *Notre Dame Journal of Law, Ethics and Public Policy* 275.

²³³ *Supra* note 228, 373.

²³⁴ CRC, Article 19.

²³⁵ *Ibid*, Article 19.

others).²³⁶ There is limited literature in this area of law concerning children, and there is therefore a need for further research to develop this area and its intersection with a children's rights approach.

6.4.4 Political opinion

Locke, Rousseau and the liberationists and protectionists that followed, emphasised the fact that as children mature, their ability to articulate and develop opinions also matures. Children in the context of the CRC thus have the right to hold a political opinion, express their opinion and convene discussions or meetings with others to discuss or express their views.²³⁷ UNHCR in their Handbook described the potential for persecution on grounds of political opinion in the following way:

'A claim based on political opinion presupposes that the applicant holds, or is assumed to hold, opinions not tolerated by the authorities or society and that are critical of generally accepted policies, traditions or methods'.²³⁸

Political opinion may apply therefore where the applicant expresses or makes their views known. However it is also possible, as UNHCR noted, that the applicant may not have expressed their views, but due to the strength of the applicant's convictions those views are likely to

²³⁶ *Ibid*, Article 8.

²³⁷ *Ibid*, Article 13.

²³⁸ *Supra* note 26, para 45. See also para 80.

become known.²³⁹ The Guidelines stated that this convention ground ‘is not limited to adult claims’.²⁴⁰

'It is important to acknowledge that children can be politically active and hold particular political opinions independently of adults and for which they may fear being persecuted'.²⁴¹

UNHCR therefore makes clear that the child may be the subject of law in the context of seeking protection from persecution on the basis of their political opinions. In case law, political opinions have also been imputed onto children.²⁴²

This area of refugee law (concerning religion and political opinion) is the closest reflection of the liberationist approach discussed in Chapter Two. This area is also where we can see the biggest leap in the *idea* of children’s rights, from Locke’s view that children could not exercise civil and political rights and Rousseau’s view that they were unable to hold views (which applied to religion) to today where children, at least in international law,²⁴³ have this right.

²³⁹ *Ibid* para 45. See also para 82.

²⁴⁰ *Ibid* para 45.

²⁴¹ *Ibid*.

²⁴² For example in, *Mr. N., n° 10004872*, the CNDA found that the applicant had a well-founded fear of persecution based on imputed political opinions linked to his former role as a child soldier in the DR Congo. The applicant was abducted by rebels (Congrès national pour la défense du peuple, CNDP) at age 15. He was drugged, tortured, trained and forced to fight. He was unable to escape and was forced to commit crimes against civilians. He learned that his father had been killed and his other family members had fled upon return home. He received death threats based on his involvement in the fighting and eventually fled. *CNDA, 20 December 2010, Mr. N., n°10004872*.

²⁴³ As established by the CRC and interpreted by UNHCR.

Children commonly play a role in national protests and movements in their own right.²⁴⁴ Children may thus be the subject of persecution on the basis of their opinions or activities. Additionally children may be involved in political activities through distributing pamphlets, acting as couriers or participating in demonstrations.²⁴⁵ There have been several specific examples of student activism, for example: the Soweto school children, Muslim children in France protesting against the prohibition of the veil in French schools and young labourers protesting working conditions in India and Pakistan.²⁴⁶

In the UK the Upper Tribunal in *AA (unattended children) Afghanistan* found that a child applicant who left Afghanistan at 14 was entitled to recognition as a refugee due to the child's well-founded fear of being persecuted on the basis of political opinion:

*'He fears persecution by the Taliban by reason of his membership of his family, and therefore being associated with their political opinions, and by reason of his own political opinions as demonstrated from his actions at the Teachers' Day ceremony',*²⁴⁷

²⁴⁴ *Supra* note 26, para 45.

²⁴⁵ *Ibid.*

²⁴⁶ *Supra* note 202, 109-111.

²⁴⁷ *Supra* note 36, para 136.

Whether or not the child is capable of holding a political opinion, or indeed religious convictions, is often determined by a third party assessment of the child's maturity and development, including their level of education and their ability to articulate those views.²⁴⁸ Studies, commentators and the judgments discussed herein have noted that decision makers are often not likely to see children as capable of holding views or political opinions.²⁴⁹ This is a matter of procedure, but it brings to light some challenges which present to children in substantiating their claims.

In Germany, for example, in *BVerwG*, a child had applied for asylum at the age of 15 based on his political opinions. This application was rejected. He applied again a year later on the basis of his membership of the 'Constitutional Party of Iran' and the 'Organisation for the Protection of the Iranian Christians' Rights'. This was also rejected. He made a subsequent application after having been involved in a play that was critical of the regime in Iran. After a further series of appeals, the case ended up at the Federal Administrative Court. The Court held that the applicant should be considered as an exception to the rule which excluded applications on the basis of post-flight reasons which were created based on the decision of the applicant (*selbstgeschaffene Nachfluchtgründe*). The justification for the application of this exception

²⁴⁸ *Supra* note 202, 109-110.

²⁴⁹ Sandy Ruxton, 'Separated Children Seeking Asylum in Europe: a Programme for Action (Separated Children in Europe Programme 2000). See also: *Salaam v. INS*, 229 F.3d 1234 (9th Cir. 2000). The board in this case refused refugee protection believing that the applicant was too young to be a leader (at 18) in a political organisation in Nigeria.

was due to the age of the applicant. It was reasoned that the applicant was not of legal age prior to expressing these most recent political opinions. This decision was remanded to the High Administrative Court Bayern for a new decision.²⁵⁰

This decision showed that those involved at various stages of the determination process did not view political activity as significant or intentional when the young person was a minor. However, once the young person reached the age of majority and exercised his right to express his political views, the court reasoned that the decisions could be re-considered on the basis that his views were made manifest on account of his participation in the play. This demonstrated the bias inherent in child asylum claims in relation to agency. Determination bodies and courts have infrequently viewed the child as capable of exercising their agency and forming political views (as discussed in Part II in relation to torture).

In a 2004 Norwegian country report for a pilot study, which looked at *Asylum Decisions on Child Applicants*, it was noted that asylum officials, judges, etc were not likely to consider children capable of holding their own political opinions. The study quoted one decision maker stating to the applicant:

²⁵⁰ Germany - Federal Administrative Court, 24 September 2009, 10 C 25.08. Summary in English provided by the European Database of Asylum Law. <<http://www.asylumlawdatabase.eu/en/case-law/germany-federal-administrative-court-24-september-2009-10-c-2508#content>> accessed 17 September 2016.

*‘You have testified that you together with your friend, zy(name), have written and distributed pamphlets against the regime. The response to that is that this statement with reference to your young age – you are 15 years old – is not credible. It is not plausible that you at an age of 15 years together with your friend – who is the same age as you – independently and on your own account - wrote and distributed pamphlets in mail-boxes up to three times a month and that you ie. and your friend have driven around in a car in your town to distribute these pamphlets’.*²⁵¹

In this example and in the example from the German court, agency was not attributed to the child applicants. The abovementioned study found that only 1 out of 26 Norwegian cases was granted on the basis of political opinion.²⁵² A children’s rights approach to the interpretation to the Refugee Convention could perhaps provide a pathway, or link, from, for example, Article 15 of the CRC, to the political opinion ground in the context of the Refugee Convention.

Case law where children are depicted as unable to exercise their agency based purely on the fact that they are children may not be considered CRC compliant, where it is not recognised that during the process of childhood, children begin to form their own views and an ability to express those views or act in a way consistent with those views (as established in Chapters Two and Three).

²⁵¹ Kate Halvorsen, *Asylum Decisions on Child Applicants: Country Pilot Project (Norway)*. (Regjeringen 2004) 34.

²⁵² *Ibid.*

This section shows that qualifying for refugee status on the basis of political opinion is not straight forward in the case of children. There is a well-documented reluctance to attribute the ability to act in a political way or to express political views to children. This reflects the uneasiness society still has with attributing agency to children, uneasiness that had emerged in the literature of the seventeenth century. The rights relating to protection are still the most developed and the least contested of the three rights groupings – in the context of international children’s rights *and* refugee law. The tendency is still to view children as vulnerable and in need of protection and less likely to view them as having agency. Successful cases, as Bhabha’s research also showed, depend on acknowledgement of children’s distinctive dependence on adult protection, a dependence that makes them more vulnerable.²⁵³ As discussed in Part II, often attributing agency works to the disadvantage of child applicants. These points are discussed below in the conclusion.

6.4.5 Conclusions: Participation rights

There are a number of examples of participation rights with a Refugee Convention nexus. There have been times where violations of participation rights in the case of children who have views that run contrary to the State or surrounding society have been recognised as refugees and instances where they have not. These examples include both religious and political opinions, beliefs and indeed behaviours

²⁵³ *Supra* note 1, 232.

classified as transgressions. In relation to autonomy and autonomy based rights contained within the CRC, choosing not to ascribe to religious norms or holding beliefs, which may place the child at risk of persecution, assumes that the child has capacity and relative autonomy.

UNHCR in their Guidelines acknowledged that children do have agency in respect of their religious beliefs and have relative autonomy in respect of their behaviours in the context of religious persecution. In refugee law, and specifically in relation to the religion ground, children can be considered as subjects of law, with agency to make decisions about their own life. UNHCR clarified that children have a right to protection from persecution in their own right on the basis of their own religious views or transgressive behaviours if they fulfill the criteria set out in the Refugee Convention. It is therefore established in both children's rights law and refugee law that children can be considered as subjects of the law in relation to their religion. Some of the typical examples, as discussed above, are: child marriage, FGM, gender identity and sexual orientation. Furthermore, refusing to subscribe in part or in full to any aspect of the family, community or State sanctioned or promoted religion may also engage the Refugee Convention.

In the case of political opinion, UNHCR and the literature supported the view that children can exercise political agency. There are instances where political opinion has been relied upon in refugee decisions. However, the literature has been critical of the approach taken by

decision makers in attributing the ability to act with agency in the context of this convention ground. As argued herein, failing to see children as capable of forming views or exercising their agency does not comply with the mandate provided by the CRC.

There have been very few published cases dealing with this area of child refugeehood. There has been more information and cases relating to the religion ground perhaps due to the link with protection rights (and nexus with the particular social group in many cases) for example in the case of FGM or child marriage.

The analysis in this section emphasised, somewhat, the relationship between CRC rights and refugee determinations, despite not having a formal framework for determining child claims. The approach in the decisions in relation to this category is nevertheless inconsistent, consistent with the other two categories. This is the least developed rights category in refugee law. This may be due to the low number of claims from young people for one reason or another or the reluctance on the part of the decision maker to attribute participation rights to children in the context of asylum (consistent with the divide that exists in the wider children's rights discourse as discussed in Chapters Two and Three). The overarching themes in these discussions on case law is that all violations point back to the sociological understanding of childhood, which is now encapsulated in Article 6 of the CRC as illuminated by the Committee, *and* that a children's rights approach would assist in

providing consistency, structure and increased visibility in the case of child refugee determinations.

6.5 Conclusions

Refugee law, among other areas of law, has challenged society's conceptualisations of children. Refugee law is at its foundation a protection mechanism and children have long been considered objects to protect. In this way refugee protection seems an obvious complement to a new, yet robust children's rights regime. The concept of children has since evolved in rhetoric, literature and law. Children are now rights holders in their own right as well as vulnerable persons requiring protection. They are people who possess rights relating to their own protection *and* rights which relate to their own beliefs, opinions and will. Children are subjects of law. Children are depicted as autonomous actors in society within the ever-increasing literature on the topic. However, it is the day-to-day lived experiences of children around the globe that shows that children are universally neither treated as individuals in need of protection nor children with autonomous rights and free-will. For example, the CRC protects the child's right to practice their religion and express their beliefs. However, this right is often limited by the beliefs of the child's family. Or, more generally, the CRC protects the child's right to have their views heard and taken into consideration when decisions related to them are being determined. However, there are very few satisfactory examples of children being facilitated to have an independent voice in the courts and it is often limited by laws relating to capacity, the views of the parents and/or an insufficient system for

guardians *ad litem* or legal representation.²⁵⁴ There is also an unease where qualification is concerned between the two regimes (international children's rights law and international refugee law) as discussed in Chapter Five and demonstrated in this chapter. This unease has been insufficiently dealt with in literature, policy, law and decision making in the case of children.

UNHCR and the Committee have dealt with the relationship between the two regimes and have even paved the way for the wide acceptance of the term *child specific persecution* and the content therein. The guidance provided by both inter-governmental organisations highlighted that there are clear convergences between the two legal regimes and suggested how the Refugee Convention could be interpreted in the case of children. Beyond international guidance, very little research exists which has looked at the characteristics of a positive experience of childhood, the rights embedded in international law that aim to enforce that experience *and* its intersection with refugee protection. The guidance and literature available at present has tended to analyse children's rights through the lens of refugee law. This means children's rights that have an obvious nexus with a convention ground *or* rights which relate to a procedural element of the determinations process are most often analysed. There are only limited examples of literature, policy, law and jurisprudence looking at the qualification of children as refugees through a children's rights lens.

²⁵⁴ See, for example: Martine Goeman et al, *Core Standards for Guardians of Separated Children in Europe* (Defence for Children, the Netherlands 2014) 20-22.

Part I sought to elaborate on three provision rights sub-categories associated with childhood in the refugee context, namely: the right to family, the right to the highest attainable standard of health and living and the right to education. All three positive rights were provided for in the CRC and they can also be found in the literature and law that preceded the CRC. The main finding in Part I related to the disconnect between social and economic rights and persecution. This is a challenge that exists across the board in respect of asylum determinations. It has affected cases submitted by adults as well as children. Part I showed that cases involving children's provision rights, which are heavily grounded in social and economic rights, were infrequent and favoured instances where a breach related to non-discrimination and was State-sponsored or tolerated. Rights that were merely not provided for (for example health care) were deemed not to have a link with the Refugee Convention. Part I also showed that the CRC was explicitly relied upon as guidance in the interpretation of the Refugee Convention in the case of provision rights (albeit infrequently). It also showed that children were sometimes considered objects and sometimes subjects of the law. However, largely, the applicants were considered objects who required third party intervention to enable them to access their rights to family, health, an adequate standard of living and education. Part I also showed that although development or Article 6 were not mentioned in the case law (with the exception of *D. v. Refugee Appeals Tribunal*) the decisions were all forward thinking and mentioned rights which corresponded with

the Committee's interpretation of Article 6: 'physical, mental, spiritual, moral, psychological and social development'.²⁵⁵

Part II elaborated on protection rights deriving from the CRC as outlined in Chapter Two. This section looked primarily at the right to be protected from (1) exploitation including labour and trafficking, (2) forced military recruitment and participation in armed conflict including indiscriminate violence and torture and (3) involvement in illicit activities- gangs. In addition, Part II looked at the role of the family in protecting/persecuting the child. It was established in Part II that protection rights were the most developed in case law, guidance and literature. This is consistent with the historical and contemporary trajectory and development of international children's rights law, including in the context of refugee law. Part II also showed that the social and economic circumstances of the child, those reflected in the provision rights set out in Part I, make children more vulnerable to protection rights violations. Part II also brought to light the fact that the CRC was at times explicitly relied upon in the interpretation of the Refugee Convention in respect of protection rights.

Part II showed that children were viewed as objects of protection in the context of refugee law and where they were viewed as subjects exercising their agency, this tended to work to their disadvantage. For example, protection from involvement in illicit activities is a CRC and

²⁵⁵ *Supra* note 84.

ILO right, yet in refugee law it has at times been interpreted to be a voluntary choice, even at the age of 14. The literature on the topic suggested that where agency enters into the protection sphere the outcomes were more likely to be negative. Development and Article 6 did not arise in protection rights cases either. However, some of the case law, for example in the case of the possibility of re-trafficking, the judgments were also forward looking. They considered the child's access to rights or a livelihood, for example in the case of minors with no known family members in the country of origin, into the future, which reflects the modern understanding of childhood – a process of growth and development. In addition, the case law also referred to rights which corresponded with the Committee's interpretation of Article 6: 'physical, mental, spiritual, moral, psychological and social development'.²⁵⁶

Part III elaborated on participation rights deriving from the CRC as outlined in Chapter Three, but with a focus on the religion and political opinion convention grounds. There is very limited case law and literature on child agency specific to persecution. In the case of adults, as Chapter Four highlighted, there has been a tendency to rely more on political persecution in refugee law generally. However, seemingly in the case of children where there is a nexus with the political opinion ground or any case where agency is prominent are less common and less likely to have positive outcomes. This may be due to the fact that participation rights

²⁵⁶ *Ibid.*

which focus on agency in and of itself require a subjective assessment by a third party.

Part III showed that child cases are dealt with differently. Children were subjects of the law in relation to participation rights. The link to development was less clear in these cases. This is likely due to the fact that decision makers are hesitant to attribute capacity to exercise agency to children and they are not likely to see agency as *part* of childhood. Protection and provision rights, or social and economic rights, were dominant in case law and the literature. Breaches of civil and political rights were infrequently considered in the case of children. This is the opposite of the trend in adult refugee cases. It is difficult to draw out the links between development and this area of case law as these cases largely focussed on whether or not the child had capacity to exercise their agency, not whether or not it was their right to do so. In other words, the case law did not therefore deal with the substantive issue of qualification, but rather focussed on the child's ability to exercise their agency. However, some of the CRC rights such as the rights to identity and to practice one's religion overlap with the Committee's interpretation of Article 6.

Despite being part of the wider discourse on childhood from the seventeenth century, child agency in the rights sphere is only in its infancy.

6.5.1 A Children's Rights Approach

A conceptualisation of the child refugee is therefore someone who is likely an object of law, a particularly vulnerable person requiring protection, whose situation may be worsened or who may be more likely to fear persecution based on their social and economic circumstances. It may then be said that in terms of prioritising rights within the CRC in the interpretation of the Refugee Convention, protection rights rank highest, followed by provision rights and with a nominal interest in participation rights. I say nominal as there is guidance and there is a clear move generally to focus on agency in the case of children in all disciplines, but that children who exercise said agency were looked upon with trepidation as described by Bhabha and Crock.²⁵⁷

Some of the case law discussed in this chapter referenced the CRC. This shows that children's rights, although the regime developed years after the establishment of refugee law, has begun to influence refugee law nonetheless. It is arguable that we are moving in this direction, that breaches of fundamental rights as contained in the CRC are considered to be so severe that they may amount to persecution. This has been a slow process and it is likely that these types of refugee cases will continue to grow. Despite inconsistencies, child-specific applications have been successful. This indicates an expansion of the area of refugee law to encompass developments in the area of children's rights law, most recently in the case of participation rights. This shows that the

²⁵⁷ *Supra* note 34, 106.

Refugee Convention is capable of accommodating applications by children and that a children's rights approach is possible and indeed advisable given the variations in outcomes in case law and approaches to child refugee law.

A children's rights approach to the interpretation of the Refugee Convention would facilitate this process. As part of this, international children's rights law would be considered as part of the assessment as to whether or not a particular rights violation amounted to persecution. A persecution barometer comprised of international children's rights law, underscored by the right to develop, could be used as a tool to interpret the Refugee Convention. That is not to say that all children's rights violations amount to persecution, but in the assessment of child claims, international children's rights law should be considered, referred to, reflected upon. A children's rights approach should lead to greater engagement with the CRC and better visibility of children's rights generally.

There were a number of instances discussed in this chapter where considering children's rights could have assisted in interpreting the threshold of persecution. For example, in *Gomez-Guzmen*, the age of the child who experienced persecution and the impact labour was having on him and also the absence of a family environment all overlap with core CRC rights: the right to be free from hazardous work (Article 32), the right to family as a vehicle to access rights (Article 5) and the right to

develop (Article 6) more generally, but which is also referred to in Article 32. ILO guidance in respect of minimum age requirements and forms of economic exploitation are also relevant. It is not possible to suggest that if these rights were considered that the child would have received protection. Children's rights should form part of the analysis to ensure that any analysis of the threshold for persecution considers their most basic rights, while recognising that the rights violation must not only amount to persecution, but must be characterised by differential impact on the basis of discrimination. And, as argued throughout this thesis, Article 6 should form the basis of this evaluation in line with the interpretation of the right to survival and development provided by the Committee:

'Article 6: the child's inherent right to life and States parties' obligation to ensure to the maximum extent possible the survival and development of the child. The Committee expects States to interpret "development" in its broadest sense as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological and social development. Implementation measures should be aimed at achieving the optimal development for all children'.

Furthermore, a children's rights approach would encompass both social and economic rights and civil and political rights consistent with the rights contained within the CRC. Protection rights therefore might not be

privileged over other rights violations in the application of a children's rights approach to the interpretation of the Refugee Convention.

Chapter Seven Conclusions

7. Introduction

This thesis has analysed the conceptualisation of children and childhood within refugee law and refugee literature. This thesis also analysed the suitability of the Refugee Convention as a framework for the interpretation of child claims. This thesis sought to analyse to what extent a children right's approach to the interpretation of the Refugee Convention is possible. The catalyst was the rapid growth in children's rights discourse following the publication of the CRC. The universal acceptance of the CRC, as a formula for childhood globally insofar as it represented the status quo in 1989, was also a catalyst. However, it was the developments that followed the adoption of the CRC where cross-pollination between the two areas of law began with increasing frequency that provided the impetus to address the hypothesis that a children's rights approach to the interpretation of the Refugee Convention is indeed possible. The application of refugee law in the case of children brought with it conceptual, procedural and interpretive challenges. Developments prior to, but more definitively, post the adoption of the CRC, indicate that a children's rights approach is possible and is developing.

7.1 Dichotomies

As set-out in Chapter One, there has traditionally been a dichotomy between refugee law and children's rights. In fact, as established in Chapters Three and Four, there were concurrent developments in both areas of law at the international level from the 1920s which dealt with the theme of international protection. However, rather than incorporating children or explicitly referring to children in refugee law or arrangements, children were addressed in the context of either once off administrative arrangements such as the *Kindertransport* in the 1930s or the 1924 Declaration of the Rights of the Child. The latter primarily drafted with children affected by war and conflict in mind, a category of

refugees often thought to be *prima facie* in contemporary discourse.¹ During this time, children were invisible within refugee discourse. However, recent developments in guidance, literature and case law to some extent show the interconnectedness of the two modern legal regimes. Nevertheless, contemporary literature deals primarily with children's rights as they relate to procedure and social and economic needs unrelated to qualifying as a refugee. There is a tendency to deal with refugee children in research and guidance holistically, with qualification forming only a small piece of the work. The focus remains on access to social and economic rights in the receiving country and procedural and other safeguards. There is in fact very limited research on the qualification of refugee children, which deals with the interpretation of persecution as it relates to children. References in guidance and law to 'child-specific forms of persecution' are only recent.

Considering these insights, this thesis looked to unpack the reasons for the dichotomy and the invisibility of children within refugee discourse by examining the developmental path followed by children's rights law and refugee law. The thesis undertook to identify and explain areas where there was overlap and where there was no overlap. The purpose of this exercise was to demonstrate the existing relationship between the two regimes and potential for a children's rights approach to expand in light of established guidance and the principles of treaty interpretation mentioned in Chapter Five. The number and proportion of children seeking asylum is growing. Alongside this growth is the growing acceptance that children have agency and can exercise that agency in a variety of ways, which impacts upon the way they are conceived of in law, including refugee law. In theory the increase in number and the growing acceptance of the notion that children have rights *in their own*

¹ UNHCR define '*prima facie refugee*' as a person recognised as a refugee, by a State or UNHCR, on the basis of objective criteria related to the circumstances in their country of origin, which justify the presumption that they meet the criteria of the applicable refugee definition. See: UNHCR, *Master Glossary of Terms Rev. 1* (2006) 17 <<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=42ce7d444>> accessed 12 May 2016.

right and not just as dependents within a family unit should result in more claims for refugee protection in their own right, which should in turn lead to a narrowing of the gap between the two legal regimes. This was the impetus for this thesis.

7.2 A children's rights framework

Chapters Two and Three formed the foundation of the thesis in terms of conceptualising the child outside of refugee law. The purpose of these chapters was to ensure that the analysis of refugee law that followed was cognisant of the wider children's rights framework and the childhood status quo as had developed over centuries, but solidified by the CRC. Childhood as constructed in Chapters Two and Three was defined as a period of growth and maturation where intervention was required to ensure protection from harm, which would interrupt or affect the child's developments as reflected in Article 6 of the CRC. Children as conceptualised in Chapters Two and Three were thus vulnerable. However, these two chapters also established that, based on a wave of literature arising from the seventeenth and eighteenth centuries and later the Civil Rights movement in the US and the codification of rights contained in the CRC, children had an evolving capacity to participate, make decisions and otherwise interact with societies around them. Chapter Three therefore established that children are rights holders and have rights that can be violated relating to their innate vulnerability, but also as a result of their own actions, behaviours or decisions. This chapter established also that adults and States have a role in ensuring access to many rights based also on the aforesaid understanding of children.

7.3 Invisibility in refugee law

Despite the rapid development of the children's rights framework and a near universal acceptance of the legal norms associated with childhood, no such understanding existed in refugee law prior to the adoption of the CRC. In fact, as established in Chapter Four, children were largely invisible in early refugee arrangements. There was very little overlap

between the two legal regimes historically. Furthermore, there is very little literature which considers children in refugee law prior to the CRC. However, with the advent of the CRC, it would follow that refugee law would begin to engage with the children's rights framework. However, at least in the contemporary and well regarded literature on the topic such as contributions made by Hathaway and Goodwin-Gill, there is very little discussion on the interpretation of the Refugee Convention in the case of children. The contemporary literature that deals with child refugees is often related to social and economic rights in the context of procedures and welfare, with only some exceptions. Nevertheless, as a result of the lack of work on child refugees and the lack of any significant correlation between the development of the two regimes and their interplay overtime, a conceptualisation was emerging. This was reinforced by the onslaught of soft law guidance emerging from UNHCR and the Committee on the Rights of the Child as discussed in Chapter Five.

7.4 A burgeoning children's rights approach to the interpretation of the Refugee Convention

The insights from soft law guidance and the ever-growing children's rights literature base showed that a children's rights approach to the interpretation of the Refugee Convention was not something completely new and was something that was to some degree developing. In their guidance materials, UNHCR referred to the CRC and the Committee on the Rights of the Child referred to the Refugee Convention. Both referred to the UDHR. The UDHR, the foundation of both conventions, paved the way for a children's rights approach in that refugee case law, guidance and literature accepted in theory and in practice that the UDHR must form part of the canon of rights interpreted alongside the Refugee Convention. The CRC emerged much later than the UDHR and the ICCPR and the ICESCR, but it nevertheless forms part of the global human rights framework. The interpretation of the Refugee Convention utilising the CRC is however a more recent development. This is due to

the fact that the CRC entered into force over 40 years after the UDHR and over a decade after the ICCPR and ICESCR.

Some child refugee cases dealt with in the higher courts (national high and supreme courts and international or supra-national courts) have referred explicitly to the CRC in their judgments as highlighted in Chapters Five and Six. Legal practitioners have also referred explicitly to the CRC in their representations in child refugee cases. These references have also made their way into higher court judgements. In recent years, direct references to child specific rights deriving from *inter alia* the CRC, the UDHR and the ICESCR have been referred to in child refugee cases as established in Chapter Six. There is very limited case law generally, however, on the interpretation of the Refugee Convention in the case of children.

7.5 Limited case law

This thesis established that two factors have influenced the availability of case law; both relate to the child's innate vulnerability and dependence on adults. In the first instance, child refugee claims are typically subsumed within or connected to the head-of-household's application. Secondly, very few numbers of separated children make their way to the Global North countries to seek refuge, though they represent a significant proportion outside receiving regions such as North America and Europe. This number is on the rise, but the proportion of separated child applicants remains small. This thesis does not discuss the reasons there are fewer separated children arriving to Global North destinations, nor why they may not seek asylum when they do find themselves in Europe or North America, for example. This fact is useful merely to illustrate one of the reasons there are low numbers in applications.

The low number of applications from children presents a challenge to this thesis. It is difficult to gauge what assessment is undertaken when arriving at a decision as to the well-foundedness of the fear of

persecution of a child if they are only considered within a larger claim. Moving away from assessing child claims in the context of an overarching family or head-of-household claim may serve to further develop a children's rights approach. However, we can see that at least procedurally, rights relating to family unity are prioritised. Access to more case law relating to separated children would also be useful for further development as it is precisely the age group of typical separated children (15 to 17) that would likely invoke autonomous rights in the context of persecution (not participation in the assessment itself). There was nevertheless sufficient case law and analysis in the literature to draw some conclusions as to the current state-of-play of the conceptualisation of child refugees in the discourse and higher courts.

7.6 A children's rights barometer for persecution: present day case law

Chapter Six examined case law relating to the children's rights framework, more specifically the conceptualisation of childhood, developed in Chapters Two and Three. It was evident that the most widely used approach to categorise rights contained in the CRC, the Three Ps approach, was also a useful framework in the context of refugee law. The analysis showed that rights considered to be categorised as provision, protection and participation were indeed violated to the extent that they amounted to persecution in the context of refugee law. Children were recognised as refugees on the basis of a violation of provision rights. The right to access education as set out in every human rights treaty under the aegis of the United Nations (and beyond) is one such example. This section also established that provision rights relating to an adequate standard of health (unless amounting to inhuman or degrading treatment) and an adequate standard of living were not as well as developed as standalone grounds. This reflects the reluctance to interpret social and economic rights violations in the context of the Refugee Convention which also exists in the wider discourse.

Some violations of protection rights were also considered to amount to persecution. This category of children's rights was most developed in the refugee case law. Several rights such as the right to be protected from trafficking, torture and abuse, including domestic, have been developed in case law. Chapter Six concluded that children in refugee discourse are most often considered in terms of their innate vulnerability and need for protection. Although there is a reluctance to acknowledge that social and economic rights violations amount to persecution, the protection rights case law established that there is nevertheless recognition of the role social and economic circumstances, in particular poverty, have on other violations which amount to persecution. In other words, it is acknowledged that children from disadvantaged circumstances are more vulnerable to persecution, for example trafficking or military conscription or gang recruitment.

Violations of participation rights were less prevalent in the case law than provision and protection rights. This section considered rights relating to autonomy, or instances where children exercised their agency. The likely reason for particularly limited case law in this area of rights is due to the two factors addressed above: child claims being subsumed within adult claims and the small number of separated children applying for refugee protection relative to the number of separated children globally. This analysis nevertheless showed that some violations of children's participation rights did amount to persecution. The most common cases involving children who exercise their agency relate to views or transgressions which run contrary to societal norms. These rights violations range from involvement in anti-government movements to expressing a desire not to be forced to marry. Other examples relate to sexual transgressions such as one's sexual orientation, gender identity or engaging in pre-marital sexual activities. One challenge in these cases, is the trepidation with which officials approach these cases. Bhabha describes child-specific attitudes, such as suspicion, condescension and patriarchal views, to 'non-conforming adolescents' as contributing to the inconsistent interpretation of refugee law in the case of children. This is

a point of procedure so I will not go into any more detail here, but it is revisited in Section 7.10, 'Moving forward'. Overall, there civil and political rights featured less in the case law and literature than social and economic rights even in the context of *qualification*. This is in contrast to trends in adult claims.

7.7 A particular convention ground

All refugee claims must have a nexus with a convention ground in order to satisfy the refugee definition. Although participation rights were interpreted in the context of the religion and political opinion convention grounds, no other section of the thesis sought to explicitly draw a parallel between the convention grounds and the children's right or rights which were violated. However, it was acknowledged in Chapter Five that child claimants most often invoked the particular social group ground. Indeed, most case law referred to in respect of provision and protection rights were considered within the frame of the particular social group ground. Chapter Five sought to link children's rights discourse and the particular social group ground from the outset, before considering the relevant case law as there was considerable conceptual overlap. Children's rights and childhood studies discourses place the child within a social group, namely children, who have a role in society as a member of that group. Childhood was described as having certain attributes in Chapter Two which shows that the social group both exists based on those innate characteristics, most notably innocence, and that the group is visible by the society around. These are the two criteria refugee applicants who invoke the particular social ground must normally satisfy. Indeed, there is a wealth of guidance and case law that support the relevance of the particular social group ground in the context of child refugee law.

The other grounds, race, nationality, religion and political opinion were referred to as relevant. However, the main objective of the thesis was to examine instances where violations of children's rights amounted to persecution. The convention grounds served to embed the children's

rights violations in refugee law. To take an example, in the case of the child who would be prohibited from accessing education on the basis of nationality (which using UNHCR's and Sir Goodwin-Gill's expanded view of nationality, was Ashkali - considered to be Roma by surrounding society), he could be conceptualised as a child (and thus inherently part of a social group) and someone who suffered discrimination based on nationality. For the purposes of this thesis, it is the violation of the right to education that is important, not the convention grounds as the main question asked herein is which children's rights violations amount to persecution.

7.8 The findings

Children are recognised as refugees on the basis of child-specific forms of persecution. This assertion is buttressed by expansive guidance, literature and some jurisprudence. The case law to date shows a willingness to engage with children's rights in the interpretation of the Refugee Convention. However, the limited case law reaching higher courts and the number of cases involving a violation of a fundamental children's right which is determined not to amount to persecution, for example protection from forced gang involvement as discussed in Chapter Six shows that the approach to date is inconsistent. There is inconsistent utilisation of and reference to the CRC in refugee case law. This may be due to the lack of authoritative guidance in the national and international contexts which would require consideration of one treaty in the interpretation of another (assuming they are relevant).

In addition, this thesis found that violations of protection rights are most prevalent in refugee case law databases and literature. This indicates that the *child-as-vulnerable-and-in-need-of-protection* conceptualisation is dominant in this area of law, consistent with the children's rights status quo. However, there are indications that refugee law is evolving alongside the wider children's rights discourse in light of developments around child agency. This is evidenced by guidance, literature and case law on children's abilities and right to exercise their agency in the

context of religion and politics, for example, to the extent that they may put, or find themselves, at risk of persecution. These developments are new. The conceptualisation of children in refugee law to date is therefore paternalistic in its application. This is not surprising as it is consistent with the wider application of the children's rights law framework.

Paternalism in refugee law is also related to best interests assessments as discussed in Chapter Three. The best interests principle requires a subjective and third party assessment of the best interests of the child. Although the child has a right to participate in this process and this is confirmed by the Committee on the Rights of the Child, the processes through which the best interests are determined are often criticised for being informed by decisions made by adults *for* children rather than adults in partnership *with* children.² There is therefore a tendency to favour the paternalistic approach in viewing the child as in need of protection in refugee law rather than looking to perhaps the more nuanced rights of children who are exercising their rights relating to active citizenship, like freedom of expression. This is reminiscent of Locke's seventeenth century perspective that children were unable to access citizenship rights as they could only exercise their agency inconsistently.

The introduction of a children's rights approach would perhaps bring refugee law more in line with the CRC. The Three P's approach to the interpretation of the CRC established that there are three sides to children's rights: provision rights, protection rights and participation rights. This thesis also established that these three categories represent the universal understanding of childhood, an understanding based on the principle of development. No one set of rights is seen to be more important than the others in pursuit of 'optimal' development. It is therefore possible to suggest that participation rights carry the same weight. In applying this approach in the context of refugee law, the

² See: Jane Fortin, *Children's Rights and the Developing Law* (3rd edn, CUP 2009).

result should be the same, for example, protection rights would not be prioritised over participation rights. Children would not be disadvantaged by the perception of or the act of exercising their agency. A children's rights approach may mitigate this risk.

7.9 The questions

This conclusion raises a number of questions as to the development of the children's rights approach to the interpretation of the Refugee Convention.

Primarily, however, it challenges the existing children's rights paradigm in that the interpretation of the Refugee Convention to date only uneasily deals with issues of agency and instances where children are indeed the subjects of law, rather than merely objects to protect by means of legal intervention. Although this thesis does not deal with matters of procedure, the conceptualisation herein challenges what Bhabha refers to as 'child-specific attitudes'.³ Some research looks at this aspect of procedure, in particular credibility, but more study is required to fully grasp the impact attitudes have on the grant of status. It is not just further study that will correct this perception or correct the tendency to view children as incapable of holding political views in their own right, it is consistency in the approach of the law and specifically a children's rights approach. In the context of applying a human rights approach to the interpretation of the Refugee Convention, Foster suggested that clear and authoritative guidance on the application of human rights law in the interpretation of the Convention and in unpacking the meaning of persecution would facilitate a more expansive interpretation taking into account the wealth of literature and case law on violations of social and economic rights in the context of persecution.⁴ The same can be said of the children's rights approach.

³ Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age* (PUP 2014) 207.

⁴ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refugee from Deprivation* (CUP 2007).

This thesis sought to analyse how children are conceived of in refugee law and in what instances would a violation of a children's right amount to persecution in current practice, specifically in the Global North. However, discussions on deficit childhood in Chapter Two raised some questions around the universality of the children's rights law framework with the CRC as the bulwark. Chapter Five referred to a resistance to incorporate the best interests principle in the context of refugee law due to the fear that it may mean children's claims would be weighted differently in that officials would have to make a welfare and/or rights based assessment comparing two jurisdictions rather than using the existing, albeit developing in the context of children, interpretation of the definition of refugee. There is a fear that broadening the scope for interpretation of the Refugee Convention may result in more children, and perhaps a significant proportion of the world's children, becoming eligible for protection on the basis that their children's rights as contained within the CRC are not satisfied and/or regularly violated.

The Refugee Convention does not, however, allow for such flexibility, as in it cannot encompass all violations of children's rights as they must be deemed to amount to persecution with a link to a convention ground. The rights violations must not only amount to persecution, but must be characterised by differential impact on the basis of discrimination. There is nevertheless scope for expansion consistent with the laws of treaty interpretation in line with the object and purpose of the treaties relevant to the case. There is an abundance of guidance on the ways in which the Refugee Convention may consider CRC-based rights. At the fore are recommendations and laws which require a lowering of the threshold of persecution, for example witnessing rather than experiencing a form of violence, or a more generous application of the burden of proof. However, as said throughout this thesis, these are matters of procedure.

7.10 Moving forward

Considering the findings and the conclusions, a number of paths of research would be recommended to continue to build upon the children's

rights approach to the interpretation of the Refugee Convention. Firstly, a reverse approach to the structure of this thesis would provide an additional avenue through which we could conceptualise the child refugee. A reverse approach would put refugee law first and children's rights second. The analysis would thus stem from the refugee legal framework and deal with the convention grounds and how child's claims are dealt with in relation to the 'link'. This approach was not chosen by this thesis as the objective was to assert a more child-centred conceptualisation of childhood before deconstructing rights which may be violated and perhaps amount to persecution. This statement was qualified by the word 'more' as the CRC, which forms the basis of the international legal framework was not drafted with or in consultation with children, but is nevertheless closer to a child-centred framework than one originating within the refugee framework given that children are not explicitly mentioned within the Refugee Convention.

Secondly, this research and the project described above would also be complimented by an in-depth analysis of the procedural challenges faced by children seeking asylum in order to ascertain the extent to which refugee determinations are affected by factors like credibility or 'child-specific attitudes'. It is not sufficient to conclude here with a conceptualisation of childhood based on children's rights and an examination of the instances where a violation amounts to persecution. The objective and subjective analyses of the different elements of a child's claim must be considered. For example, how is the child's right to have their voice heard, or participate, in determination proceedings? This question is particularly pertinent in those instances where the child is subsumed and at times indistinguishable in the adult's claim. Another point raised throughout is how a refugee decision maker may make a subjective assessment as to the capacity of a child to exercise their agency by expressing views contrary to the religious, political or societal status quo. These factors impact upon the child's ability to access asylum procedures and their ability to substantiate a claim and thus must form part of this discourse. Indeed, a wealth of literature is already

available on this aspect of child claims, but it does not deal with a children's rights approach to the interpretation of the convention with a view to assessing the qualification of child refugees. As noted throughout, safeguards and child welfare dominate discourse on child refugees and asylum seekers.

Thirdly, there is insufficient case law available at the international level. It would be a worthwhile endeavour to focus on one or more countries as case studies to analyse their administrative decisions and lower court decisions, as well as a more exhaustive evaluation of higher court decisions which deal with children qualifying or applying to qualify for refuge. This thesis provides a general overview of the literature and the case law available and widely accessible to researchers via the most common refugee law databases and literature. However, the findings are inconclusive as the case law, which is very limited, does not illustrate significant trends.

7.11 Conclusion

The hypothesis set out in Chapter One was that the Refugee Convention is capable of accommodating claims from children and that in fact there is already jurisprudence, guidance and literature that support a children's rights approach to its interpretation. To complement the children's rights approach, this thesis set out to establish a conceptualisation of child refugees and asked which children's rights when violated amount to persecution. The hypothesis is supported by the findings in the thesis in that a children's rights approach is possible and indeed there is evidence that it is already developing. The conceptualisation of the child refugee that emerged was one of innocence and vulnerability, yet there are indications that autonomous rights are increasingly the subject of refugee determinations. This is consistent with developments in children's rights and children and childhood studies generally.

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