



The University of
Nottingham

UNITED KINGDOM • CHINA • MALAYSIA

The Interplay of Children's Rights and International Refugee Law:

Protection and Best Interests of the Refugee and Asylum-Seeking Child

By

F Ruth Brittle, LLB, LLM, Solicitor (non-practising)

Thesis submitted to the University of Nottingham for the degree of Doctor of
Philosophy

June 2019

Table of Contents

Acknowledgements	iv
Abstract	v
Table of Cases.....	vi
Table of Treaties	ix
Abbreviations	xi
CHAPTER 1: Introduction.....	1
1. Context and Scope of Thesis.....	1
2. Reason for the Research.....	9
3. Research Objectives and Research Questions.....	11
4. Methodology	13
5. Thesis Structure	13
6. Rights-based approach	15
7. Key Definitions and concepts	17
7.1 Migrant	18
7.2 Refugee.....	19
7.3 Asylum-Seeker	20
7.4 Unaccompanied and Separated Children	21
7.5 Children on the Move.....	22
7.6 International Protection	23
8. Concluding Remarks	23
CHAPTER 2: Article 3 CRC: Best Interests, Protection, Care and Well-Being.....	24
1. Introduction.....	24
2. Best Interests in International Law: An Introduction	25
3. Article 3 CRC	29
3.1 Article 3(1): The Best Interests Principle	29
3.2 Article 3(1): Drafting the Best Interests of the Child Principle.....	32
3.3 Operation and Scope of the Best Interests Principle.....	38
3.4 Article 3(2): Protection and Care for a Child’s Well-Being.....	43
3.5 Breathing Life into the Right to Protection and Care as is Necessary for Well-Being under Article 3(2)	45
4. Best Interests Principle in a Rights Framework	50
4.1 The Role(s) of the Best Interests Principle.....	51
5. Meaning of ‘Best Interests’	57
5.1 Why <i>Best Interests</i> ?.....	58

5.2	What Interests of Children are Protected by the Principle?	59
6.	The Best Interests Principle: Challenges and Problems	62
7.	Conclusion.....	65
CHAPTER 3: Article 22 CRC, the Child as a Refugee or Asylum-Seeker		67
1.	Introduction	67
2.	The International Legal Framework for a Refugee Child.....	69
2.1	Right to seek and enjoy asylum.....	70
2.2	The Convention on the Rights of the Child 1989.....	72
2.3	The Convention Relating to the Status of Refugees 1951 (The Refugee Convention).....	74
3.	Article 22 CRC.....	76
3.1	Travaux Préparatoires of Article 22 CRC	80
3.2	Article 22(1) – Scope and Parameters.....	86
3.3	Article 22(2) – Scope and Parameters.....	94
4.	Specific (Applicable) Rights under the CRC	97
4.1	Non-discrimination (Article 2 CRC).....	98
4.2	Right to life, survival and development (Article 6 CRC).....	99
4.3	Right to be heard and participation (Article 12 CRC)	101
4.4	Right to liberty/freedom from detention (Article 37(b)).....	104
4.5	Right to family Life: Articles 9, 10, 16 and 22(2) CRC	107
5.	Conclusion.....	116
CHAPTER 4: Protection in International Law - IRL, IHRL and CRC		117
1.	Introduction	117
2.	What is Protection?.....	119
3.	Protection under International Refugee Law (IRL).....	122
3.1	What is international protection?.....	122
3.2	State Protection in the Refugee Convention.....	126
3.3	Complementary Protection.....	135
4.	Protection under International Human Rights Law (IHRL)	139
4.1	Obligation to protect and the tripartite typology of obligations	140
4.2	Obligation to protect and fulfil.....	142
5.	Protection for Refugee Children under International Children’s Rights law. 143	
5.1	Special Protection of Children.....	144
5.2	Protection under the CRC.....	145
6.	Conclusion - The Normative Content of the Right to Protection	150
CHAPTER 5: <i>Non-Refoulement</i> and the Protection of Child Refugees		153

1. Introduction.....	153
2. Jurisdiction and Extraterritorial Obligations.....	155
3. Four Scenarios	162
4. <i>Non-Refoulement</i> in International Refugee Law	163
4.1 <i>Non-refoulement</i> under the Refugee Convention 1951	165
5. <i>Non-Refoulement</i> in International Human Rights Law	169
5.1 <i>Non-refoulement</i> – Human Rights Treaties	169
5.2 <i>Non-Refoulement</i> – Customary International Law	174
5.3 <i>Non-Refoulement</i> and Child Refugee and Asylum-Seekers	175
6. Best Interests, Protection and <i>Non-Refoulement</i>	187
6.1 Return decisions	190
6.2 Migration Control Actions	194
7. The Principle of Precaution and <i>Non-Refoulement</i>	195
8. Conclusion	197
CHAPTER 6: Best Interests and the Refugee Child’s Right to Protection.....	199
1. Introduction.....	199
2. Best Interests in International Refugee Law.....	200
2.1 Best Interests of the Refugee Child – ‘Soft Law’ Developments.....	203
2.2 Best Interests and IRL – International standards.....	214
3. Best Interests and ‘Appropriate Protection’ in the Asylum Process.....	215
3.1 Access to the territory of the host state.....	215
3.2 Reception conditions	219
3.3 Access to asylum procedures and determination of refugee status	222
3.4 Family reunification	224
3.5 Durable Solutions	226
3.6 Returns and Deportation	229
4. Does balancing best interests ensure ‘appropriate protection’?	233
5. Conclusion	235
CONCLUSION	236
1. Thesis Objective and Main Argument	236
2. My Key Findings.....	237
Bibliography.....	241

Acknowledgements

My research journey has not been an easy one. It has demanded my heart and soul and there have been difficult challenges along the way. However, there is also a lot I am grateful for, in particular the opportunities this PhD has given me and the people I have met on my journey. To all my friends who have supported, encouraged, guided and motivated me through the highs and lows, thank you.

I would like to thank my supervision team of Professor Aoife Nolan, Professor Ralph Sandland, Professor Dominic McGoldrick and Dr Daria Davitti. They have challenged, advised and supported me throughout. They have read and commented on my thesis and brought different perspectives to bear. They helped shaped my thinking, taught me so much and I am grateful for their inspiration and encouragement along the way. I would also like to thank the School of Law at the University of Nottingham for the opportunity to spend three and half years pursuing this project. I would also like to thank the Law School Reception team who are the loveliest team and no request is ever too difficult!

I am indebted to the AHRC/M3C Doctrinal Training Partnership for funding my PhD and providing me with support, training and opportunities which have enhanced my doctoral experience. I will never forget 'Journey to Justice' and the opportunity to contribute to such a fantastic project.

Next I would like to thank the PhD community at the University of Nottingham for friendship and debate and for keeping me grounded. I would especially like to thank Michelle, who has always been there for me, and Tim, Katarina, Cerys and Naomi who have all helped and supported me in different ways, I am forever in your debt.

To Sarah, Sally, Leanne, Rachael and Heidi, who have patiently listened to me talking about my thesis, kept me sane over the last three and half years and told me to keep going when I felt like giving up, thank you. To Leanne, a huge thank you for the end of thesis proof reading and spotting typos, stray commas and lack of full-stops!

To my dear friend Helena (Heg), who was taken from us too early, you were the inspiration for my involvement with refugees and asylum-seekers in Nottingham and gave me so much love and care when I needed it most, I miss you so much. I want to thank Suzy who gave me so many insights into the traumas and pain refugees face to get to the UK and safety.

To Mum and Dad (& the whole the family), thank you for everything, I could not have done this without you.

Finally, to Simon, Maeve and Ciaran, for their patience and endurance and for putting up with me as I laboured through this thesis. To Maeve and Ciaran, I apologise that my 'book' does not have pictures, a main character, a protagonist or a good story line! To Simon, without your love and support, I would never have finished this, you have been my rock, my love, my supporter, the provider of lovely food and patient proof-reader. You have supported my journey and surrounded me with love. I cannot thank you enough for what you have done and sacrificed, so that I could do this!

Abstract

There is broad acceptance of the interaction between international human rights law (IHRL) and international refugee law (IRL) and that the growing alignment between both areas of international law contributes to the development of IRL. Nevertheless, the child is often invisible or incorrectly assessed in a refugee status determination process. The United Nations Convention on the Rights of the Child (CRC) is recognised as an interpretative instrument to assess refugee children's claims. This is evidenced in contexts including the interpretation of the definition of 'refugee' in the Refugee Convention, the determination of the 'being persecuted' criteria, the *non-refoulement* duty of the state and as a potential additional source of protection for children.

The best interests principle in Article 3(1) CRC, which renders children's best interests a primary consideration in all actions concerning them (including refugee and asylum-seeking children) has been used to balance a child's interests against the interests of others in cases involving them. The principle has become a dominant feature in asylum cases where children are involved, with the child's interests being balanced against those of the state. The growing alignment between IHRL (including children's rights) and IRL reflects the fact that IRL is moving towards a rights-based approach to protection in the context of child asylum claims, but that the parameters of protection are interpreted too restrictively. This is due to a narrow interpretation of the best interests principle, resulting in the privileging of state interests over the refugee child's protection and rights.

My thesis argues that this state of affairs is problematic in terms of ensuring the protection and the rights of refugee children. It does so on the basis that the balancing exercise currently carried out by decision-makers ignores the obligation of the state under Article 3(2) CRC to protect and care for the child as is necessary for their well-being. The thesis argues that this obligation, which complements the best interests principle in Article 3(1) CRC, as well as the obligation to provide 'appropriate protection and humanitarian assistance' to refugee children under Article 22 CRC amounts to a right to protection for the refugee child in terms of the CRC. This right should be an integral part of the operationalisation of the best interests principle in decision-making about the refugee child.

Table of Cases

INTERNATIONAL

CAT Committee

JHA v Spain No 323/2007, UN Doc. CAT/C/41/D/323/2007 (2008).

CRC Committee

DD v Spain, UN Doc. CRC/C/80/D/4/2016 (12 February 2019).

IAM (KYM) v Denmark, UN Doc. CRC/C/77/D/3/2016 (25 January 2018).

YB and NS v Belgium, UN Doc. CRC/C/79/D/12/2017 (27 September 2018).

Human Rights Committee

ARJ. v Australia 692/1996, UN Doc CCPR/C/60/D/692/1996 (28 July 1997).

Baban v Australia 1014/2001 (6 August 2003).

Errol Simms v Jamaica 541/1993, UN Doc. CCPR/C/53/D/541/1993 (3 April 1995).

G.T. v Australia 706/1996, UN Doc. CCPR/C/61/D/706/1996 (4 December 1997).

Jalloh v The Netherlands 794/1998 (23 March 2002).

Lopez-Burgos v Uruguay R.12/52 (29 July 1981).

Raziyeh v Denmark 2512/2014, UN Doc, CCPR/C/119/D/2512/2014 (10 April 2017).

X v Denmark, 2007/2010 UN Doc. CCPR/C/110/D/2007/2010 (12 May 2014).

X v Sweden 1833/2008, UN doc. CCPR/C/103/D/1833/2008 (1 November 2011).

International Court of Justice

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004.

REGIONAL

Court of Justice of the European Union (CJEU)

Parliament v Council C-540/03 (27 June 2006).

Chakroun v Minister van Buitenlandse Zaken, C-578/08 (4 March 2010).

N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland, C-411/10 and C-493/10 (1 February 2011).

European Committee on Social Rights

EUROCEF v France, Decision on Merits, Complaint No 114/2015 (24 January 2018).

European Court of Human Rights

Abdulaziz, Cabales and Balkandali v the United Kingdom, Application nos 9214/80, 9473/81 and 9474/81, GC (28 May 1985).

Al Skeini v United Kingdom, Application no 55721/07 (7 July 2011).

Amuur v France, Application no 19776/92 (25 June 1996).

Antwi v Norway, Application no 26940/10 (14 February 2012).
 Berisha v Switzerland, Application no 948/12 (30 July 2013).
 Catan and others v Republic of Moldova and Russia, Application nos
 43370/04, 8252/05, 18454/06 (19 October 2012).
 Chahal v United Kingdom, 23 EHRR 413 (15 November 1996).
 Cyprus v Turkey, Application nos 6780/74 and 6950/75 (26 May 1975).
 Gebremedhin v France, Application no 25389/05 (26 April 2007).
 HA and Others v Greece, Application no 19951/16 (28 February 2019).
 Hirsi Jamaa v Italy, Application no 27765/09 (23 February 2012).
 Issa and others v Turkey, Application no 3821/96 (16 November 2004).
 Jeunesse v The Netherlands, Application no 12738/10 (3 October 2014).
 J.K. and Others v. Sweden [GC], Application no 59166/12 (23 August
 2016).
 Khan v France, Application no 12267/16 (28 February 2019).
 Lozidou v Turkey, Application no 15318/89 (23 February 1995).
 Mayeka and Mitunga v Belgium, Application no 13178/03 (12 October
 2006).
 MSS v Belgium and Greece, Application no 30696/09 (21 January 2011).
 Muskhadzhiyeva v Belgium, Application no. 41442/07 (19 January 2010).
 ND and NT v Spain, Application Nos. 8675/15 and 8697/15 (3 October
 2017).
 Neulinger and Shuruk v Switzerland, Application no 41615/07 (6 July
 2010).
 Nunez v Norway, Application no 55597/09 (28 June 2011).
 Rahimi v Greece, Application no 8687/08 (5 April 2011).
 Riad and Idiab v Belgium, Application nos 29787/03 and 29810/03 (24
 January 2008).
 Sen v The Netherlands, Application no 31465/96, (21 December 2001).
 Sharifi v. Italy and Greece, Application no 16643/09 (21 October 2014).
 Soering v United Kingdom, Application no 14038/88 (7 July 1989).
 SS and Others v Italy, Application no 21660/18 (pending)
 Tuquabo-Tekle v The Netherlands, Application No 60665/00 (1 March
 2006).
 Üner v The Netherlands, Application no 46410/99 (18 October 2006).
 Z and T v The United Kingdom, Application no 27034/05 (28 February
 2006).
 ZA v. Russia, Application no 61411/15 (28 March 2017).

Inter-American Court and Commission of Human Rights

Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-
 21/14 (August 19 2014) Rights and Guarantees of Children in the Context
 of Migration and/or in need of International Protection.
 Pacheco Tineo Family v Bolivia Judgment, series C No 272 (November 25
 2013).

NATIONAL

Australia

Mehmood v Minister for Immigration and Multicultural Affairs [2000] FCA
 1799.
 Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR
 1.
 Minister for Immigration and Multicultural Affairs v Respondents,
 S152/2003 (2004) 222 CLR 1.

Plaintiff S195/2016 v Minister for Immigration and Border Protection (CTH) & Ors [2017] HCA 31.

Wan v Ministry of Immigration and Multicultural Affairs (2001) 107 FCA 133.

Kammasae v Commonwealth of Australia and others [2017] VSC 537 (6 September 2017).

Canada

Baker v Canada (MCI) [1999] 2 SCR 817.

Kim v Canada (MCI)[2011] 2 FCR 448.

Ward v Canada (Attorney General) [1993] 2 SCR 689.

New Zealand

Re MN, Refugee Appeal No.2039/93 (NZ RSAA, 12 February 1996).

RSAA Refugee Appeal No 71427/99 (16 August 2000).

United Kingdom

AA (unattended children, Afghanistan) [2012] UKUT 00016.

AJ (Liberia) v Secretary of State for the Home Department [2006] EWCA Civ 1736.

AM (a child) v Secretary of State for the Home Department [2018] EWCA Civ 1815.

AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123.

Atkinson v Secretary of State for the Home Department [2004] EWCA Civ 846.

Citizens UK v Secretary of State for the Home Department [2018] EWCA Civ 1812.

DK v Secretary of State for the Home Department [2006] EWCA Civ 682.

Horvath v Secretary of State for the Home Department [2000] UKHL 37, [2001] 1 AC 489.

N v Secretary of State for the Home Department [2004] 1 WLR 1182.

R (European Roma Rights Centre) v. Immigration Officer at Prague Airport [2004] UKHL 55.

R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin III Regulation – investigative duty) IJR [2016] UKUT 00231 (IAC).

R v Secretary of State for the Home Department exp Adan [2001] 2 AC 477.

Secretary of State for the Home Department (SSHD) v ZAT and others [2016] EWCA Civ 810 (also cited as ZT (Syria) and others v SSHD [2016] EWCA Civ 810).

ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v Secretary of State for the Home Department (2015) UKUT 6.

ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4.

United States of America

Sale, Acting Commissioner, Immigration and Naturalization Service et al., Petitioners v Haitian Centers Council, Inc. et al, 509 US 155 (1993).

Table of Treaties

Geneva Declaration of the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec. Supp. 21, 43 (1924 Declaration).

Convention relating to the International Status of Refugees 1933 169 LNTS 3663 (adopted 28 October 1933) (official text in French).

UN General Assembly, Universal Declaration on Human Rights, 217 A (III) (10 December 1948)(UDHR).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('Fourth Geneva Convention').

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (adopted 4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR).

Convention Relating to the Status of Refugees (1951) (28 July 1951, came into force 22 April 1954) 189 UNTS 150; 1967 Protocol Relating to the Status of Refugees (1967) 606 UNTS 8791 (the Refugee Convention).

UN Declaration on the Rights of the Child, GA Res 1386 (XIV) UN Doc. A/4354 (1959)(adopted 20 November 1959) (1959 Declaration).

European Social Charter ETS 35 (1961) and the European Social Charter (revised) ETS163 (1996) (ESC or Charter).

International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1966) 993 UNTS 3 (ICESCR).

International Covenant on Civil and Political Rights (adopted 19 December 1966, in force 23 March 1976) 999 UNTS 171 (ICCPR).

Declaration on Territorial Asylum, UNGA Resolution 2312 (XXII)(14 December 1967).

Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 (entered into force 7 December 1978) (Additional Protocol II).

Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13 (CEDAW).

Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237 (adopted on 18 December 2002, entered into force 22 June 2006).

Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UN General Assembly UN Doc. A/RES/41/85 (3 December 1986).

Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3 (CRC).

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child prostitution and Child pornography, UN Doc. A/RES/54/263 (adopted 25 May 2000, entered into force on 18 January 2002) (OPSC).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc. A/RES/54/263 (adopted 25 May 2000, entered into force 12 February 2002) (OPAC).

Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, UN Doc. A/RES/66/138 (adopted 19 December 2011, entered into force 14 April 2014) (OPCP).

African Charter on the Rights and Welfare of the Child, opened for signature 1 July 1990 OAU Doc. CAB/LEG/24.9/49 (entered into force 19 November 1999)(ACRWC).

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UN Doc. A/RES/45/158 (adopted 18 December 1990, entered into force 1 July 2003) (ICMW).

Charter of Fundamental Rights of the European Union OJ C/364/01 (18 December 2000) and 2012/C 326/02 (26 October 2012)(CFREU).

Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (adopted 30 March 2007, entered into force 3 May 2008)(CRPD).

International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, UN Doc A/61/448 (adopted 20 December 2006, entry into force 23 December 2010) (CED).

Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
ACHR	American Convention on Human Rights
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFREU	Charter of Fundamental Rights of the European Union (EU Charter of Fundamental Rights)
CJEU	Court of Justice of the European Union
CMW	Committee on Migrant Workers
CRC	Convention on the Rights of the Child
CRC Committee	Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EASO	European Asylum Support Office
ECOSOC	United Nations Economic and Social Council
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
ECSR	European Committee of Social Rights
ESC	European Social Charter and the Revised Social Charter
EU	European Union
GA	United Nations General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACtHR	Inter-American Court on Human Rights
ICJ	International Court of Justice
ICL	International Criminal Law

ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ICRC	International Committee of the Red Cross
ICRL	International Children’s Rights Law
IGO	Inter-Governmental Organisation
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILO	International Labour Organisation
IO	International Organisation
IOM	International Organization for Migration
IRL	International Refugee Law
NGO	Non-Governmental Organisation
OHCHR	United Nations Office of the High Commissioner for Human Rights
UKCA	United Kingdom Court of Appeal
UKSC	United Kingdom Supreme Court (previously UKHL: House of Lords)
UKUT	United Kingdom Upper Tribunal
UN	United Nations
UNCAT	Committee against Torture
UNCEDAW	Committee on the Elimination of Discrimination Against Women
UNCRPD	Committee on the Rights of Persons with Disabilities
UNHRC	Human Rights Committee (ICCPR)
UNHCR	United Nations High Commissioner for Refugees
UNHCR ExCom	Executive Committee of the United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties

CHAPTER 1: Introduction

1. Context and Scope of Thesis

Children¹ who are on the move and outside their country of origin are particularly vulnerable and face substantial challenges in securing access to asylum and refugee status determination procedures and enjoyment of their rights.² Despite almost universal ratification of the Convention on the Rights of the Child (CRC),³ it has been observed that children seeking asylum often exist in a state of rightlessness⁴ and are treated as migrants first, subject to suspicion, resentment and policies of immigration control.⁵

Child asylum-seekers and refugees, whether accompanied, unaccompanied⁶ or separated⁷ cross three areas of international law; international refugee law (IRL), international humanitarian law (IHL) and international children's rights law (ICRL). Although IHL is relevant, this thesis is focused on the interaction between IRL and children's rights, where a child refugee or asylum-seeker has to negotiate a new future in a country of refuge and safety. Children are rights bearers under the CRC and in states which have ratified the Convention Relating to the Status of Refugees 1951 and its Protocol 1967 (Refugee Convention),⁸ a child's status will be determined under refugee status determination procedures set up by the state.⁹ In order to access these procedures, the asylum-

¹ A 'child' is anyone under the age of 18, unless, under the law applicable to the child, majority is attained earlier, as defined by Article 1 of the Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990) 1577 UNTS 3 (CRC).

² Committee on the Rights of the Child (CRC Committee), General Comment No. 6, 'Treatment of Unaccompanied and Separated Children Outside their Country of Origin' (2005) CRC/GC/2005/6 (GC 6), para 1.

³ 196 States have ratified CRC; the USA is the only UN Member State which has not ratified it.

⁴ J Bhabha, 'Arendt's Children: Do today's Migrant Children Have a Right to Rights?' (2009) 31 *Human Rights Quarterly* 410 at 420.

⁵ R Thorburn Stern, 'Unaccompanied and Separated Asylum-seeking Minors: Implementing a Rights-based Approach in the Asylum Process' in S Mahmoudi, S, P Leviner, A Kaldal, and K Lainpelto (eds) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff, Leiden and Boston 2015) 242 at 243.

⁶ 'Unaccompanied children': defined in CRC Committee, GC 6, para 7 (see below in section 7.4).

⁷ 'Separated Children': defined in CRC Committee, GC 6, para 8 (see below in section 7.4).

⁸ Convention Relating to the Status of Refugees (1951) (28 July 1951, came into force 22 April 1954) 189 UNTS 150; 1967 Protocol Relating to the Status of Refugees (1967) 606 UNTS 8791 (the Refugee Convention).

⁹ The Refugee Convention does not prescribe the procedure for determining refugee status and leaves the choice of measure of implementation at national level: see GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press, Oxford 2007), at 54 and 528 – 551.

seeking or refugee child has to be within the state's jurisdiction.¹⁰ A child, recognised as a refugee by the state, should not only be accorded the rights provided for in the Refugee Convention, but should be able to enjoy all of his or her rights under the CRC from the moment he or she enters the jurisdiction.

In both legal frameworks, the principle of the best interests of the child¹¹ has become fundamental¹² to any decision or action concerning the child – a standard which, according to the Committee on the Rights of the Child (CRC Committee), is a substantive right, a procedural guarantee and an interpretative legal principle.¹³ A central theme of my thesis is the role of the best interests principle in identifying the parameters of international protection for a refugee or asylum-seeking child and whether this fulfils a child's rights to protection and care for their well-being.¹⁴ Children forced to migrate to escape persecution, conflict, generalised violence, poverty and natural disasters encounter a tension between their rights and interests and those of the state. For the state there is a tension between its 'right' to control the border and its citizens and its obligation to protect all children within its jurisdiction. In this context children's rights and interests are pitted against the state interest in immigration control.

Ever since refugee status was recognised in international law in the 1930s, states tread a fine line between providing refuge for those genuinely fleeing a 'well-founded fear of persecution'¹⁵ and ensuring border control to manage the entry requirements for people who wish to take advantage of better economic conditions or to prevent those who intend to cause harm, from entering the state. A rights-based approach to providing protection for refugee children should acknowledge the risks children are exposed to and seek to ensure the enjoyment of the full range of rights which follows from refugee status and their status as a child.¹⁶

¹⁰ The CRC has a broad jurisdictional clause in Article 2 and thus the rights in the CRC apply to all children in the state's jurisdiction, whether or not the child has reached the territory of the state. See Chapters 3 and 5. However, in the UK, the safeguarding and welfare (best interests) duty only applies to children who are already in the UK – s 55 of the Borders Citizenship and Immigration Act 2009 (BCIA).

¹¹ Article 3(1) CRC.

¹² CRC Committee, General Comment No.14, 'The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)', UN Doc. CRC/C/GC/14 (2013)(GC 14), para 1 and para 6(b).

¹³ These three roles of best interests are set out in CRC Committee GC 14, para 6.

¹⁴ Article 3(2) CRC.

¹⁵ Article 1A(2) of the Refugee Convention.

¹⁶ JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017) at 15.

Through the influence of international human rights law (IHRL), IRL has expanded its reach beyond the five Refugee Convention grounds for a 'well-founded fear of being persecuted'.¹⁷ IHRL standards are utilised by domestic and regional courts, by quasi-judicial bodies, state actors and the UN High Commissioner for Refugees (UNHCR) to interpret the definition of 'refugee'¹⁸ and 'being persecuted' under Article 1A(2) of the Refugee Convention. IHRL has also played a crucial role in the expansion of the principle of *non-refoulement*¹⁹ and is the body of law underpinning complementary protection.²⁰ Hathaway argues that the influence of IHRL over IRL is so strong that refugee law should be reconceived as human rights protection.²¹ Goodwin-Gill defends the Refugee Convention against the criticisms that it is 'redundant' and 'functionally inefficient, overly legalistic, complex and difficult to apply'.²² Rather than abandoning the Refugee Convention, there should be commitment to making it more efficient and effective and to filling the protection gaps, recognising that the Convention has matured 'under the influence of human rights and converging humanitarian norms'.²³ Chetail asserts that IHRL has 'radically informed and transformed' IRL so that 'the normative frame of forced migration has been displaced from refugee law to human rights law'.²⁴ This is particularly pertinent for both accompanied and unaccompanied children who, historically, have been invisible in asylum and immigration law and unable to access refugee status determination processes.²⁵ The CRC influence on IRL has had a particularly significant impact on child asylum claims, as states are obliged to interpret the refugee definition under the

¹⁷ V Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press, Oxford 2014) 19 at 20. The five grounds are race, religion, nationality, membership of a particular social group and political opinion (Article 1A(2) of the Refugee Convention).

¹⁸ JC Hathaway, *The Law of Refugee Status* (Butterworths, Toronto 1991); M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge 2007); JC Hathaway and M Foster *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge 2014).

¹⁹ J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 *The International Journal of Children's Rights* 251; J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007); V Chetail n 17, at 23.

²⁰ See Chapter 4, para 3.3.

²¹ JC Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113.

²² GS Goodwin-Gill, 'Editorial: Asylum 2001 – A Convention and A Purpose' (2001) 13 *International Journal of Refugee Law* 1.

²³ *Ibid*, at 15.

²⁴ V Chetail, n 17 at 22.

²⁵ JM Pobjoy, n 16 at 46-47.

Refugee Convention to take account of 'child-specific' forms of persecution.²⁶

The CRC Committee identifies four key principles, which are necessary in the development of a children's rights perspective throughout all levels of government and which are required for effective implementation of the CRC.²⁷ These necessarily also apply in the context of immigration and asylum procedures. The first principle is non-discrimination,²⁸ which 'requires [s]tates actively to identify individual children and groups of children the recognition and realisation of whose rights may demand special measures'.²⁹ Additionally, the rights in the Convention should be guaranteed for all children within the jurisdiction of a state.³⁰ Second, the CRC Committee emphasises the principle of the best interests of the child, which must be a primary consideration in all actions concerning children.³¹ The best interests principle requires active measures by all branches of government and should be applied to all actions and decisions affecting the child, whether directly or indirectly.³² The third principle is the right to life, survival and development.³³ 'Development' should be interpreted in its broadest sense, in particular taking into consideration a child's physical, mental, spiritual, moral, psychological and social development.³⁴ The fourth key principle is the right of the child to express his or her views and to have them taken into consideration (right of the child to be heard).³⁵ The child should be an active participant in the promotion, protection and monitoring of his or her rights and this principle applies to all measures adopted by states to implement the CRC.³⁶ National asylum procedures, which determine a child's status, should have these four principles at their core.

It is acknowledged by academics, state practice, domestic and regional courts that the CRC should be an interpretative tool for child

²⁶ CRC Committee, GC 6, paras 59 and 74; See, for example, *Kim v Canada (MCI)*[2011] 2 FCR 448, para 61.

²⁷ CRC Committee, General Comment no. 5, General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (2003) (GC 5), para 12.

²⁸ Article 2 CRC.

²⁹ CRC Committee, GC 5, para 12.

³⁰ *Ibid*, para 30.

³¹ Article 3(1) CRC.

³² CRC Committee, GC 5, para 12.

³³ Article 6 CRC.

³⁴ CRC Committee, GC 5, para 12.

³⁵ Article 12 CRC.

³⁶ CRC Committee, General Comment no. 12, The Right of the Child to be Heard, UN Doc. CRC/C/GC/12 (1 July 2009) (GC 12).

asylum claims.³⁷ Nevertheless, much of the academic discussion on the refugee child focuses on the child within the international refugee law framework,³⁸ which confers rights based on refugee status, rather than on the rights of a child under the CRC. A thread running through my thesis is that a child in the context of international protection should be regarded as a child first and that a rights-based approach focusing on the CRC should be the main source of protection for the child.³⁹

My thesis explores the development of the best interests principle in ICRL and analyses how it has been operationalised in the context of a child seeking international protection. It has been argued that the principle should be considered an independent source of protection for a child seeking asylum⁴⁰ and my thesis explores the nexus between the best interests principle and the concept of protection in both IRL and ICRL. The best interests focus in ICRL and IRL, as my thesis demonstrates, is based on the articulation of the principle in Article 3(1) CRC.⁴¹

In my thesis, I challenge the narrow interpretation of the best interests principle and the utilisation by decision-makers and courts of the balancing exercise inherent in Article 3(1) CRC, through proposing a fresh and original perspective based on the concept of the child's right to protection. Specifically, I argue that Article 3 CRC not only sets out the best interests principle but includes the child's right to protection and care for his or her well-being under Article 3(2) CRC.⁴² A child's right to protection, can potentially, be derived from a number of provisions including Article 22,⁴³ for refugee and asylum-seeking children and for all

³⁷ JM Pobjoy, n 16 at 28.

³⁸ For example, JM Pobjoy, n 16; J McAdam, n 19.

³⁹ As I discuss in Chapter 4, I am not adopting a paternalistic or restrictive concept of protection. It is my argument that protection in its widest sense includes the child's right to a protective environment to enjoy all rights under the CRC.

⁴⁰ J Pobjoy, 'The Best Interests Principle as an Independent Source of International Protection' (2015) *International and Comparative Law Quarterly* 327. I discuss this argument in chapter 6.

⁴¹ Article 3(1) CRC: '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'.

⁴² Article 3(2) CRC obliges states to ensure care and protection for the child as is necessary for his or her well-being. See Chapter 2, section 3.4.

⁴³ This is the provision on refugee and asylum-seeking children. See Chapter 3.

children, Articles 19,⁴⁴ 32,⁴⁵ 33,⁴⁶ 34,⁴⁷ 36,⁴⁸ 37⁴⁹ and 39⁵⁰ CRC. However, there is not scope in my thesis to deal with each of these provisions individually. It is Article 3(2), alongside Article 22, which forms the basis of the *refugee* child's⁵¹ right to protection.⁵²

Under Article 3(1) CRC, a state is able to utilise the best interests balancing exercise to narrow its protection obligations towards the refugee and asylum-seeking child or to serve absolutist agendas by weighing its interests in immigration control against the interests of the child.⁵³ Crucially, the protection obligation under Article 3(2) is not qualified as 'a primary consideration' and this should strengthen the best interests principle because the outcome of assessing a child's best interests should be the well-being of the child. Operationalisation of both Article 3(1) and Article 3(2) CRC follows the rights-based approach promoted by the CRC Committee.⁵⁴

It might be argued that I am trying to push the boundaries of the best interests principle and a child's right to protection and by adopting an expansionist perspective, my argument will push the boundaries of human rights protection too far, such that it will be ineffective.⁵⁵ However, what I am proposing in this thesis sits within the parameters of the state's obligations under the CRC. The best interests as a guiding principle in the CRC is appropriate in all decisions concerning children and should be interpreted from a child rights perspective. It is a principle which is incorporated into some of the domestic legal systems of states which have

⁴⁴ Right to protection from violence.

⁴⁵ Right to be protected from economic exploitation and work which is harmful or hazardous.

⁴⁶ Protection from the illicit use of narcotic drugs and psychotropic substances.

⁴⁷ Protection from all forms of sexual exploitation and sexual abuse.

⁴⁸ Protection against all other forms of exploitation prejudicial to any aspects of the child's welfare.

⁴⁹ Prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

⁵⁰ Promotion of the physical and psychological recovery and social reintegration of a child victim, fostering the health, self-respect and dignity of the child.

⁵¹ Article 22 CRC is clear that the scope of protection extends to both children with a recognised refugee status and to children seeking asylum, including children who have failed to secure asylum status but remain in the host state (see Chapter 3).

⁵² My argument in this thesis is that there are three threads to a child's right to protection, the child's right to protection from harm, protection for the well-being and development of the child and a right to a protective environment conducive to enjoying rights (Chapter 4).

⁵³ C Smyth 'The best interests of the child in the expulsion and first-entry jurisprudence of the European Court of Human Rights: How principled is the Court's use of the principle?' (2015) 17 *European Journal of Migration and Law*, 70 at 72.

⁵⁴ See for example, CRC Committee, General Comment No 13 on the right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2011) (GC 13) and section 4 below.

⁵⁵ EG Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution Press, Washington DC 2011) at 275.

ratified the CRC⁵⁶ and is incorporated into regional legal systems including the European Union (EU)⁵⁷ and the African Union.⁵⁸ In the context of a refugee or asylum-seeking child, the best interests principle should operate as part of a rights-based approach. State authorities should conduct a careful assessment of a child's best interests and where the decision is going to have a significant impact on the child there should be more intense scrutiny of the child's best interests to ensure a child's right to protection.⁵⁹

The best interests principle has become an important principle in IRL and plays a significant role in protecting children and in securing their rights.⁶⁰ The existence of the principle in domestic law and in the soft-law of the CRC Committee and the UNHCR means that courts and decision-makers must, at least, turn their minds to the child in the case and consider the child's best interests.

The importance of the principle in immigration and asylum law is reflected in the jurisprudence of domestic courts. For instance, in *Baker v Canada*⁶¹ it was held that the best interests principle is an important factor in immigration decisions that directly affect children. The decision-maker, when exercising discretion, should give the best interests of the child 'substantial weight' and 'be alert, alive and sensitive to them'.⁶² In the case of *Wan v MIMA*,⁶³ the Federal Court of Australia held that a decision-maker must assess whether best interests are outweighed by the strength of any other considerations. In the UK case of *ZH (Tanzania) v SSHD*,⁶⁴ Lady Hale held that best interests must be considered first but are not the

⁵⁶ See for example: L Lundy, U Kilkelly, B Byrne and J Kang, *The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries* (UNICEF and Centre for Children's Rights, Queen's University Belfast 2012), which reviewed implementation of the CRC (including Article 3(1)) in 12 states: 8 European states plus Australia, Canada, New Zealand and South Africa.

⁵⁷ Article 24(2) of the Charter of Fundamental Rights of the European Union OJ C/364/1 (18 December 2000).

⁵⁸ Article 4 of the African Charter on the Rights and Welfare of the Child, (opened for signature 1 July 1990 OAU Doc. CAB/LEG/24.9/49, entered into force 19 November 1999)(ACRWC).

⁵⁹ See Chapter 2.

⁶⁰ See eg A Lundberg, The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights (2011) 3 *Journal of Human Rights Practice* 49; K Sandberg, The Role of National Courts in Promoting Children's Rights: The Case of Norway (2014) 22 *International Journal of Children's Rights* 1; M Kalverboer, D Beltman, C van Os and E Zijlstra, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures (2017) 25 *International Journal of Children's Rights* 114.

⁶¹ *Baker v Canada* (MCI) [1999] 2 SCR 817.

⁶² *Ibid*, para 75.

⁶³ *Wan v Ministry of Immigration and Multicultural Affairs* (2001) 107 FCA 133.

⁶⁴ *ZH (Tanzania) v SSHD* [2011] UKSC 4.

only consideration.⁶⁵ Lord Kerr firmly tipped the scales in favour of the best interests principle when he said that where the best interests favour a certain course, that course should be followed and

what is determined to be in the child's best interests should customarily dictate the outcome of cases... and it will require *considerations of substantial moment* to permit a different result.⁶⁶

The considerations which permit a different result must necessarily be very narrow, must acknowledge the child as a rights holder, must follow a rights-based approach and must not undermine the refugee child's access to international protection.

In terms of the jurisdictional scope of my thesis, primarily I am interrogating the interaction between IRL and ICRL, the operationalisation of the best interests principle and the child's right to protection in international law. However, the examples I use to illustrate my arguments are derived from domestic case law in the common law tradition (as that is a system I am most familiar with, but additionally, common law jurisdictions have been at the forefront of the development of IRL and, in general, the judgments are in English), as well as case law from the ECtHR because its jurisprudence on asylum and immigration law in the context of child migration is the most developed of the regional human rights systems. Although there is no best interests principle in the text of European Convention on Human Rights (ECHR),⁶⁷ the ECtHR has recognised that the best interests principle should be considered in cases concerning children⁶⁸ and has integrated the best interests principle into the right to respect for private and family life under Article 8 of the ECHR. The ECtHR does not always follow the rights-based approach advocated by the CRC Committee⁶⁹ or adopt a principled approach towards a child's best interests interpreted in the light of the relevant rights of the child in the CRC.⁷⁰ Although I acknowledge the relevance of EU law, unfortunately, there is not the scope within the parameters of my thesis to provide a

⁶⁵ Ibid, para 29.

⁶⁶ Ibid, para 46 (emphasis added).

⁶⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No 11 and 14 (adopted 4 November 1950, entry into force 3 September 1953) ETS 5 (ECHR). Article 8(2) allows a balancing exercise in the context of proportionality, see for example, ECtHR, *Jeunesse v The Netherlands*, Application No 12738/10 (3 October 2014).

⁶⁸ See, for example, ECtHR *Neulinger and Shuruk v Switzerland* Application No. 41615/07 (6 July 2010), para 135.

⁶⁹ See 'Rights-based Approach' below in section 6; C Smyth, n 53; ECtHR, *Mayeka and Mitunga v Belgium*, Application No. 13178/03 (12 October 2006).

⁷⁰ C Smyth, n 53 at 72 and 103.

comprehensive coverage of the EU's Common European Asylum System. Nevertheless, throughout my thesis, some of the CEAS instruments are cited to illustrate operationalisation of a child's best interests and right to protection. Smyth, in her work on the interaction between CEAS and children's rights demonstrates how much of the EU's legislation on asylum and immigration law is influenced by the CRC, but also highlights the gaps in protection (some of these gaps have been rectified in the recast versions of the relevant directives).⁷¹

2. Reason for the Research

There is international commitment to protect all persons under the age of 18 who should be recognised as rights holders and children first and foremost and who have rights regardless of status. Immigration policies should never be enforced at the expense of a child's enjoyment of his/her rights.⁷² The CRC takes a broader approach to children seeking international protection than the Refugee Convention by expressly referring in Article 22 CRC to the child 'who is seeking refugee status' and 'who is considered a refugee',⁷³ which refers to a 'refugee' as defined by Article 1A(2) of the Refugee Convention. The CRC Committee has given a broad interpretation to Article 22 CRC and has recognised the need to persuade states to adopt a child rights approach to *all* children who are outside their country of origin, whether they satisfy the definition of refugee or not.⁷⁴

Whilst there has been some analysis of the implementation of the four guiding principles of the CRC and the interaction of children's rights and international human rights law,⁷⁵ there has been less research on the interplay of children's rights and principles in the context of

⁷¹ C Smyth, *European Asylum Law and the Rights of the Child* (Routledge, Oxford 2014).

⁷² CRC Committee, Report on the Day of General Discussion 'The Rights of all Children in the Context of International Migration' (2012), para 5.

⁷³ Article 22(1) CRC.

⁷⁴ See CRC Committee GC 6; Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the 'general principles regarding the human rights of children in the context of international migration', UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22), para 9; CRC Committee Report on the Day of General Discussion (2012), para 5.

⁷⁵ See, for instance A Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge, Oxford 2013); N Peleg, *The Child's Right to Development* (Cambridge University Press, Cambridge 2019); A Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill Nijhoff, Leiden 2018); E Brems, E Desmet and W Vandenhoele (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration* (Routledge, London 2017).

asylum/refugee law,⁷⁶ and specifically on the role the best interests principle plays during the assessment of a child's claim for asylum.⁷⁷ My research provides an original perspective on the concept of protection, specifically a right to protection for a refugee child, focusing on Article 3(2) and Article 22 CRC.

There have been a number of initiatives by international and regional organisations in recent years (including the UN, the European Union (EU) and the Council of Europe (CoE)), which have raised awareness of the vulnerability of children seeking asylum or refugee status, highlighted protection gaps in IRL and have advocated strengthening laws to protect the rights of children seeking international protection.⁷⁸ There has been increased engagement with Article 3(1) by national courts in a range of migration contexts.⁷⁹ Academic research and writing in this area, has grown exponentially in the last decade. For example, the work of Pobjoy and his analysis of the alignment between IRL and the CRC and the three modes of interaction when considering the status of a refugee child: CRC as a procedural guarantee, CRC as an interpretative aid and the CRC as an independent source of status outside IRL.⁸⁰ Additionally, Pobjoy has argued that Article 3 has the capacity to provide an independent source of protection outside the traditional refugee protection regime.⁸¹ Article 3(1) creates a new category of protected persons whose claims need to be processed.⁸² The question in these cases is whether the removal of the child from the host state is in the child's best interests. If removal is contrary to those interests then there will be a strong presumption against removing the child.⁸³ Arnold explores the conceptualisation of children within refugee law and refugee discourse.⁸⁴ Smyth has provided a detailed analysis of the interaction between children's rights and Common European

⁷⁶ However, there is emerging research in this area. See, for example, J McAdam, n 19; C Smyth, n 53 and n 71; J Pobjoy, n 16; S Arnold *Children's Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (Routledge, Abingdon 2017).

⁷⁷ Although see J Pobjoy, n 40.

⁷⁸ For example, The European Agency for Fundamental Rights (FRA), Report on Separated, Asylum-Seeking Children in European Union States (2010); European Commission, *Communication from the Commission to the Parliament and Council: Action Plan on Unaccompanied Minors* (2010-14) SEC(2010)534; The Council of Europe's Strategy for the Rights of the Child 2012 – 2015 and 2016-2021; UK House of Lords European Union Committee, *Children in Crisis: Unaccompanied Migrant Children in the EU* (2016).

⁷⁹ Ibid.

⁸⁰ JM Pobjoy, n 16 at 27 - 31.

⁸¹ JM Pobjoy, n 40 at 362.

⁸² N Blake, 'Current Problems in Asylum and Protection Law: The UK judicial perspective' (9th World Conference of the International Association of Refugee Law Judges, Slovenia, 7 September 2011), 10.

⁸³ J Pobjoy, n 40 at 333.

⁸⁴ S Arnold n 76.

Asylum System (CEAS) and considers how far the European framework gives effect to the rights of the child under CRC.⁸⁵ Drywood observes that the strategy to 'mainstream' children's rights into EU asylum and refugee law has been evident in the legislation and policies of the EU.⁸⁶ Research carried out by Bhabha, Crock, Finch and Schmidt,⁸⁷ the Children's Society,⁸⁸ and the Law Centres Network,⁸⁹ the European Union's Agency for Fundamental Rights (FRA)⁹⁰ and the EU CONNECT project⁹¹ have provided valuable qualitative empirical research on the impact of asylum procedures on unaccompanied or separated children seeking asylum. However, little analysis has been carried out on whether the current framework which invokes the best interests principle as the mechanism to decide the outcome for a refugee or asylum-seeking child operates to ensure the child's right to 'appropriate protection' under Article 22 CRC. The reports highlighted above demonstrate that the dominant state practice, in Europe for instance, on the operationalisation of the best interests principle allows for the balancing of interests that may not always ensure appropriate protection for the child.⁹² My research demonstrates that the best interests principle must be infused with a comprehensive concept of protection under the CRC. This is my original and important contribution to the fields of children's rights and IRL.

3. Research Objectives and Research Questions

The objectives of my research are, first, to analyse the children's rights framework for international protection both through the CRC and IRL, using international treaties and 'soft-law' relevant to both children's rights and IRL to support this analysis. Second, to examine the concept of best interests in children's rights law, highlighting the challenges posed by its indeterminacy in the context of decisions about children. Third, I

⁸⁵ C Smyth, n 71.

⁸⁶ E Drywood, 'Challenging concepts of the 'Child' in Asylum and Immigration Law: the example of the EU' (2010) 32 *Journal of Social Welfare and Family Law* 309 at 310.

⁸⁷ J Bhabha and M Crock, N Finch and S Schmidt, *Seeking Asylum Alone: A Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (The Federation Press, Annandale 2007).

⁸⁸ L Gregg and N Williams, *Not Just a Temporary Fix: The Search for Durable Solutions for Separated Migrant Children* (The Children's Society, London 2015).

⁸⁹ T Brown, H Johnson, N Adams, K Cronin, R Kohli, B Sandhu, *Put yourself in Our Shoes: Considering the Children's Best Interests in the Asylum System* (Law Centres Network 2015).

⁹⁰ EU Agency for Fundamental Rights, n 78.

⁹¹ R O'Donnell and M Hagan, *Identification, Reception and Protection of Unaccompanied Children: Connect Project Report* (European Commission 2014), which compares the practices of identification, reception and protection in Italy, the Netherlands, Sweden and the United Kingdom.

⁹² See Chapter 6.

interrogate how the principle of best interests is interpreted by the CRC, UNHCR and applied by states in an asylum or immigration context. Fourth I analyse the child's right to protection in the CRC and how concepts of protection in IRL and IHRL provide the normative content of a refugee and asylum-seeking child's right to protection. Finally, my research considers how a rights-based approach to the best interests principle recalibrates the scales in favour of a child's right to protection. In particular, I explore how the *non-refoulement* principle interacts with children's rights to ensure a child's right to protection in IRL and IHRL. My research demonstrates that the best interests approach which has been adopted in the context of refugee and asylum law, is interpreted narrowly and is utilised procedurally and in the care of a refugee or asylum-seeking child, but not as part of a substantive claim. Pobjoy has argued that whilst states have recognised that Article 3(1) is relevant to procedural guarantees in an asylum process and to the treatment of children whilst they are awaiting a decision, there is less acknowledgement of its relevance to the substantive determination as to whether a child can secure for refugee protection.⁹³ The approach to a child's eligibility for international protection should be rights-based approach focusing on which outcome provides appropriate protection for the child, whilst at the same time upholding the child's rights (and his/her status as a rights holder). In order to achieve the objectives of my research, my research questions are as follows:

1. What is the international legal framework applicable to a refugee child?
2. What does 'protection' look like for a child seeking international protection and what should it look like? How do the concepts of protection in Article 3(2) and Article 22 converge to accord protection to a refugee or asylum-seeking child's rights?
3. To what extent does a refugee or asylum-seeking child have a right to protection in the CRC?
4. How should protection influence the balancing of a child's best interests in an asylum claim?
5. To what extent should the application of a rights-based understanding of the best interests principle recalibrate the scales in favour of a child's right to protection in asylum and immigration decisions?

⁹³ J Pobjoy, n 16 at 197; J Pobjoy, n 40 at 333.

4. Methodology

Answering the central questions in this research required the employment of doctrinal method, archival research, an analysis of the legal and theoretical underpinnings of the best interests principle and an evaluation of the normative content of the state's obligation to protect a refugee or asylum-seeking child.

My research project included a doctrinal analysis of legislation, treaties, soft law instruments and case law on children's rights and refugee law. This required an exposition of the CRC, the Refugee Convention and a range of interpretative tools, such as reviewing the General Comments, the jurisprudence of the CRC Committee and other human rights treaties' monitoring bodies, the jurisprudence from regional bodies and national courts and the guidance and policies of the UNHCR. An analysis of the best interests principle is key to determining how children's rights are protected when children seek international protection. The principle is set out in international treaty law, regional law and national legislation and interpreted in national and supranational courts. This required a review of the *travaux préparatoires* of the CRC and an examination of the discussions which took place during the drafting of the Convention between 1978 and 1989. I carried out archival research at the UN library in Geneva to examine the original Working Group papers which form the *travaux préparatoires* of the CRC. There has been extensive literature on the principle and its status as a legal interpretative principle in children's rights, but very little analysis of Article 3(2)⁹⁴ and how this interacts with the operationalisation of the principle and the refugee or asylum-seeking child's right to protection. In answering the research questions, this thesis seeks to address this gap in the literature.

5. Thesis Structure

In Chapter 2, I begin by examining the development of the best interests principle from a principle in domestic law to a legally binding

⁹⁴ Although, see brief analysis in MDA Freeman, 'Article 3. The Best Interests of the Child' in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2007); EE Sutherland 'Article 3 of the CRC: The Challenges of Vagueness and Priorities' in EE Sutherland and LA Barnes MacFarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 21; J Eekelaar and J Tobin, 'Article 3: The Best Interests of the Child' in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 73.

principle in ICRL. I review the *travaux préparatoires* of Article 3(1) CRC and the meaning and scope of the principle and the challenges arising from the operationalisation of the best interests principle. In light of my argument on developing a (holistic) interpretation of the best interests principle and protection for a refugee child, this chapter also examines the *travaux préparatoires* of Article 3(2), which provides support for my argument that a child has a right to protection. Chapter 3 analyses the concept of a refugee child under Article 22 CRC and what is meant by appropriate protection by examining specific ('applicable') rights relevant to a refugee or asylum-seeking child.

Chapter 4 analyses the concept of protection in international law, focusing on IRL, IHRL and the CRC. This analysis pinpoints the normative content of the right to protection for a refugee or asylum-seeking child. Connected to this concept of protection and essential to the protection of a refugee child, is the principle of *non-refoulement* and the interplay of the principle with the best interests of the child. Chapter 5 examines the state's duty of *non-refoulement*, the tension between the increase in the use of *non-entrée* policies by states who wish to deter refugees from arriving at their borders and the obligation to respect, protect and fulfil a child's rights. The principle of *non-refoulement* is the cornerstone of refugee protection⁹⁵ and Chapter 5 demonstrates the need for a close alignment between the principle of *non-refoulement*, the child's best interests and the child's right to protection at different points on his or her journey to safety. The final chapter draws the threads of my argument together to examine the rights-based approach to the best interests of the refugee or asylum-seeking child to ensure the best protection outcome for a child. Even though the best interests principle is acknowledged as an important factor in cases involving refugee and asylum-seeking children, when the best interests are weighed against a state's interest in immigration and border control, a child's best interests are likely to lose. This, it is argued, does not correlate with a rights-based approach to refugee status determination for children and there needs to be a different perspective brought to bear to ensure that children's rights (in particular their right to protection) are secured.

⁹⁵ J Durieux, 'Three Asylum Paradigms' (2013) 20 *Journal of Minority and Group Rights* 147 at 167.

6. Rights-based approach

The approach underpinning my research is a rights-based approach. The CRC Committee in its General Comments urges states to adopt a rights-based approach,⁹⁶ but what is meant by this? The term 'rights-based' is used to describe any actions which are broadly influenced by international human rights standards.⁹⁷ IHRL instruments represent 'a core set of values [which are] pre-requisites for a dignified human life that ... enjoy widespread, if not universal, acceptance'.⁹⁸ Lundy and McEvoy identify that a children's rights-based approach should be based on the UN's three core principles of a human rights-based approach: (1) actions or activity which further realise human rights, (2) human rights standards which should guide all actions and (3) activity or actions which should contribute to the capacities of duty-bearers to meet their obligations and rights-holders to claim their rights.⁹⁹

The rights-based approach was first discussed in the context of the right to development and has been embraced by human rights bodies, international organisations (IOs) and non-governmental organisations (NGOs) in a broad range of contexts since.¹⁰⁰ There has been a proliferation of reports and 'how-to' manuals and guidebooks which seek to illustrate how such an approach can be applied in practice.¹⁰¹ Significantly, the United Nations Children's Fund (UNICEF) was one of the first UN agencies to advocate a rights-based approach.¹⁰² The Committee urges a rights-based approach when a state is assessing and determining a child's best interests, declaring that '[t]he full application of the concept of the child's best interests requires the development of a rights-based

⁹⁶ For example, CRC Committee GC 13, para 59.

⁹⁷ L Lundy and L McEvoy, 'Childhood, the United Nations Convention on the Rights of the Child, and Research: What Constitutes a 'Rights-Based' Approach?' in MDA Freeman (ed) *Law and Childhood Studies* (Oxford University Press, Oxford 2012) 75 at 76.

⁹⁸ M Darrow and L Arbour, 'The Pillar of Glass: Human Rights in Development Operations of the United Nations' (2009) 103 *American Journal of International Law* 446 at 498.

⁹⁹ L Lundy and L McEvoy, n 97 at 78; UN Statement of Common Understanding on a Human-Rights Based Approach to Development Cooperation (UN, Geneva 2003) (Stamford Statement).

¹⁰⁰ For example, the Vienna Declaration and Programme of Action 1993 advocated a rights-based approach in areas such as development and Kofi Annan's directive that human rights should be mainstreamed into the activities of all UN agencies: *Renewing the United Nations, A Programme for Reform*, Secretary General's Report UN Doc. A/51/950 (14 July 1997).

¹⁰¹ J Tobin, 'Understanding a Human Rights based Approach to Matters involving Children: Conceptual Foundations and Strategic Considerations' in A Invernizzi and J Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, Farnham 2013) 61 at 62 - 64.

¹⁰² UNICEF, *A Human Rights Approach to UNICEF's Programming for Children and Women: What it is and Some Changes it will Bring* (UNICEF, New York 1998).

approach'.¹⁰³ In General Comment No 13, the Committee stated that a rights-based approach includes:

[r]espect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights-bearing person...[which] is best realised by respecting, protecting and fulfilling all of the rights in the Convention.... It requires a paradigm shift away from child protection approaches in which children are perceived and treated as "objects" in need of assistance rather than as rights holders entitled to non-negotiable rights to protection.¹⁰⁴

Tobin seeks to identify the principles to construct a coherent and persuasive account of the conceptual foundations of a rights-based approach in relation to children and in particular acknowledges the social, political, economic and cultural context in which a rights-based approach is to be implemented.¹⁰⁵ Tobin's framework for a rights-based approach recognises the child as a rights holder, considers the rights of the child in all matters concerning them, acknowledges the importance of the family unit to the upbringing of the child and the child's evolving capacities, the primacy of the best interests principle and the obligation to adapt processes, procedures and decision-making to identify a child's best interests.¹⁰⁶ The recognition of the best interests principle as an element of a rights-based approach to all matters concerning children, does not give decision-makers licence to make a subjective or speculative assessment of a child's best interests. Instead, a rights-based approach to best interests must include a right to be heard and the decision-maker must give 'due weight' to the child's views.¹⁰⁷ Tobin argues that Article 12 CRC distinguishes a rights-based approach to children's interests from the traditional welfare approach where children's voices were silent or marginalised and subject to an adult's expert opinion.¹⁰⁸ Whilst Article 12 is hugely significant for children's rights, I am mindful, nevertheless, that an uncritical embracing of Article 12 does not acknowledge that, for a refugee and asylum-seeking child, Article 12 and other participation rights can be

¹⁰³ CRC Committee, GC 14, para 5.

¹⁰⁴ CRC Committee, GC 13, para 59.

¹⁰⁵ J Tobin, n 101 at 76.

¹⁰⁶ J Tobin, 'Courts and the Construction of Childhood: A New Way of Thinking' in MDA Freeman (ed) *Law and Childhood Studies* (Oxford University Press, Oxford 2012) 55 at 62.

¹⁰⁷ Article 12 CRC.

¹⁰⁸ J Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children' (2009) 33 *Melbourne University Law Review* 579 at 590-591.

problematic in the context of a 'culture of disbelief' and the hostile environment in which asylum proceedings play out.¹⁰⁹

A rights-based model to identify a child's best interests should involve a consideration of (a) the wishes of a child; (b) the relevance of any other rights under the CRC; (c) the particular circumstances of the child; and (d) any available empirical evidence which may be of relevance.¹¹⁰ A rights-based approach should reduce both the indeterminacy of the principle and the danger of an adult's subjective assessment.¹¹¹ A rights-based approach should be applied throughout the asylum process and is relevant to the procedure as well as the substantive issues in the case.

Throughout my thesis a rights-based approach informs my conceptualisation and proposed operationalisation of the best interests principle and the child's right to protection in situations where a child's protection, safety and security are at risk. This approach suggests an alternative way where the child's right to protection under Article 3(2) and Article 22 CRC informs the determination of the child's best interests and the weight to be attributed to a child's best interests when balanced against the migration control interests of the state.

7. Key Definitions and concepts

In an international migration context and particularly in situations of forced migration, there are a number of terms used to describe children and their families who are compelled to flee their country of origin. Not all children who are crossing international borders are in need of international protection. There are multiple reasons why children cross borders and my thesis focuses on those who are in need of international protection and thus, usually fall into the category of refugees or asylum-seekers. At the CRC Committee's Day of General Discussion in 2012, the delegates urged states to avoid rigid categorisation or definitions of children and these should only be used to illustrate the diversity of situations which children find themselves in.¹¹² The United Nations High Commissioner for Human Rights (OHCHR) notes that migrating children, including children left behind and children on the move 'appear in the universal protected group

¹⁰⁹ H Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258; UK House of Lords European Union Committee, 'Children in Crisis: Unaccompanied Migrant Children in the EU' (2016); see also Chapter 3, section 4.3 below.

¹¹⁰ J Tobin, n 108 at 592.

¹¹¹ I discuss this point in Chapter 2.

¹¹² CRC Committee, Report of the Day of General Discussion (2012) (DGD 2012), para 13.

of “children” at the same time as they are divided into a number of different categories’.¹¹³ The report of the OHCHR’s study asserts that the challenge for the formulation and implementation of policy is to ensure that ... categorisation does not impede a human rights response to the assistance and protection needs of children in the context of migration.¹¹⁴

7.1 Migrant

UNICEF has defined migrants as follows, ‘Migrants are individuals who are moving or have moved across an international border or within a state away from their habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of stay is.’¹¹⁵ This is a broad definition including both regular and irregular or forced migration and to incorporate people who are sometimes described as ‘economic migrants’¹¹⁶ as well as people fleeing because of persecution, generalised violence, armed conflict, poverty and environmental or natural disasters. ‘Forced migration’ has been defined by the International Organization for Migration (IOM) as ‘a migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects)’.¹¹⁷

The CRC and CMW Committees recognise the ‘double vulnerability’ of children in the context of international migration¹¹⁸ and their joint General Comments cover situations of (a) children who are migrants themselves, either alone or with their families, (b) children born to migrant parents in countries of destination or (c) children who remain in their country of origin

¹¹³ OHCHR Study on the challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration UN Doc. A/HRC/15/29 (5 July 2010) (OHCHR Study), para 4.

¹¹⁴ Ibid, para 5.

¹¹⁵ UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children*, (UNICEF, New York, 2016), page 14. The International Organization for Migration (IOM) uses the same definition, see IOM:UN Migration, Key Migration terms, available at: <https://www.iom.int/key-migration-terms> [accessed 7 May 2019].

¹¹⁶ See M Foster, n 18 at 11 – 21. Foster challenges the simplistic dichotomy which pervades international law and state practice between ‘economic migrants’ and ‘political refugees’.

¹¹⁷ IOM, UN Migration, Key Migration terms, available at: <https://www.iom.int/key-migration-terms> [accessed 7 May 2019].

¹¹⁸ JGC 3 and 22, para 3: ‘Double vulnerability’ refers to the fact they are children and children affected by migration.

while one or both parents have migrated to another country.¹¹⁹ The joint General Comments recognise the positive aspects of migration, when it is safe and regular, but the focus of the two Committees is on the human rights violations which children are exposed to in unsafe and/or irregular migration.¹²⁰

7.2 Refugee

The definition of a refugee is set out in Article 1A(2) of the Refugee Convention:

...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.

Refugee status is declaratory, not constitutive, thus, someone is a refugee as soon as he or she fulfils the criteria set out in the definition. 'A person ... does not become a refugee because of recognition, but is recognised because he [or she] is a refugee'.¹²¹ Although there is no specific reference to children or age in the definition, and only passing reference to children in the Convention as a whole, it is acknowledged that the Refugee Convention is age neutral and applies to everyone, children and adults.¹²² The only references to children in the Refugee Convention refer to the parents' right to provide religious education for their children,¹²³ the impact of having children who are nationals of the country of residence on a refugee's right to work,¹²⁴ and the requirement to apply national standards on minimum age for employment.¹²⁵ Article 22 of the Refugee Convention, which concerns the right to elementary education, does not refer to childhood or age. The United Nations Conference of Plenipotentiaries, however, recognised the special protection needs of

¹¹⁹ Ibid.

¹²⁰ Ibid, para 8.

¹²¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/Eng/REV.3 (2011), 28.

¹²² JM Pobjoy, n 16 at 17.

¹²³ Article 4 of the Refugee Convention.

¹²⁴ Article 17(2)(c) of the Refugee Convention.

¹²⁵ Article 24(1)(a) of the Refugee Convention.

children and urged states to provide for '[t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption'.¹²⁶

The danger of an approach which is not sensitive to the needs of the child and does not take account of child-specific persecution, is that it is interpreted from an adult perspective,¹²⁷ fails to take account of children as rights holders and refugees in their own right¹²⁸ and renders children invisible.¹²⁹ The CRC Committee,¹³⁰ the UNHCR¹³¹ and the Special Rapporteur on the human rights of migrants,¹³² have emphasised the need for a child-rights focused approach to interpreting the refugee definition and the persecution element, in particular, to ensure that states do not overlook or inappropriately assess children applying for international protection. Throughout this thesis I refer to 'refugee children', which is the term adopted by the CRC Committee. However, this is not confined to children who satisfy the refugee definition only, but encompasses all children in need of international protection, including asylum-seeking children.

7.3 Asylum-Seeker

An asylum-seeker is a person seeking some form of international protection from a state other than his or her own. An asylum-seeker is the embodiment of the right to seek and enjoy asylum under Article 14 of the Universal Declaration on Human Rights (UDHR).¹³³ Asylum has been described as the 'protection accorded by a State [...] to an individual who comes to seek it'.¹³⁴ Although Article 14 UDHR provides 'everyone' with a right to seek and enjoy asylum', there is no legally binding right to asylum

¹²⁶ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons', UN Doc A/CONF.2/108/Rev.1(26 November 1952) Recommendation B.

¹²⁷ M Crock, 'Re-thinking the Paradigms of Protection: Children as Convention Refugees in Australia' in J.McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford and Portland, Oregon 2008) 155 at 157.

¹²⁸ *Ibid*, at 155.

¹²⁹ J Pobjoy, n 16 at 3 and 46 – 52.

¹³⁰ CRC Committee GC 6, para 21: States must adopt a 'child-sensitive assessment of protection needs, taking into account persecution of a child-specific nature'.

¹³¹ UNHCR, *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* HCR/GIP/09/08 (UNHCR, 22 December 2009), para 1.

¹³² See for example, CRC Committee Report on the Day of General Discussion, (2012).

¹³³ UN General Assembly, Universal Declaration on Human Rights, 217 A (III) (10 December 1948)(UDHR).

¹³⁴ A Grahl-Madson, *The Status of Refugees in International Law* (A.W. Sijthoff, Leiden 1972), 3.

under international law.¹³⁵ This is due to the reluctance of states to accept that they have an obligation to grant asylum to anyone who seeks it.¹³⁶ Nevertheless, states do have an obligation in international law not to obstruct the individual's right to seek and enjoy asylum.¹³⁷

7.4 Unaccompanied and Separated Children

The UNHCR has regarded unaccompanied and separated children as part of its remit since the 1980s.¹³⁸ The Working Group which drafted the CRC discussed the phenomenon of unaccompanied children during the drafting of Article 22, focusing on state obligations to assist with tracing family members.¹³⁹ There has been growing concern about the treatment and lack of rights protection for unaccompanied children¹⁴⁰ and the CRC Committee published a General Comment in 2005 defining both unaccompanied and separated children.¹⁴¹

'Unaccompanied children' are defined as 'children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so'.¹⁴² 'Separated children' are those who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives.¹⁴³ The Separated Children in Europe Programme (SCEP)¹⁴⁴ has rejected the term 'unaccompanied children' and prefers to use the phrase 'separated children', who are 'under 18 years of age, outside their country of origin and separated from both parents, or their previous legal, or customary primary caregiver'.¹⁴⁵ The SCEP uses the

¹³⁵ See Chapter 3, section 2.1. The existence of a right to asylum is controversial and there is little consensus on the matter among refugee scholars. Some scholars, for example, Gil- Bazo argue that there is a limited right to asylum for non-EU nationals claiming asylum in the EU under Article 18 CFREU: M Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law* (2008) 27 *Refugee Survey Quarterly* 33, 52; M den Heijer, 'Article 18- Right to Asylum' in S Peers, T Harvey, J Kenner and A Ward (eds), *The European Charter of Fundamental Rights: A Commentary* (Hart Publishing, Oxford 2014) 519 at 522.

¹³⁶ GS Goodwin-Gill and J McAdam, n 9 at 358; see section 4.1 below.

¹³⁷ See Chapter 3, section 2.1, when I discuss the right to seek and enjoy asylum further.

¹³⁸ UNHCR ExCom, *Conclusion on Refugee Children*, 12 October 1987, No 47(XXXVIII), para (i).

¹³⁹ Article 22(2); See Chapter 3 below.

¹⁴⁰ See, for example the reports set out in n 78 above; J Bhabha et al, n 87 and R O'Donnell and M Hagan, n 91.

¹⁴¹ CRC Committee, GC 6, n 2.

¹⁴² CRC Committee, GC 6, para 7.

¹⁴³ CRC Committee, GC 6, para 8.

¹⁴⁴ Separated Children in Europe Programme is a joint initiative between UNICEF, UNHCR and Save the Children, which aims to realise the rights and best interests of separated children who come to or through Europe.

¹⁴⁵ Save the Children Fund, Separated Children in Europe Programme, *Statement of Good Practice*, (ed) T. Smith (4th Revised Edition, Save the Children Denmark 2009) at 3.

word 'separated' rather than 'unaccompanied' 'because it more accurately defines the essential problem that such children face. Namely, they lack the care and protection of their parents or primary caregiver and suffer socially and psychologically from this separation.¹⁴⁶

7.5 Children on the Move

'Children on the move' has become the umbrella term for different groups of children who have left their place of birth. It includes internally displaced people as well as refugees. For organisations such as UNICEF, this term better reflects the reality that children are undertaking irregular journeys, often crossing international borders. Their reasons for migrating are complex and overlapping and sometimes change as their journey progresses.¹⁴⁷ They may search for protection or search for better opportunities for work or education.¹⁴⁸ The Inter-Agency Group on Children on the Move was formed in 2011 and includes international organisations (IOs), non-governmental organisations (NGOs),¹⁴⁹ individual experts and academics. The aim of the group is to share academic and practitioner expertise on the protection challenges for children on the move. This Group defined 'children on the move' as:

children moving for a variety of reasons, voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement while it may open up opportunities might also place them at risk (or at an increased risk) of economic or sexual exploitation, abuse, neglect and violence.¹⁵⁰

This does not provide a new legal definition or clarification on existing definitions or develop a new category of children, but provides a perspective on the complex reasons for children migrating and the challenges of categorising them.¹⁵¹

¹⁴⁶ Ibid, 4.

¹⁴⁷ UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (UNICEF, New York 2017).

¹⁴⁸ OHCHR Study, n 113, para 5.

¹⁴⁹ It includes the following agencies: International Labour Organisation (ILO), IOM, UNHCR, UNICEF, Plan International, Save the Children, Terre des Hommes, the African Movement of Working Children and Youths (AMWCY/MAEJT), Environmental Development Action in the Third World (ENDA), World Vision and the Oak Foundation.

¹⁵⁰ Inter-Agency Group on Children on the Move: *The UN High Level Dialogue on Migration and Development 2013: Why children matter: Background Paper, April 2013* at 2.

¹⁵¹ See also IOM, *Children on the Move* (2013): available at: http://publications.iom.int/system/files/pdf/children_on_the_move_15may.pdf [accessed 31 March 2019].

7.6 International Protection¹⁵²

In a note on international protection,¹⁵³ the UNHCR described the need for international protection as arising 'when a person is outside their own country and unable to return home because they would be at risk there, and their country is unable or unwilling to protect them'.¹⁵⁴ Risks include persecution, threats to life, freedom or physical integrity arising from armed conflict, serious public disorder, or generalised violence. Other risks include famine linked to situations of armed conflict, natural or man-made disasters and risks associated with being stateless.¹⁵⁵ It is generally regarded as an umbrella term covering all the different forms of protection granted to people who are forced to migrate, rather than people who are migrating voluntarily and ends when a sustainable or durable solution has been reached.

8. Concluding Remarks

In this introductory chapter, I have outlined the scope and context of my thesis, explaining why this research is important, original and makes a significant contribution to knowledge in the area of children's rights and refugee law. I have outlined my key research questions, explained my methodology and the objectives of my research. This thesis proposes a different perspective on the operationalisation of the best interests principle and the child's right to protection in the context of IRL. I have signposted the rights-based approach which is fundamental to my thesis and accords with the approach adopted by the CRC Committee.

In the next chapter, I examine the foundations of the best interests principle in Article 3(1) CRC and demonstrate that when this is viewed alongside its overshadowed neighbour (Article 3(2)), a balancing between the interests of the child and those of the state must be considered from a rights-based perspective, ensuring the child's right to protection.

¹⁵² I discuss international protection further in Chapter 4.

¹⁵³ UNHCR, *Persons in need of international protection*, June 2017, available at: <http://www.refworld.org/docid/596787734.html> [accessed 17 July 2017].

¹⁵⁴ *Ibid* at 1.

¹⁵⁵ *Ibid*.

CHAPTER 2: Article 3 CRC: Best Interests, Protection, Care and Well-Being

1. Introduction

This chapter provides an overview of the development of the best interests principle in international law and examines the concept of protection and care for the well-being of the child in the first two paragraphs of Article 3 of the Convention on the Rights of the Child (CRC).¹ Article 3(1) CRC represents the main articulation of the best interests principle in international law, although it appears elsewhere in the CRC² and in other international human rights instruments.³ The second paragraph of Article 3 CRC is the right of the child to protection and care as is necessary for his or her well-being.⁴ This paragraph has been overlooked but its protection basis is important to understanding the best interests principle and forms part of the child's right to protection.

This chapter provides an exposition of the *travaux préparatoires* of Article 3(1) and (2), to provide context for the role of the best interests principle in the protection of refugee and asylum-seeking children. I explain the development of best interests as an international legal principle 'in all actions concerning children'.⁵ I demonstrate the significance of the principle in international law, reviewing the standards stipulated by the CRC Committee.⁶ The operationalisation of the best interests principle in the context of children's rights is important for the framework of legal protection for refugee children.⁷ This chapter will also introduce the CRC's

¹ I do not discuss Article 3(3) because it is beyond the scope of this thesis to discuss this paragraph in detail. However, it is relevant in terms of reception conditions for unaccompanied and separated children, see Chapter 6, section 3.2.

² The principle is referred to in Articles 9(1), 9(3), 18, 20, 21, 37(c) and 40(2)(b)(iii) CRC: see discussion below.

³ The principle is referred to in other international instruments, for example, Principle 2 and 7 of the Declaration on the Rights of the Child 1959, Articles 5(b) and 16((1)(d) of the Convention on the Elimination of All forms of Discrimination against Women and Articles 7(2) and 23(2) and 23(4) of the Convention on the Rights of People with Disabilities.

⁴ Article 3(2) CRC.

⁵ Article 3(1) CRC.

⁶ CRC Committee, General Comment no 14, 'The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)', UN Doc. CRC/C/GC/14 (2013) (GC 14).

⁷ See J Pobjoy, 'A Child Rights Framework for Assessing the Status of Refugee Children' in S.S. Juss and C Harvey *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham 2013) 91; J Pobjoy, 'The Best Interests Principle as an Independent Source of International Protection' (2015) 64 *International and Comparative Law Quarterly* 327.

concept of protection in Article 3(2) CRC, which is integral to the operationalisation of the best interests principle.

First, I discuss how the best interests principle has been formulated in international law. Second, I review the *travaux préparatoires* of Article 3(1) and the scope of the best interests principle as formulated in Article 3(1). Next, I analyse the meaning of protection and well-being in Article 3(2) CRC. The subsequent analysis of the definition and meaning of the best interests principle seeks to flesh out the main components of the principle and its operationalisation in some state practice. Finally, I examine the challenges and problems presented by the best interests principle in the context of a child seeking international protection. Despite the challenges, it would not be desirable or possible to remove the best interests principle from the child's rights' framework because of the universality of the principle and the value it adds to the protection and visibility of children's rights, especially children in the context of forced migration. For such a child, best interests must be applied from a rights-based perspective of protection.

2. Best Interests in International Law: An Introduction

The best interests principle pre-dated the CRC and was widely utilised, mainly in Western and industrialised states, in the context of family disputes,⁸ particularly in situations where the state had to intervene in the private ordering of family matters and in adoption cases.⁹ With the almost universal ratification of the CRC (as of 2019, the USA is the only state yet to ratify the CRC), the principle is now an integral part of international children's rights law. The best interests principle is at the heart of children's rights¹⁰ because it applies to all actions or decisions concerning a child or a group of children and is a primary consideration in most contexts.¹¹ The CRC Committee has given the principle a prominent role in the CRC and it considers best interests to be one of the four guiding

⁸ P Alston and B Gilmour Walsh, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (Innocenti Studies, UNICEF 1996), 1. Alston and Gilmour-Walsh give examples of countries such as Canada, France, India, the UK, USA and Zimbabwe where the principle (prior to the CRC) was familiar in the context of family law principles.

⁹ S Parker, 'The Best Interests of the Child – Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26 at 27.

¹⁰ *Ibid.*

¹¹ The main exceptions are adoption under Article 21 CRC where best interests are the paramount consideration and under Article 9 CRC in relation to the separation of the child from his or her parents where best interests are the only qualification for separation (see chapter 4, section 4.5).

principles which underpin the CRC,¹² the other three being non-discrimination (Article 2), right to life, survival and development (Article 6) and the right of the child to express their views and to have those views listened to (Article 12).¹³ Significantly, as discussed below, there was little consideration during the drafting of the CRC of the meaning of 'best interests'.

Article 3(1) sets out the main (but not the only) expression of the principle in the CRC:

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.

Best interests are mentioned in other articles in the CRC - in relation to the separation of the child from the family setting (Article 9), with reference to parental responsibility for the upbringing and development of the child (Article 18), in relation to deprivation of the family environment and adoption (Articles 20 and 21), and in the context of a child's deprivation of liberty (Article 37) and involvement with the criminal justice system (Article 40). The best interests principle is expressed either as 'a primary consideration' (Article 3(1)) or as 'the paramount consideration' (Article 21) or decisions must be made in the best interests of a child (Articles 9(1), 20, 37 and 40). The principle also appears in all three of the Optional Protocols to the CRC - in Article 8(3) of the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,¹⁴ the preamble to the Optional Protocol on the involvement of Children in Armed Conflict¹⁵ and the preamble and Articles 2 and 3 of the Optional Protocol on a Communications Procedure.¹⁶ Thus the Committee has grounds to declare

¹² CRC Committee, General Comment no 5, 'General Measures of Implementation of the Convention on the Rights of the Child' UN Doc. CRC/GC/2003/5 (27 November 2003) (GC 5), para 12.

¹³ Ibid.

¹⁴ Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography, adopted by General Assembly Resolution A/RES/54/263 (25 May 2000), came into force 18 January 2002 (OPSC).

¹⁵ Optional Protocol to the CRC on the involvement of Children in Armed Conflict, adopted by General Assembly Resolution A/RES/54/263 (25 May 2000), came into force 12 February 2002 (OPAC).

¹⁶ Optional Protocol to the CRC on a Communications Procedure, adopted by General Assembly Resolution A/RES/66/138 (19 December 2011), came into force 14 April 2014 (OPCP).

that the principle of best interests 'expresses one of the fundamental values of the Convention'.¹⁷

The principle has attained international recognition through its prominent position in the CRC.¹⁸ The 'best interests of the child' is pervasive in the vocabulary of international organisations, such as UN Children's Fund (UNICEF)¹⁹ and the UN High Commissioner for Refugees (UNHCR),²⁰ in domestic legislation,²¹ and in national constitutions.²² It may be perceived as incongruous that a principle, which developed in the context of resolving disputes and conflicts between competing interests in family cases before children were recognised as rights holders, has become a key guiding principle in the main international instrument on children's rights to be applied in *all* situations concerning children.²³

The best interests principle as set out in Article 3(1) CRC, if properly implemented, ought to provide states and decision-makers with the structure and framework to make rights-based decisions and take action on behalf of an individual child or children as a group. Article 3(1) should also ensure the full and effective enjoyment of a child's rights²⁴ and, alongside Article 2, ensure that a child is treated the same as other children in the state without discrimination. The best interests principle (along with all of the rights in the CRC) applies to all children within the jurisdiction of the state.²⁵

¹⁷ CRC Committee, GC 14, para 1.

¹⁸ See for example, J Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children.' (2015) 23 *International Journal of Children's Rights* 3.

¹⁹ See for example, R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, UNICEF, Geneva 2007); P Jeronimo Vink, and N Finch, *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 OHCHR, Regional Office for Europe 2012).

²⁰ For example, UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva May 2008) and UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018).

²¹ H Ross, 'Children's Rights and Theories of Rights' (2013) 21 *International Journal of Children's Rights* 679, 680. Ross gives the UK's Children Act 1989 as an example of the all-pervasiveness of the principle in legislation on children; See also, L Lundy, U Kilkelly, B Byrne and J Kang, *The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries* (UNICEF and Centre for Children's Rights, Queen's University, Belfast 2012), which reviewed the implementation of the CRC in 12 states, noted that the best interests of the child was the principle most likely to be represented in domestic law, at 4.

²² Tobin noted the principle in the constitutions of Ecuador, Ethiopia, Gambia, Namibia, South Africa and Uganda, see J Tobin, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 12 *South African Journal on Human Rights* 86 at 113.

²³ MDA Freeman, 'Article 3. The Best Interests of the Child', in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2007), page 4.

²⁴ CRC Committee GC 14, para 4.

²⁵ Article 2 CRC. See also the discussion on jurisdiction in chapter 5.

Daly observes that the best interests principle 'is a legal device which is used by courts in cases in which they are called upon to make a determination in a case concerning a child'.²⁶ It is based on the legal assumption that children do not have capacity to exercise their legal rights, so decisions must be taken on their behalf by 'responsible' adults thus, the principle should feature in all proceedings concerning children in order to protect the child's interests as the child will be incapable of doing so.²⁷ However, the Convention on the Rights of Persons with Disabilities (CRPD)²⁸ takes a different approach - it has a concept of supported decision-making,²⁹ which recognises the agency and autonomy of the person to make their own decisions on the basis that he or she has the necessary support and assistance to make that decision. The adoption of the 'social' model in the CRPD marked a step-change from decision-making in a person's best interests.³⁰ This model recognises that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others.³¹ But this model was not extended to children with disabilities, whose rights to participate in decisions about their lives is qualified by their best interests.³²

Although Article 12 CRC has granted a new status to children who are entitled to participate in the decisions that affect them, the implementation of the best interests principle by many states and its conceptualisation in the CRC confirms the substituted decision-making approach, rather than the supported decision-making model.³³ Additionally, Article 12 in the context of an asylum claim by an unaccompanied child can be problematic and may undermine, rather than support the child's claim for international protection.³⁴ Nevertheless, the best interests principle, the right to be heard in Article 12 and other rights in the CRC, such as the child's right to

²⁶ A Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill, Leiden 2018) at 81.

²⁷ *Ibid.*

²⁸ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (adopted 30 March 2007, entered into force 3 May 2008) (CRPD).

²⁹ Article 12(3) CRPD.

³⁰ R Sandland, 'Lessons for children's rights from disability rights', in E Brems, E Desmet and W Vandenhoele (eds) *Children's Rights Law in the Global Human Rights Landscape: Inspiration, Integration?* (Routledge, Abingdon 2017) 109 at 122 - 123.

³¹ Preamble to the CRPD, para (e).

³² Article 7(2) and (3) CRPD.

³³ A Daly, n 26 at 23.

³⁴ H Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258. I explore this argument in Chapter 3.

freedom of expression including the freedom to receive and impart information (Article 13), should provide the normative framework for any action or decision concerning a refugee child.³⁵

A review of the historical development of the best interests principle helps us to understand the meaning of best interests and its prominent role within international children's rights law today and is discussed in the next section.

3. Article 3 CRC

This section covers a brief history of the development of the best interests principle in international law and an overview of the *travaux préparatoires* of Article 3(1) and 3(2) CRC. The evolution of the principle in international law will provide the basis for discussion of the concept of best interests and its relationship with Article 3(2) CRC.

3.1 Article 3(1): The Best Interests Principle

The first international instrument recognising children's rights was the League of Nations Declaration on the Rights of the Child in 1924, although it was not formulated in rights language.³⁶ While there was no reference to best interests in the Declaration, the preamble recognised that 'mankind owes to the child the best that it can give'.³⁷ In 1946, the idea for a new Declaration on the Rights of the Child was mooted by the International Union for Child Welfare and proposed to the UN's Economic and Social Council (ECOSOC).³⁸ The UN Declaration on the Rights of the Child was adopted in November 1959.³⁹

The best interests principle in international law can be traced back to Principle 2 of the 1959 Declaration, which states:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions

³⁵ J Zermatten, 'Best Interests of the Child' in S Mahmoudi, P Leviner and A Kaldal (eds) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill, Leiden 2015) 30.

³⁶ Geneva Declaration of the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec. Supp. 21, 43 (1924 Declaration).

³⁷ Preamble of the 1924 Declaration.

³⁸ UN *Report of the Temporary Social Commission*, Session held in New York, 29 April – 14 May 1946, UN Doc. E/41.

³⁹ UN Declaration on the Rights of the Child, GA Res 1386 (XIV) UN Doc. A/4354 (1959) (adopted 20 November 1959).

of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 2 was limited to use in the context of legislative action, in contrast to Article 3(1) CRC, which states that the best interests principle applies to *all* actions concerning children. There was little discussion on the inclusion of the best interests principle in the Declaration⁴⁰ and the best interests of the child were *the paramount* consideration, because of the limited scope of the principle. Additionally, Principle 7 stipulated that a child's education and guidance *shall be* guided by the best interests of the child.

Prior to the CRC, the best interests principle was incorporated into other binding international human rights instruments. A version of the principle appears in Articles 5(b) and 16(1)(d) of the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW), which uses the phrase 'the primordial consideration' as well as 'paramount'.⁴¹ Subsequently, the principle has been inserted into a number of other IHRL instruments after 1989. For example, the CRPD includes the best interests principle as a primary consideration for children with disabilities in Article 7(2),⁴² in Article 23(2), which gives paramouncy to the principle for guardianship, wardship and adoption and in Article 23(4), which prohibits separating a disabled child from his or her parents, except where it is necessary in the child's best interests.

The principle also appears in non-binding international instruments, such as Article 5 of the 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (the 1986 Declaration),⁴³ which accords paramouncy to the child's best interests, including the child's need for affection, security and continuing care, where a child is being placed outside his or her parents' care. This provision was discussed by the Working Group on the CRC when Article 21 CRC (adoption) was being drafted and influenced the inclusion of the

⁴⁰ See Veerman's discussion of the Declaration in P Veerman, *The Rights of the Child and the Changing image of Childhood* (Martinus Nijhoff Publishers, Dordrecht 1992) at 159 – 180.

⁴¹ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entry into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁴² This mirrors Article 3(1) CRC. See also section 2 above.

⁴³ UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UN General Assembly UN Doc. A/RES/41/85 (3rd December 1986).

paramourcy principle into Article 21 to reflect international standards on adoption.⁴⁴ The paramourcy of the principle in these instruments and the apparent weakening of the principle in Article 3(1) CRC to a *primary consideration*, is partially explained by the fact that in CEDAW, CRPD and the 1986 Declaration the principle is to be applied in specific situations and to individual children, whereas Article 3(1)CRC is intended to be applied in *all* actions concerning both individual children and children as a group. A principle of such broad scope reflects a weaker standard to take account of a wide range of situations concerning children both directly and indirectly.⁴⁵

Article 3(1) CRC represents a 'very significant extension' of the principle, with humble origins in domestic family law and divorce.⁴⁶ Given that the principle was recognised domestically before it was enshrined in an international convention, it might seem logical to base the interpretation and application of the principle enshrined in Article 3(1) CRC on the interpretation of the principle developed in domestic jurisprudence. However, Alston and Gilmour-Walsh warn against using national jurisprudence as a persuasive precedent,⁴⁷ because the principle is used in a narrow range of circumstances in domestic law and does not provide a secure conceptual basis to develop a theory of the best interests principle for broader application.⁴⁸ Instead, I argue that the interpretation of the principle should be based on guidance from the CRC Committee and UN and international organisations such as UNICEF and UNHCR and best practice in IRL.

Although the concept of best interests was not novel, its codification in the CRC extended its scope to impose, for the first time in international law, an obligation on states to ensure that the interests of the child would be at the heart of any administrative, legislative and judicial decision-making which directly or indirectly impacts on children.

⁴⁴ UN ECOSOC, Commission on Human Rights, forty-fifth session, Report of the Working Group on a draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48 (2 March 1989), paras 351 and 362-363.

⁴⁵ U Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in E.E. Sutherland and L Barnes MacFarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 51 at 53.

⁴⁶ P Alston, 'Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law and the Family* 1 at 4; G van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, Dordrecht 1998) at 45.

⁴⁷ P Alston and B Gilmour-Walsh, n 8 at 6.

⁴⁸ *Ibid.*

3.2 Article 3(1): Drafting the Best Interests of the Child Principle

The rationale for including the best interests principle in the CRC was only briefly discussed towards the start of the negotiations on the Convention⁴⁹ and the inclusion of the principle was not reviewed once there was consensus on which rights should be included.⁵⁰ Article 3 is an example of the drafters introducing concepts into the CRC, without detailed discussion as to their legal meaning and conceptual basis.⁵¹ The drafters did not explore the conceptual or theoretical basis for the best interests principle, despite its centrality to the new framework for children's rights. Tobin acknowledges that the best interests principle may be a 'curious inclusion', but he argues:

it is a necessary inclusion in a model of children's rights that is not prepared to abandon children to their complete autonomy and, instead, prefers to recognise that children's capacity to exercise their rights autonomously will evolve as they mature and develop.⁵²

I do not seek to argue that best interests should not have been included in the CRC nor advocate that it should only be used in limited circumstances (this would be contrary to the intention of the principle, which is to be applied in *all* actions concerning the child or children), but its use within a refugee and asylum-seeking context needs to be carefully delineated and guided by a rights-based approach.

3.2.1 The Polish Proposal for a Convention on the Rights of the Child: 1978

The original draft of the Convention, put forward by the Polish delegation in 1978, reproduced the 1959 Declaration including the version of the best interests principle set out in Principle 2 of the 1959

⁴⁹ See discussion on the *travaux préparatoires* in this section.

⁵⁰ N Cantwell, 'Are 'Best Interests' a Pillar or Problem for Implementing the Human Rights of Children?' in T Liefwaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 years and Looking Ahead* (Brill, Leiden 2016) 61.

⁵¹ N Peleg, *The Child's Right to Development* (PhD Thesis, University College London 2012) at 93.

⁵² J Tobin, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children' (2009) 33 *Melbourne University Law Review* 579 at 590.

Declaration.⁵³ This described a child's best interests as *the paramount consideration* and at first, this wording was not reviewed or discussed.⁵⁴ A number of states commented on this first draft of the best interests principle. The French Government was of the opinion that Article II (in the original ordering of the Convention) should not constitute an actual commitment by states but instead should be a recommendation to states in an annex or as part of the Preamble.⁵⁵ New Zealand in its comments noted that the best interests of the child 'will be open through the general terms in which [it is] couched, to varied interpretations and will in fact be defined nationally in terms of the laws and the child-rearing practices which are adopted and acceptable in that nation'.⁵⁶ This revealed some concern about including an open-ended and subjective concept into a binding human rights treaty, which opened the possibility of culturally relative interpretations of the principle.⁵⁷ But this concern was not addressed when the new draft was presented to the Working Group the following year and the best interests principle remained part of the draft Convention.⁵⁸ This would have been an opportunity for the Working Group to discuss the theoretical underpinnings of the principle and its status alongside a comprehensive catalogue of rights, but this did not happen.

The only other place the best interests principle appeared in the first draft was in relation to a child's education in Article VII. According to this article, best interests should be the 'guiding principle of those responsible for (his) education and guidance, whilst responsibility lies with (his) parents'.⁵⁹

3.2.2 Redraft of Article 3: 1979 – 1981.

The following year (October 1979) the Convention was completely

⁵³ See UN ECOSOC, Commission on Human Rights, thirty-fourth session, Letter dated 17th January 1978 from the Permanent Representative of Poland to the Director of the Division of Human Rights, UN doc. E/CN.4/1284 (18 January 1978); see section 3.1 above.

⁵⁴ UN ECOSOC, Commission on Human Rights, thirty-sixth session, Question of a Convention on the Rights of the Child: Report of the Working Group, UN Doc. E/CN.4/L.1542 (10th March 1980).

⁵⁵ UN ECOSOC, Commission on Human Rights, thirty-fifth session, Question of a Convention on the Rights of a Child: Report of the Secretary General, UN Doc. E/CN.4/1324/Add.1 (27 December 1978) at 4, para 4(a).

⁵⁶ *Ibid*, Add.5.

⁵⁷ See eg P Alston and B Gilmour-Walsh, n 8 at 17; G van Bueren n 46 at 47.

⁵⁸ UN ECOSOC, Commission on Human Rights, thirty-sixth session, Question of a Convention on the Rights of the Child, Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva, E/CN.4/1349 (10 October 1979, reissued 17 January 1980).

⁵⁹ UN ECOSOC, Commission on Human Rights, thirty-fourth session, (18 January 1978).

redrafted by the Polish delegation.⁶⁰ It incorporated a broader range of rights to reflect developments in the concept of childhood and human rights generally, and to reflect the detailed comments of states, international organisations and non-governmental organisations provided to the Secretary General.⁶¹ In this second draft, the best interests principle was more precisely worded and remained '*the paramount consideration*'.⁶² At this stage the principle became part of Article 3 in the new version.⁶³

During the meeting of the Working Group in 1980, a number of proposals on Article 3 were submitted but were not considered by the Working Group because of lack of time.⁶⁴ Of significance was the United States of America's (USA) submission which proposed that the best interests of the child 'shall be a primary consideration'.⁶⁵ This was the first time it had been suggested that the best interests of children were not the paramount, nor the main consideration. The USA provided no explanation for this alternative wording.

The USA reintroduced their proposal at the meeting of the Working Group which took place in 1981.⁶⁶ A number of delegates at the 1981 Working Group were of the view that the Polish version was wider in scope and 'better protected the child'.⁶⁷ Nevertheless 'in search for compromise' the Working Group agreed to use the USA's proposal going forward as a basis for discussion.⁶⁸ The only hint of a rationale behind best interests being 'a primary consideration' was that some delegates thought the word

⁶⁰ New draft submitted in Note Verbale on 5th October 1979, n 58.

⁶¹ UN ECOSOC, Report of the Secretary General, (27 December 1978).

⁶² Article 3 of the revised Polish draft (5 October 1979), n 58:

1. In all actions concerning children, whether undertaken by their parents, guardians, social or State institutions, and in particular by courts of law and administrative authorities, the best interest of the child shall be the paramount consideration.
2. The States parties to the present Convention undertake to ensure the child such protection and care as his status requires, taking due account of the various stages of his development in family environment and in social relations, and, to this end, shall take necessary legislative measures.
3. The States parties to the present Convention shall create special organs called upon to supervise persons and institutions directly responsible for the care of children.

⁶³ UN ECOSOC, Commission on Human Rights, thirty-sixth session, (10 October 1979, reissued 17 January 1980).

⁶⁴ UN ECOSOC, Commission on Human Rights, thirty-sixth session, Question of a Convention on the Rights of the Child: Report of the Working Group, UN Doc. E/CN.4/L.1542 (10 March 1980).

⁶⁵ Ibid at 8.

⁶⁶ UN ECOSOC, Commission on Human Rights, thirty-seventh session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/L.1575 (17 February 1981).

⁶⁷ Ibid at 3-7.

⁶⁸ Ibid at 4, para 22.

'paramount' was too broad 'to qualify the consideration to be given to the interests of the child' and that 'best interests' should be 'a primary consideration'.⁶⁹ One speaker (the report of the Working Group does not specify who) argued that a child's best interests were not the overriding, paramount consideration in every case as other parties may have equal or superior legal interests.⁷⁰ The example given was medical emergencies during childbirth, when a mother might have an overriding interest.⁷¹ Some delegates emphasised that Article 3(1) did not need to refer to the specific obligations of the state because it was stating a general principle and the specific obligations of the state (and parents) would be set out in the subsequent paragraphs.⁷² The Report does not specify which delegations supported 'a primary consideration' wording, but the argument that best interests should be primary and not paramount was ultimately persuasive.

The discussion at this Working Group also considered the question of whether such an obligation should be imposed on parents in an international convention. Although it was recognised that imposing such obligations also increased protection for the child,⁷³ the consensus reached was that Article 3 should not specifically impose obligations on parents.

3.2.3 First Reading and Technical Review of the Convention: 1988

Article 3 was not discussed in the Working Group meetings of 1982 and 1983. In 1984, three non-governmental organisations (NGOs) provided a statement to the Working Group suggesting that because of its 'general nature', the concept of best interests 'may induce States, when children are of dual origin, to give this concept a purely nationalist content and interpretation'.⁷⁴ Although the principle should bring states' legislation on best interests closer together, these NGOs feared that 'there is a possibility that it may drive them further apart. The Convention would be

⁶⁹ Ibid at 4, para 23.

⁷⁰ Ibid at 5, para 24.

⁷¹ Ibid.

⁷² Ibid. There were 2 versions of Article 3 being debated at the 1981 Working Group: The USA proposal dealt with the right to be heard in paragraph 2, the supervision of state institutions looking after children in paragraph 3 and an obligation to ensure such protection and care as the child's status requires in paragraph 4 (para 20 of the Report); the Australian delegation's proposal was much closer to the final version of Article 3 (2) and (3) which appears in the CRC today (para 21 of the Report).

⁷³ Ibid at 4, para 23.

⁷⁴ UN ECOSOC, Commission on Human Rights, Written Statement on behalf of International Federation of Human Rights, International Federation of Women in Legal Careers, Pax Romana, UN Doc. E/CN.4/1984/WG.1/WP.6 (1984), para B.

in danger of losing its universal character'.⁷⁵ These points were not discussed during the 1984 Working Group and the next time Article 3 was mentioned was during the technical review of the Convention in 1988.⁷⁶

UNICEF commented that by asserting the child's best interests as 'a primary consideration', the provision introduces a twofold qualification:

The word "primary" implies that other considerations, although not deemed primary, may nevertheless be taken into account. The article "a" indicates that there may be several considerations, each of which is primary. The issue which arises by virtue of standards incorporated in other widely accepted human rights instruments is whether a single qualification is not sufficient. If this were considered to be the case, the wording could be changed to indicate that the child's best interests would be "the primary consideration".⁷⁷

UNICEF's important intervention does not appear to have been discussed at the Working Group in 1988⁷⁸ or 1989.⁷⁹ However, the 1989 Working Group report mentions the text 'incorporating revisions by UNICEF', with an amendment in the text replacing 'a' with 'the'.⁸⁰ This was discussed at the Working Group which met during 1988 and early 1989.

The delegates of the Working Group noted that in the context of considering the child's best interests, there were 'situations in which the competing interests of justice and of society at large should be of at least equal, if not greater, importance than the interests of the child'.⁸¹ The Canadian delegate made the point that when '*the*' was used in other international instruments in relation to the primacy of the principle, it referred to more limited circumstances than those contemplated by Article 3.⁸² The observer for Finland suggested that the interests of the child should be 'the' primary consideration only in actions involving his or her

⁷⁵ Ibid.

⁷⁶ See OHCHR, *Legislative History of the Convention on the Rights of the Child* (OHCHR/Save the Children, New York, Geneva 2007) at 343.

⁷⁷ UN ECOSOC, Commission on Human Rights, Written Statements of UNICEF and WHO, UN Doc. E/CN.4/1989/WG.1/CRP.1 (1989) at 13-14.

⁷⁸ UN ECOSOC, Commission on Human Rights, forty-fourth session, Report of the Working Group on a draft convention on the rights of the child, UN Doc. E/CN.4/1988/28 (6 April 1988).

⁷⁹ UN ECOSOC, Commission on Human Rights, forty-fifth session, Report of the Working Group on a draft convention on the rights of the child, UN Doc. E/CN.4/1989/48 (2 March 1989).

⁸⁰ Ibid at 22, para 117.

⁸¹ Ibid at 22, para 121.

⁸² Ibid at 22 - 23, para 122.

'welfare'. The proposal was supported by the observer for the Netherlands, but was opposed by the delegations of Portugal, Australia, Canada and Senegal because they argued that it sought to narrow the scope of protection the paragraph afforded to children.⁸³ Consensus was reached on the wording '*a primary consideration*' because those who favoured the version with '*the*' did not insist on revision.⁸⁴

Only the Venezuelan delegation in 1989 raised the issue of the inherent subjectivity in the phrase 'best interests of the child'.⁸⁵ Whilst not opposed to the actual phrase, the Venezuelan representative was concerned that interpretation of the principle would be left to the discretion and judgment of the decision-maker applying the principle, especially as there was no attempt to insert a prior stipulation that the 'best interests of the child' refers to his or her all round development, in particular, the physical, mental, spiritual, moral and social development of the child (which had been in the 1959 Declaration).⁸⁶ There was a short debate about this issue at the end of which the Venezuelan delegate withdrew her comment for the sake of consensus.⁸⁷ Unfortunately the report of the Working Group for 1989 does not elaborate on the nature of the debate on this point and what issues were raised by other delegations.

3.2.4 Adoption of the Convention 1989

When the Convention was adopted in 1989, the best interests principle appeared in seven other articles in addition to Article 3(1).⁸⁸ Given the importance of the principle, it is surprising that after all the rights had been agreed, there was never a review of the potential implications of giving such 'an unprecedented role to a child's "best interests" in a human rights treaty'.⁸⁹ Cantwell argues that if it had been reviewed later in the process, there might have been questions about whether the best interests principle was relevant in the context of the comprehensive human rights agreed in the CRC. He was concerned that it may impede awareness that children have human rights as opposed to 'special' rights, especially as no other human rights treaty - either before

⁸³ Ibid at 23, para 123.

⁸⁴ Ibid at 23, para 125.

⁸⁵ Ibid at 22, para 120.

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Articles 9(1) 9(3), 18, 20, 21, 37 and 40 CRC.

⁸⁹ N Cantwell, n 50 at 63. Cantwell was part of the NGO group which commented on the draft convention in the late 1980s and he does not address why the NGOs did not argue for a review of the best interests principle at the time.

the CRC or since - incorporates a best interests principle for different groups of people.⁹⁰ For example, in international human rights law, the notion of considering a disabled person's best interests would counteract the underpinning 'social model' of disability of the CRPD.⁹¹

One explanation for the lack of a debate between the delegates at the Working Group about the scope and desirability of a best interests principle in the CRC is that the principle had already appeared in the 1959 Declaration and, fundamentally, the states, international organisations and NGOs involved in the Working Group had no issue with the existence of the principle in an international children's rights treaty. It is argued that the reason for this was because a number of delegates at the Working Group were so familiar with the phrase 'best interests' and from its

extensive usage in the domestic law of many countries as to conclude that it required no close analysis... and felt no need either to defend its open-endedness or to propose elements which might inject some particular content into it.⁹²

States were content to accept the concept without debating its meaning or the challenges the principle may pose.⁹³ In 1989 (as I have highlighted earlier), the principle was a familiar concept in some states which meant that it was logical and coherent to include it in a Convention on children's rights.

Later in this chapter I examine the definition and broader implications of the principle, but first I explore the interpretation of the wording in the Article to determine the scope and parameters of the principle.

3.3 Operation and Scope of the Best Interests Principle

3.3.1 'In all actions concerning children'

In terms of scope, the best interests principle covers '*all actions concerning children*', which was a significant expansion of the concept as understood in domestic proceedings.⁹⁴ The manner in which the principle is

⁹⁰ N Cantwell, 'The Concept of the Best Interests of the Child: What Does it Add to Children's Human Rights?' in M Sormunen (ed), *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe, Strasbourg 2016) 18, 24. For example, the CRPD does not have a best interests principle, except in relation to children.

⁹¹ R Sandland, n 30; see section 2 above.

⁹² P Alston, n 46 at 11.

⁹³ MDA Freeman, n 23 at 26.

⁹⁴ See P Alston, n 46 at 11.

articulated in Article 3(1), purports to be a comprehensive one which encompasses every action concerning children.

The CRC Committee advises that the principle includes all acts, conduct, proposals, services, procedures, measures and omissions and applies not only to explicit actions concerning children, but also to actions that have an indirect impact on children.⁹⁵ Additionally inaction or failure to take action and omissions are 'actions' for the purposes of Article 3.⁹⁶ The Committee has interpreted 'concerning' to mean measures affecting individual children and groups of children as well as measures which affect children even if they are not the direct targets of the measure, thus 'concerning' must be understood in a broad sense.⁹⁷ It is arguable that all actions taken by a state affect children directly and indirectly but the CRC Committee recognise that it would be disproportionate to expect states, private institutions, parents and guardians to assess and determine the best interests of children for every action, 'where a decision will have a major impact on a child... a greater level of protection and detailed procedures to consider their best interests is appropriate'.⁹⁸

3.3.2 'Whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies'

This wording reveals the centrality of the principle in all state structures and institutions. It is a comprehensive obligation imposed on a wide range of state actors and state bodies and non-state bodies/actors with public powers, whose work and decisions impact on children,⁹⁹ thus assuming a broad application, in any matter where children are concerned, in the realisation of their rights.

The CRC Committee emphasised that each arm of the state's executive, legislature and judicial branches of government must consider how children's rights and *interests* will be affected by their decisions and actions¹⁰⁰ and the right will be implemented, taking all necessary deliberate

⁹⁵ CRC Committee, GC 14, paras 17, 18, 19 and 20.

⁹⁶ Ibid, para 18.

⁹⁷ Ibid, para 19. 'Concerning' is synonymous with 'affecting': see J Eekelaar and J Tobin, 'Article 3: The Best Interests of the Child' in J Tobin, (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 73 at 78.

⁹⁸ Ibid, paras 19 and 20. See below in 3.3.3 on direct and indirect decisions and primacy of best interests.

⁹⁹ CRC Committee, GC 14, para 12 and 25 – 31.

¹⁰⁰ Ibid, para 12.

and concrete measures.¹⁰¹ Private social welfare institutions were included in this provision to reflect the reality that the governments of many states either contract out or delegate authority to private entities to fulfil their obligations or to provide services to children. These bodies also have a duty to ensure that the best interests of children are a primary consideration where their actions impact on children's enjoyment of their rights.¹⁰² The first joint General Comment of the CRC Committee and the Committee on Migrant Workers (CMW) urged states to give 'high priority to the child's best interests in their legislations, policy and practice'.¹⁰³

The best interests principle in Article 3(1) applies to children as individuals and to specific situations, but also it applies to children generally and to children as a group.¹⁰⁴ The Committee considers that best interests is conceived as a collective as well as an individual right.¹⁰⁵ Parker argued that '[i]t is hard to see how, practically, the article [Article 3(1)] can have anything other than a collective focus',¹⁰⁶ he acknowledged that courts tend to be making decisions about individual children, whereas the other decision-makers mentioned in Article 3(1) often make decisions about groups of children and the paramountcy formulation in family law will be of no use when making such decisions.¹⁰⁷

3.3.3 'A Primary Consideration'

The principle of the best interests of the child is considered '*a primary consideration*', under Article 3(1) CRC. As I discussed earlier there was some debate at the drafting stage about whether it should have been *the* primary consideration or *the paramount* consideration.¹⁰⁸ It has been argued that whether the indefinite 'a' or definite 'the' is used, the essence

¹⁰¹ Ibid, para 13 and 15.

¹⁰² Ibid, para 26.

¹⁰³ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017), para 32(a). The Committees discuss the balancing of best interests and giving appropriate weight to the rights of the child (para 32(c)).

¹⁰⁴ CRC Committee, GC 14, paras 22 and 23.

¹⁰⁵ Ibid, para 23. The Committee implies 'collective' in the sense of a group of children as well as collective group rights. This paragraph gives an example of the right of indigenous children to 'collective cultural rights'.

¹⁰⁶ S Parker, n 9 at 28.

¹⁰⁷ Ibid.

¹⁰⁸ 1959 Declaration; see above.

of seeking what is best for the child is not dislodged'.¹⁰⁹ However, using the indefinite article does appear to alter where the principle lies in terms of priorities.

Archard argues that if best interests had been expressed in paramountcy terms then the child's interests would trump all other considerations¹¹⁰ and given the general application of the principle in Article 3(1) CRC, this would not be appropriate in every situation. The phrasing of the principle in Article 3(1) CRC, means 'a primary consideration is an important one, but not such as necessarily to outweigh all others'.¹¹¹ By being a primary consideration, the principle should not trump other rights in the CRC automatically, where, for example, the principle comes into conflict with the child's right to freedom of expression or the right to receive information (Article 13 CRC). There is no hierarchy of rights in the CRC,¹¹² so it would have been incoherent and inconsistent to suggest that best interests should have overall paramountcy in the Convention,¹¹³ especially as the Committee has stipulated that there is a *right* to having best interests assessed and determined.¹¹⁴

Zermatten asserts that Article 3(1) 'establishes the obligation to consider, in all decisions, the best interests of the child; it is not a choice but an obligation to examine this principle'.¹¹⁵ The words '*shall be*', which immediately precede 'a primary consideration', indicate that there is a legal obligation on states to assess and determine best interests.¹¹⁶ In other words a decision-maker does not have a discretion about whether or not the best interests of the child are relevant and whether or not to apply the principle in any action concerning children.¹¹⁷ The only discretion is over what factors to apply and what other considerations may be weighed in the balance. This interpretation justifies the CRC Committee's view that a child

¹⁰⁹ J Spinak, 'When did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate' (2007) 41 *Family Law Quarterly* 393 at 396.

¹¹⁰ D Archard, 'Children, adults, best interests and rights' (2013) 13 *Medical Law Journal* 55 at 59.

¹¹¹ *Ibid* at 60.

¹¹² CRC Committee, GC 5, para 6. The wording of article 2 also suggests that there is no hierarchy of rights.

¹¹³ D Archard *Children, Rights and Childhood* (Routledge, Abingdon 2015) 120.

¹¹⁴ CRC Committee GC14, para 6(a).

¹¹⁵ J Zermatten, n 33 at 35.

¹¹⁶ CRC Committee GC 14, para 36.

¹¹⁷ *Ibid*; JC Llorens, 'Presentation of General Comment No 14: Strengths and Limitations, Points of Consensus and Dissent Emerging in its Drafting' in M Sormunen (ed), *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe, Strasbourg 2016) 11 at 12.

has a right to have their best interests assessed and determined.¹¹⁸ Thus, Article 3(1) CRC, even though it adopts a weaker version of the principle than in Article 21 CRC, for example, gives decision-makers the option to treat the best interests of the child as the paramount consideration *if the situation demands it*.¹¹⁹

In situations where there is a conflict of interests or rights, the decision will come down to a question of priorities. The framing of best interests in Article 3(1) and its role within the CRC, requires a balance to be struck between the interests of a child and other factors, including the interests and rights of others. According to the Committee this reflects the child's level of 'dependency, maturity, legal status and voicelessness'.¹²⁰ Thus, '[p]rioritising the best interests of the child stems from recognition of the obvious fact that due to their youth, inexperience and lack of political power, children are not well placed to protect their own interests.'¹²¹

The priority of a child's interests depends on whether the decision about the child (or children) impacts them directly or indirectly. The best interest of the refugee child is a determining factor for specific actions, which the UNHCR identify as being adoption (Article 21), separation of the child from his or her parents (Article 9) and decisions about repatriation and resettlement of unaccompanied or separated children.¹²² In all other cases the best interests of the child are 'a primary consideration' and although considered first will be one of a number of competing interests and could be outweighed.¹²³ This means that in cases directly affecting the child the focus of the decision-maker should be on what outcome would be best for the child and this means examining as wide a range of possible outcomes as possible. However, if the decision affects a child indirectly, the focus should be on reaching the best solution to the issue to be decided not on the best outcome for the child.¹²⁴ Thus, although the best interests principle is premised on the primacy of children's interests, both Lady Hale

¹¹⁸ CRC Committee, GC 14.

¹¹⁹ P Alston and B Gilmour-Walsh n 8 at 12 (my emphasis).

¹²⁰ CRC Committee, GC 14, para 37.

¹²¹ EE Sutherland, 'Article 3 of the United Nations Convention on the Rights of the Child: The Challenges of Vagueness and Priorities in EE Sutherland and L Barnes Macfarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 21 at 35.

¹²² UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva May 2008), at 15 and 21; CRC Committee GC 6 paras 84, 92-93.

¹²³ *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, paras 26 and 33.

¹²⁴ J Eekelaar, n 18 at 5.

in *ZH(Tanzania)* and Eekelaar suggest that where there is the potential for a direct and significant impact of a decision on a child, the interests of the child should be paramount whereas the primacy of interests is more relevant for indirect decisions. However, the example given by both Lady Hale and Eekelaar - where a child's parents are going to live - is a decision which *directly* affects a child in need of international protection and thus best interests should be a paramount consideration in that context.

Before children were considered rights holders under the CRC, adults were the sole arbiters of what constituted children's best interests. However, under the CRC it would be inconsistent for adults to ignore the children's views on their best interests in the light of Articles 3, 5 (evolving capacities) and 12 (right to be heard/right to participate) and the role the CRC as a whole plays in the identification of those interests. A child's best interests must be informed by children themselves where they have capacity to participate (Articles 5 and 12) and can make their views known (Article 12).

There is a close and important link between a child's best interests and his or her protection and care under Article 3(2) CRC. This subparagraph tends to be overshadowed by its more dominant and controversial neighbour. The next two sections examine the *travaux préparatoires* of the second paragraph of Article 3 and the operation and scope of that paragraph.

3.4 Article 3(2): Protection and Care for a Child's Well-Being

Article 3(2) CRC states:

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.

3.4.1 The Polish Proposal: 1978

The wording of Principle 2 of the 1959 Declaration formed the first draft of Article II (Article 3),¹²⁵ with emphasis on the child enjoying 'special protection'. The World Health Organization (WHO) commenting on this wording in 1978 queried the use of the phrase 'special protection' and

¹²⁵ For the wording of Principle 2 see para 3.2.1 above.

asked what the child is being protected against, '[w]ould it be against harmful social environment, against disease, against abuse, etc.? Perhaps this point should be clarified'.¹²⁶ This point was not addressed specifically when the Convention was completely redrafted by the Polish delegation the following year, but 'special protection' was removed altogether in the redraft.

3.4.2 Redraft of Article 3: 1978 - 1983

The revised Polish draft in 1979 separated the best interests principle from the protection element.¹²⁷ In the redrafted Convention Article 3(2) stated:

The States Parties to the present Convention undertake to ensure the child such protection and care as his status requires, taking due account of the various stages of his development in [a] family environment and in social relations, and, to this end, shall take necessary legislative measures.¹²⁸

The 1981 session of the Working Group, which discussed Article 3, confirmed that Article 3(1) sets out the general principle of best interests, with specific obligations listed in the following provisions which were necessary for greater protection.¹²⁹ This is significant because it reveals that the Working Group did not think that best interests alone could ensure effective protection for the child and Article 3(2) complements the best interests principle. The Australian delegation in 1981 added to this provision to ensure a balance between the rights and responsibilities of parents and legal guardians and the obligations of the state. The Australian delegate argued that the proposal took account of a basic aim of the 1979 Warsaw Conference, 'namely the need to secure the rights of the child through support to the family in need'.¹³⁰

The only debate on Article 3(2) was on the question of rights and duties of parents and whether the rights and duties should be extended to others who have legal responsibility for the upbringing of children. A compromise was reached by inserting 'legal guardians' into the provision.¹³¹ In 1983 Belgium suggested the following wording: 'State

¹²⁶ UN ECOSOC, Commission on Human Rights, Report of the Secretary-General (1978), para h.

¹²⁷ See section 3.2.2 above.

¹²⁸ UN ECOSOC, Note Verbale (1979).

¹²⁹ UN ECOSOC, Commission on Human Rights, Report of the Working Group (1981), para 24.

¹³⁰ *Ibid*, para 21.

¹³¹ *Ibid*, paras 33 and 34.

Parties ... undertake to ensure the child the *right to physical and moral integrity*, as well as such protection and care as is necessary for his well-being'.¹³² This amendment was supported by the International Federation of Women in Legal Careers and the International Abolitionist Federation.¹³³ However, the proposed amendment by Belgium was never raised at subsequent Working Group meetings. It is not clear from the Reports of the Working Group why the concept of 'well-being' received so little attention, apart from the comment by WHO (see below).¹³⁴ As with best interests, the implications of inserting this into an international human rights treaty were not regarded as particularly significant at the time.

3.4.3 First Reading and Technical Review

In 1988, during the technical review of the draft convention, UNICEF suggested changing the language of Article 3(2) to make it gender inclusive.¹³⁵ The WHO delegation in 1988 suggested that Article 3(2) echoes Article 2(l) of the WHO constitution,¹³⁶ which stipulates that one of the functions of WHO is 'to promote maternal and child health and welfare',¹³⁷ aligning the concept of 'well-being' in Article 3(2) with the child's health and development.¹³⁸ The final wording of Article 3(2) CRC was accepted without further debate, when the final version of the Convention was put forward for adoption by the General Assembly in 1989.

3.5 Breathing Life into the Right to Protection and Care as is Necessary for Well-Being under Article 3(2)

There has been little commentary on 'often neglected' Article 3(2) CRC¹³⁹ and it has been noted that '[s]uch is the pervasive nature of Article 3(1) that Articles 3(2) and 3(3) are sometimes overshadowed by their omnipresent sibling in academic literature'.¹⁴⁰ Freeman regards Article 3(2)

¹³² UN ECOSOC, Commission on Human Rights, UN Doc. E/CN.4/1983/WG.1/WP.21.

¹³³ UN ECOSOC, Commission on Human Rights, thirty-ninth session, Written Statement submitted by two non-governmental organisations in consultative status: The international Federation of Women in Legal Careers and the International Abolitionist Federation, UN Doc. E/CN.4/1983/NGO/33 (17 February 1983).

¹³⁴ I review some of the literature on well-being below in section 3.5.2 below.

¹³⁵ UN ECOSOC, Commission on Human Rights (1989) at 13 – 14.

¹³⁶ World Health Organization (WHO), *Constitution*, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.

¹³⁷ UN ECOSOC, Commission on Human Rights (1989) at 13.

¹³⁸ The preamble of the WHO Constitution states: '[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity' and '[h]ealthy development of the child is of basic importance; the ability to live harmoniously in a changing total environment is essential to such development', n 136.

¹³⁹ See, for example MDA Freeman n 23 at 65; J Eekelaar and J Tobin, n 97 at 100 – 103.

¹⁴⁰ EE Sutherland, n 121 at 23.

as focusing on the child's *need* for care and protection as opposed to the child's *right* to care and protection.

However, as I argue in chapters 3 and 4 of this thesis, for a refugee child there is a right to protection in Articles 3(2) and 22 CRC, along with other protection rights in the CRC, such as Articles 19, 20, 32, 33, 34, 36 and 39. It is important at this stage to highlight that during the drafting of this paragraph it was not suggested that a child's care and protection or a child's well-being should weigh in the balance against other interests or considerations. Article 3(2) CRC cannot be interpreted so that a child's care, protection and well-being are balanced against other considerations which might outweigh a child's protection and well-being. It would not be appropriate, for example to weigh a child's well-being and right to be protected from violence or other harm under Article 19 CRC against a state's policy of returning all failed asylum-seekers to their country of origin. The CRC in *IAM (KYM) v Denmark*¹⁴¹ stated that where there are reasonable doubts that a receiving state or country of origin cannot protect a child against harm then the child should not be returned.¹⁴² The state has an obligation to prevent exposure to such harm in the future.¹⁴³ This obligation to ensure a child's well-being cannot be compromised to fulfil a state's policy on immigration control. The CRC Committee regard the care, protection and safety of the child as being elements of the best interests assessment or determination procedure and part of the state's obligation to ensure protection, care and well-being under Article 3(2) CRC.¹⁴⁴

3.5.1 Care and Protection

Who is responsible for children and their care and protection? Primary responsibility rests with the child's parents, but the obligation to care and protect as is necessary for a child's well-being rests with the state. States must take account of the responsibilities, rights and duties of parents and legal guardians.¹⁴⁵ Freeman argues that Article 3(2)

should be seen as a backstop provision, [which is] there to ensure that failures by States Parties cannot be justified just because an obligation does not exactly fit within a specific

¹⁴¹ CRC Committee, *IAM (KYM) v Denmark*, UN Doc. CRC/C/77/D/3/2016 (25 January 2018).

¹⁴² *Ibid*, para 11.8(c).

¹⁴³ *Ibid*, para 12.

¹⁴⁴ CRC Committee, GC 14, para 71.

¹⁴⁵ Article 3(2); MDA Freeman, n 23 at 65.

provision. If there are lacunae in the provisions of the Convention, Article 3(2) is intended to fill them in.¹⁴⁶

In other words, Article 3(2) fills the gaps in protection for children who are not covered by the CRC – street children, LGBT+ children and girl children.¹⁴⁷ But the use of the term ‘well-being’ and references to care and protection in other parts of the Convention suggests that Article 3(2) is not merely a gap-filling provision, but plays an essential role in how best interests and other rights in the CRC are interpreted and operationalised. The CRC Committee interprets ‘protection and care’ in a broad sense, not limited to negative terms, such as ‘to protect the child from harm’.¹⁴⁸ In fact the CRC Committee aligns protection and care to the ‘comprehensive ideal of ensuring the child’s “well-being” and development’.¹⁴⁹

3.5.2 Well-Being

The phrase ‘well-being’ appears in other articles in the CRC, besides 3(2) and is closely connected to development. Even though the term is used in the CRC, a definition remains elusive.¹⁵⁰ In the preamble to the CRC, the family unit is the natural environment for the growth and *well-being* of children and in Article 17, the right of the child to information and material is aimed at the promotion of his or her social, spiritual and moral *well-being* and physical and mental health. Ultimately ‘every child and young person should live in a supportive, protective and caring environment that promotes his or her full potential.’¹⁵¹ The outcome of any decision concerning a child should promote his or her well-being. However, the conflating of children’s well-being and rights in academic literature, government policy and legislation could lead to a diminishment of children’s rights if they are marginalised in favour of measures, indicators and outcomes which focus on professionals’ and experts’ views on children’s ‘well-being’.¹⁵²

¹⁴⁶ Ibid, 66.

¹⁴⁷ Ibid.

¹⁴⁸ CRC Committee GC 14, para 71. In chapter 4, I explore the meaning of protection and analyse the normative content of protection in the context of a refugee or asylum-seeking child.

¹⁴⁹ Ibid. This wording is similar to P Alston, ‘The Legal Framework of the Convention on the Rights of the Child’ (1992) 91(2) *Bulletin of Human Rights* 1 at 9; Alston also mentioned the ‘comprehensive ideal of the child’s well-being’, but not development.

¹⁵⁰ EE Sutherland, n 121 at 40.

¹⁵¹ UN General Assembly, ‘Guidelines for Alternative Care of children’ (2010) UN Doc A/RES/64/142, para 4.

¹⁵² K Tisdall, ‘Children’s Rights and Children’s Well-Being: Equivalent Policy Concepts’ (2015) 44 *Journal of Social Policy* 807 at 819 – 820; L Lundy, ‘United Nations Convention on the Rights of the Child and Child-Wellbeing’, in A Ben-Arieh, F Casas, I Frønes and J Korbin (eds.) *Handbook of Child Well-Being* (Springer, Dordrecht 2014) 2439.

It is significant that the drafters of the CRC chose to use 'well-being', a phrase without universal legal meaning, in Article 3(2), but without discussing what it meant during the drafting stage.¹⁵³ In academic writing, there is little concordance on what well-being means. I have considered three approaches. According to Raz, 'our well-being consists in the wholehearted and successful pursuit of valuable activities',¹⁵⁴ which suggests that a person's well-being is a result of something a person does for themselves. Raz is not connecting well-being to children and their future, but well-being in the present. Sen considers that the primary feature of 'well-being' is how a person functions (in a very broad sense),¹⁵⁵ which again focuses on what the individual does for themselves. Fabre defines 'well-being' as 'the absence of physical suffering'¹⁵⁶ and that others should respect our autonomy and well-being by refraining from harming us.¹⁵⁷ Fabre's approach focuses on a person's state of being, separating well-being from a person's autonomy to act.¹⁵⁸ Fabre's understanding is more focused on what society does to ensure a person's well-being. In the context of children, their capacity is evolving as they grow and thus their ability to influence and make decisions on their well-being will change over time. The interpretation of well-being by the CRC Committee indicates that there is a core minimum to secure a child's well-being and this stems from the care and protection a child should receive from the state and their parents or legal guardians.

The CRC Committee asserts that 'children's well-being, in a broad sense includes their basic material, physical, educational and emotional needs, as well as needs for affection and safety'.¹⁵⁹ The obligation of the state is to ensure that the care and protection of a child should be taken into consideration in any best interests assessment or determination. Thus, the well-being of the child must be the outcome of a best interests assessment or determination and the obligation encompasses both passive

¹⁵³ EE Sutherland, n 121 at 23.

¹⁵⁴ J Raz, *Ethics in the Public Domain*, (Clarendon Press, Oxford 1994) at 3. I have omitted the numbers from the text.

¹⁵⁵ A Sen, 'Well-Being, Agency and Freedom' (1985) 82 *The Journal of Philosophy* 169 at 197-198.

¹⁵⁶ C Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, Oxford 2000) at 9 and 13.

¹⁵⁷ *Ibid* at 7. Fabre assumes in her book that rights are respected and promoted by us and others. In international human rights law, the obligations to respect, protect and fulfil rights is imposed on states not individuals.

¹⁵⁸ *Ibid* at 13.

¹⁵⁹ CRC Committee General Comment No 14, para 71.

and active (including pro-active) obligations and should thus be at the forefront of the decision-maker's mind when assessing and determining a child's best interests.¹⁶⁰ This is a much broader concept than Fabre's absence of physical suffering as the core of well-being.

Children's health needs are a key element of well-being, which the WHO made reference to in the *travaux préparatoires*. The preamble to the WHO constitution defined health as 'a state of complete physical, mental and social *well-being* and not merely the absence of disease or infirmity'.¹⁶¹ Eekelaar includes health as part of 'well-being' and defines it as including the:

physical and mental health of the person necessary to achieve those ends [degree of success achieved in realising a person's significant goals in life]; the opportunity to maintain and establish important personal relationships; the ability to benefit from educational, social and economic activity and to integrate into society; the ability to develop abilities and interests and to realise life plans. In the case of the inexperienced, it will include guidance towards achieving these goals.¹⁶²

There has been some progress in relation to developing measurable indicators for well-being,¹⁶³ following the CRC Committee's request for states to establish national standards for child well-being, health and development as securing these conditions is the ultimate goal of child caregiving and protection.¹⁶⁴ However, a move towards measuring well-being for the protection of children must not overshadow a child rights approach and the importance of recognising the child as a rights holder.¹⁶⁵

Article 3(2) CRC must, therefore, be read together as part of Article 3(1) CRC,¹⁶⁶ and is an important part of the operationalisation of the best interests principle. Because of this provision the balancing exercise that

¹⁶⁰ P Alston, n 149 at 9. See also J Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 483 at 488-489.

¹⁶¹ Preamble to the WHO *Constitution*, n 136 (my emphasis).

¹⁶² J Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237 at 243. These criteria draw on J Griffin, *Well-Being: Its Meaning, Measurement and Moral Importance* (Oxford University Press, 1986) and J Raz, *The Morality of Freedom* (Clarendon Press, 1986), chapter 12.

¹⁶³ UNICEF *Strategic Plan, 2014-2017, E/ICEF/2013/21* and the *Final Results Framework for the UNICEF Strategic Plan, 2014 - 2017, E/ICEF/2014/8*.

¹⁶⁴ CRC Committee, General Comment no. 13, The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2011) (GC 13), para 18. But see Tisdall's critique of how Scotland has implemented this, K Tisdall, n 152.

¹⁶⁵ L Lundy, n 152 at 2459.

¹⁶⁶ MDA Freeman, n 23 at 67.

states undertake in the context of a best interests assessment or determination may undermine a refugee child's right to protection, if the 'well-being' of the child is not prioritised in terms of outcome.

This section has focused on the *travaux préparatoires* of Articles 3(1) and (2) CRC. The best interests principle, as enshrined in Article 3(1) CRC dominates the landscape of decision-making in matters concerning children. But Article 3(2) CRC confirms that the ultimate goal of the best interests principle is to ensure the care and protection of a child as is necessary for his or her well-being.¹⁶⁷ Three decades after the CRC was adopted by the General Assembly, the meaning of 'best interests' remains elusive and susceptible to interpretations which do not always suit a child rights agenda and, as I argue later in this thesis, do not necessarily enhance a refugee child's right to protection. The best interests principle is applied to a broad range of situations which affect children and it has been suggested that the principle is not a 'philosophical viewpoint to be debated', but a 'vehicle for action'.¹⁶⁸ The next section reviews the roles assigned to best interests by the CRC, which makes the principle one of the fundamental values of the Convention.¹⁶⁹

4. Best Interests Principle in a Rights Framework

The best interests principle predated the CRC and evolved in an era when children had few, if any, recognised rights, were not acknowledged as rights holders and at a time when children were often viewed as 'instruments for the promotion of the interests of others'.¹⁷⁰ The principle has been described as a 'basically paternalistic and charitable notion' which states must take account of in the implementation of children's human rights.¹⁷¹ The danger with a paternalistic approach is that the adults making decisions about children's lives essentially regard children as vulnerable victims requiring protection from harm. Therefore, instead of acknowledging children as rights holders who have autonomy, agency and personhood, decision-makers adopt an adult construction of what is in the child's best interests, rooted in an adult concept of childhood.¹⁷² However,

¹⁶⁷ J Zermatten n 160 at 489.

¹⁶⁸ J Fierens, 'Alpha Ursae Minoris: The North Star and the Child's Best Interests among Competing Interests' in M Sormunen (ed), *The Best Interests of the Child - A Dialogue between Theory and Practice* (Council of Europe Publishing, Strasbourg 2016) 36 at 37.

¹⁶⁹ CRC Committee, GC 14, para 1.

¹⁷⁰ J Eekelaar, n 162 at 240.

¹⁷¹ N Cantwell, n 50 at 62.

¹⁷² J Eekelaar and J Tobin, n 97 at 76.

the criticism of the paternalistic nature of the principle does not mean it should be rejected as a principle in the context of making decisions about children's lives: '[t]he principle is based upon the recognition that an adult is only in a position to take decisions on behalf of a child because of the child's lack of experience and judgment'.¹⁷³ This is true as long as such decisions are rights-based, alongside the other rights in the Convention.

Earlier in the chapter, I highlighted the fact that the Working Group did not review the implications of having a best interests principle in a rights convention after all the other rights had been agreed.¹⁷⁴ The silence on its utility and its role within a rights treaty was not questioned to any great extent, with objections dropped in favour of consensus. It is only since the Convention was adopted in 1990 that there has been a debate on the utility and role of the best interests principle in the CRC.

The principle has evolved since the CRC was adopted beyond its paternalistic dynamic to one where it leads the way towards greater implementation of the CRC.¹⁷⁵ It allows children to exercise their rights by ensuring states and other duty-bearers fulfil their obligations¹⁷⁶ and the principle assists decision-makers to achieve an outcome that will have the most positive or least negative impact on them.¹⁷⁷ It is significant that the principle sits alongside a catalogue of rights which provide a broad ethical or value framework and which give greater certainty to the content of the best interests principle.¹⁷⁸

The Committee in part addresses the uniqueness of the best interests principle in the context of children's rights by assigning the principle three roles to ensure the principle achieves its goal of ensuring 'the full and effective enjoyment of rights ... and the holistic development of the child'.¹⁷⁹

4.1 The Role(s) of the Best Interests Principle

According to the Committee the best interests principle is a threefold concept: a substantive right, a rule of procedure and a fundamental

¹⁷³ J Zermatten n 160 at 485.

¹⁷⁴ N Cantwell, n 50 at 63.

¹⁷⁵ U Kilkelly, n 45 at 63.

¹⁷⁶ H Stalford, 'The broader relevance of features of children's rights law: the "best interests of the child" principle' in E Brems, E Desmet and W Vandenhoe (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge, Abingdon 2017) 37 at 38.

¹⁷⁷ Ibid.

¹⁷⁸ P Alston, n 46 at 19.

¹⁷⁹ CRC Committee, GC 14, para 82.

interpretative legal principle.¹⁸⁰ These roles indicate the various functions it has in a children's rights framework. All three roles can operate at different levels in actions concerning a child or children.¹⁸¹

4.1.1 Best Interests Principle: A Substantive Right

The CRC Committee declares that it is a *fundamental* assumption, derived from the CRC, that the 'right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention'.¹⁸² In General Comment 14, the Committee expands on the notion that Article 3(1) CRC contains a right, which includes 'the right of the child to have his or her best interests assessed and taken as a primary consideration ... both in the public and private sphere'¹⁸³ and 'when different interests are being considered'.¹⁸⁴

Is it appropriate or coherent to consider best interests as a right? Article 3(1) CRC does not contain the word 'right' and instead is part of a number of provisions (Articles 1-5) in the CRC which form the 'umbrella' of the CRC and come before the substantive rights listed in the CRC. There is not much academic support for the Committee's position that Article 3(1) CRC creates a 'substantive' right. Kilkelly argues that '[r]egardless of where it is situated in the Convention, a plain reading of the text does not support the view that Article 3(1) contains a right'.¹⁸⁵ The framing of the principle in Article 3(1) CRC does not impose an obligation and does not identify a duty-bearer. Alston describes Article 3(1) CRC as containing a general requirement to ensure that all actions are informed by the best interests of the child rather than imposing an obligation on states as such.¹⁸⁶

However, applying the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT),¹⁸⁷ it is possible to find support for the CRC Committee's assertion that Article 3(1) CRC creates a right. The meaning of a treaty provision must be determined in the light of

¹⁸⁰ Ibid, para 6.

¹⁸¹ Ibid.

¹⁸² CRC Committee, GC 13, para 3(f).

¹⁸³ CRC Committee, General Comment No 14, para 1.

¹⁸⁴ Ibid, para 6(a).

¹⁸⁵ U Kilkelly, n 45 at 57. See also MDA Freeman, n 22 at 4; G Van Bueren, n 46 at 46.

¹⁸⁶ P Alston, n 46 at 15.

¹⁸⁷ Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

the object and purpose of the treaty or convention as a whole.¹⁸⁸ It is arguable that Article 3(1)'s prominent position in the CRC, read in the light of the other rights in the CRC, the object and purpose of the CRC as set out in the preamble to the CRC and underpinned by the child as a rights holder, justifies the Committee's approach to the rights status of the best interests principle.¹⁸⁹

As to whether there is a duty bearer in Article 3(1) CRC, although 'States Parties' are not explicitly mentioned, the listing of bodies, such as public or private social welfare institutions, courts of law, administrative authorities or legislative bodies reflects the organs of the state or those to whom the state has given delegated authority. These are the relevant state bodies who bear the duty for ensuring that best interests are a primary consideration in any decision concerning children.¹⁹⁰

The Committee declares that the child's *right* to have his or her best interests assessed is directly applicable (self-executing) and can be invoked before a court.¹⁹¹ This suggests that the right can be relied on by children directly, without incorporation or implementation of the principle into national law. The question of whether a treaty provision is self-executing before a national court is usually determined by the national legal system¹⁹² and requires implementing legislation if the best interests principle is not part of domestic law. Whilst the Committee has encouraged all States Parties to incorporate the CRC into domestic law to ensure that provisions of the CRC can be invoked before the courts and applied by national authorities,¹⁹³ this has not been done in all jurisdictions around the world.¹⁹⁴ UNICEF carried out a study, which revealed that the CRC had been directly incorporated into the national law of 35 out of the 52 countries surveyed.¹⁹⁵ International human rights treaties leave it to States Parties to decide how to give effect to their international obligations at a domestic level. It is unlikely that states would agree with the Committee that the child's *right* to have their best interests assessed and taken as a primary consideration is 'self-executing' and can be invoked

¹⁸⁸ Article 31(1) VCLT.

¹⁸⁹ U Kilkelly, n 45 at 57 – 58.

¹⁹⁰ *Ibid* at 58.

¹⁹¹ CRC Committee, GC 14, para 6(a).

¹⁹² JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017) at 197, footnote 84.

¹⁹³ CRC Committee GC 5, para 20.

¹⁹⁴ See for example, P Jeronimo Vink, and N Finch, n 19 at 22; L Lundy, U Kilkelly, B Byrne and J Kang, n 21 at 17.

¹⁹⁵ UNICEF, *Law Reform and Implementation of the CRC* (UNICEF Innocenti Research Centre, Florence 2007).

before a domestic court. Although the Committee is the primary interpreter of the CRC and has persuasive influence, states decide whether and how to incorporate the best interests principle into national law.

The Committee's assertion that Article 3(1) CRC is a right, may provide children with a procedural right to have their best interests considered as a primary consideration and there is certainly state practice indicating that if a court or administrative authority does not consider a child's best interests this constitutes an error of law.¹⁹⁶ There is recognition that Article 3(1) is a fundamental interpretative principle in all actions concerning a child.

4.1.2 Best Interests Principle: A Fundamental Interpretative Legal Principle

The CRC Committee has stated that where a 'legal provision is open to more than one interpretation; the interpretation which most effectively serves the child's best interests should be chosen'.¹⁹⁷ The Convention and its Optional Protocols provide the framework for interpretation. The Committee considers the principle as a lens through which children's rights can be implemented and interpreted, but this is problematic because of the tenuous rights base accorded to the principle.¹⁹⁸ In domestic jurisdictions, the best interests concept has been considered a dominant interpretative principle as well as a 'mediating' principle¹⁹⁹ to resolve conflicts between different interests, particularly in family cases where a judge often has to balance competing parents' interests or balancing parents' interests against children's interests, or balancing parents' interests and children's interests against the state's interests. The traditional approach in family law was to view 'best interests' in terms of a child's 'welfare' and 'protection'; not with a view to promoting or protecting a child's human rights.²⁰⁰ The CRC Committee urges a 'paradigm shift away from child protection approaches

¹⁹⁶ See, for example UK case of *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, para 24; see also F Meyler and D Morrish, 'Best Interests of the Unaccompanied Refugee Child: United Kingdom and Canadian Approaches in Legislation and Case Law' (2017)(unpublished paper presented to the 11th Conference of the International Association of Refugee Law Judges).

¹⁹⁷ General Comment No 14, para 6(b).

¹⁹⁸ U Kilkelly, n 45 at 61 - 62.

¹⁹⁹ P Alston, n 46 at 15 - 16; J McAdam, 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 at 254.

²⁰⁰ G van Bueren, n 46 at 46.

in which children are perceived as objects ... rather than as rights holders'.²⁰¹

Cantwell argues that because the principle has such a prominent role,²⁰² there is a danger that best interests are invoked when a reference to a right would suffice. Nevertheless, he accepts that the principle can play a positive role to fill gaps not covered by rights.²⁰³ Parker has also acknowledged this role, '[i]n all matters not governed by positive rights in the Convention, [A]rticle 3(1) will be the basis for evaluating the laws and practices of the states'.²⁰⁴ Kilkelly sees one of the merits of Article 3(1) is to act as a gateway to children's rights, because it focuses on the child and promotes child-centred interpretation and decision-making, ironically because it is not couched in 'rights' language.²⁰⁵ Pobjoy highlights the significance of the best interests principle for child refugees and argues that best interests should be an independent source of protection for children who are at risk of being removed, notwithstanding the fact that they do not qualify for refugee protection or cannot seek protection as part of a state's *non-refoulement* obligations.²⁰⁶

Article 3(1) is shaped and constrained by the rights set out in the CRC so a decision or action taken on behalf of a child cannot conflict with another right in the CRC.²⁰⁷ It is worth repeating here that for the Committee, the concept of best interests is to ensure full and effective enjoyment of all rights in the CRC and 'the holistic development of the child', all rights are in the child's best interests and 'no right could be compromised by a negative interpretation of the child's best interest'.²⁰⁸ The Committee advocates an approach which emphasises that what is deemed to be in a child's best interests must also protect their rights. In other words, a rights-based approach must be adopted when assessing and determining best interests.²⁰⁹ A 'principled construction' of Article 3(1) CRC, requires a decision-maker to consider the extent to which, for

²⁰¹ CRC Committee, GC 13, at para 59.

²⁰² N Cantwell, n 50 at 62.

²⁰³ *Ibid*, at 66 and 71.

²⁰⁴ S Parker, n 9 at 27.

²⁰⁵ U Kilkelly, n 45 at 65.

²⁰⁶ J Pobjoy (2015), n 7. I explore this argument further in Chapters 5 and 6.

²⁰⁷ MDA Freeman, n 23 at 5; J Tobin, 'Beyond the Supermarket Shelf: Using A Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275 at 287.

²⁰⁸ CRC Committee, GC 14, para 4.

²⁰⁹ See Chapter 1, section 5.

example, a child seeking international protection will enjoy the rights under the Convention.²¹⁰

4.1.3 Best Interests Principle: A Rule of Procedure

The third role assigned to the best interests principle is its role as a procedural rule in that it must be considered in every decision concerning or impacting, positively or negatively, directly or indirectly on a child or on a group of children.²¹¹ Any assessment or determination of a child's best interests requires procedural guarantees and a decision should be justified by demonstrating how the right (to assess and determine best interests) has been respected in the decision.²¹² It is in this role that the principle can remedy its shortcomings by shaping the process of determining the child's best interests.

The CRC Committee has advocated an approach which purports to alleviate the negative elements of the operation of the principle. First, a decision-maker should establish the relevant elements in a best interests assessment, to 'give them concrete content and assign a weight to each in relation to each other'.²¹³ Then a procedure should be followed with legal guarantees and 'proper application of the right'.²¹⁴ The Committee considers that procedural guarantees require a combination of Article 3(1) and Article 12 (the right to be heard) and that the two rights are inextricably linked for this purpose.²¹⁵ Procedural guarantees include requirements to establish facts,²¹⁶ reduce delays,²¹⁷ ensure qualified professionals are involved in the assessment of the child's best interests,²¹⁸ provide legal representation where appropriate,²¹⁹ apply legal reasoning²²⁰ and ensure mechanisms for reviewing or revising decisions.²²¹ The Committee recognises that it would be overly onerous to oblige a state to carry out a comprehensive process of determining the best interests of the

²¹⁰ JM Pobjoy (2015), n 7 at 352.

²¹¹ CRC Committee, GC 14, para 6(c).

²¹² Ibid.

²¹³ Ibid, para 46; the elements are set out in GC 14, paras 52 – 79, in a non-hierarchical list.

²¹⁴ Ibid.

²¹⁵ Ibid, paras 89 – 91; see also CRC Committee, General Comment no. 12, 'The Right of the Child to be Heard', UN Doc. CRC/C/GC/12 (1 July 2009), para 74.

²¹⁶ Ibid, para 92.

²¹⁷ Ibid, para 93.

²¹⁸ Ibid, paras 94 and 95.

²¹⁹ Ibid, para 96.

²²⁰ Ibid, para 97.

²²¹ Ibid, para 98.

child, for each and every action or decision concerning a child.²²² There is a proportional relationship between the decision and the impact on the child: 'where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate'.²²³ For example, where an assessment is being made about returning a child to their country of origin where they might be at risk of persecution or serious harm, greater safeguards must be in place.²²⁴ General Comment No. 14 emphatically states that the best interests of a child must be based on an assessment of *all elements* of a child's interests in a specific situation.

The CRC Committee's attempt to reduce the indeterminacy of the principle through a procedural approach, however, does not provide decision-makers with guidance on what weight to assign to different elements in the assessment, plus 'it fails to address directly many of the critical issues that constantly plague the determination of a child's best interests'.²²⁵

5. Meaning of 'Best Interests'

This chapter demonstrates that, although the best interests principle is regarded as a central tenet of children's rights, its 'precise definition remains elusive and its application highly inconsistent and contingent upon subjective interpretation'.²²⁶ Alston and Gilmour-Walsh commented that:

the central importance of the best interests principle within the CRC framework does not mean that its interpretation or application is in any way straightforward or uncontroversial. Paradoxically, the stronger the agreement as to its centrality, the greater the diversity of approaches advocated in its application.²²⁷

Alston has commented that the meaning of 'best interests' when drafting Article 3(1) CRC 'seems either to have been taken for granted or to have been considered unimportant'.²²⁸

²²² Ibid, para 20.

²²³ Ibid.

²²⁴ T Brown, H Johnson, N Adams, K Cronin, R Kohli, B Sandhu, *Put Yourself in Our Shoes: Considering Children's Best Interests in the Asylum System* (9 November 2015) Law Centres Network at 29. See also JGC 3 and 22, paras 32(k) and 33; CRC Committee, *Views, IAM (KYM) v Denmark* (2018). I deal with this in more detail in chapter 6.

²²⁵ J Eekelaar and J Tobin, n 97 at 84.

²²⁶ H Stalford, n 176 at 37.

²²⁷ P Alston and B Gilmour-Walsh, n 8.

²²⁸ P Alston, n 46 at 11.

5.1 Why *Best Interests*?

It has been argued that the use of the superlative word *best* (*supérieur* in French) means a child's interests will always triumph over the interests of others.²²⁹ A literal interpretation could mean that the child is an exceptional person whose interests are always primary or paramount, but, in reality, a child remains a part of a family or community and their interests need to be balanced against others' interests.²³⁰ For Zermatten, '[t]he combination of "*best*" and "*interests*" merely signifies that *the ultimate goal is the "well-being" of the child, as defined in the Preamble, Article 3(2) and throughout the Convention*'.²³¹ Eekelaar asks, is a child entitled to the

disposition which offers the most advantageous prospects for [his or her] development...[which] must require nurturing the relationship most likely to fulfil these prospects in a manner compatible with the least disturbance to existing profitable attachments?²³²

The best interests of the child could be interpreted as shorthand for the range of factors which are necessary to protect the child's well-being in the short, medium and long term.²³³

Archard is concerned that the word *best* has been attached to a child's interests which means that 'we are obliged to promote the interests of the child to the highest degree possible, rather than simply take those interests into account to some degree'.²³⁴ Because the language of the principle is *maximizing*, the principle suggests that agencies and persons with responsibility for children must do the best by the child that they can (for example always look for the *best* education, the *best* healthcare, *best* housing), which when examined in this way makes the principle 'unfeasibly demanding'²³⁵ and how do we measure what is the 'best' of everything for a child?

In this vein, why does the CRC (and regional and domestic law) prioritise children's interests specifically over and above other groups or

²²⁹ H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267.

²³⁰ J Zermatten n 160 at 488 and 489.

²³¹ *Ibid*, at 489 (emphasis in the original).

²³² J Eekelaar, 'Trust the Judges: How far should Family Law go?' (1984) 47 *Modern Law Review* 593 at 597.

²³³ H Stalford, n 176 at 38.

²³⁴ D Archard, n 110.

²³⁵ D Archard, n 113 at 113.

family members? It is argued that children's interests should be prioritised because children are disproportionately affected by violations of their civil, political, social and economic rights.²³⁶ In the context of refugee children, they are disproportionately affected by both the causes of forced displacement and by decisions taken on their behalf by adults to undertake dangerous and life-threatening journeys to reach safety. Children's best interests and their right to protection should take priority because they 'wield no significant political, legal or (strategic) economic power and are ... excluded from the vast majority of important societal institutions'.²³⁷ The ultimate aim of prioritising children's rights must be to increase their visibility within legal processes (such as asylum and refugee procedures), because of such exclusion. Prioritising children's rights ensures recognition of their status as rights holders, ensures their voice is heard and ensures their interests are identified and become part of the decision-making process.²³⁸ Giving primacy to the child's best interests must mean respecting other CRC rights.²³⁹

The CRC Committee, when discussing the weight to be attached to a child's best interests, advises states that 'a larger weight must be attached to what serves the child best'.²⁴⁰ Additionally, as Eekelaar has argued, where the decision affects the child directly, the focus should be on the solution which provides the best outcome for a child.²⁴¹ 'Best' means that children's interests must not be ignored by decision-makers, including parents. Thus, the decision-maker must turn his or her mind to the child and his or her rights/interests. In this way the best interests of the child is a gateway right.²⁴²

5.2 What Interests of Children are Protected by the Principle?

The CRC does not identify what type of interests the principle is meant to protect nor is there an indication as to whether the interests

²³⁶ A Nolan, *Children's Socio-Economic Rights: Democracy and the Courts* (Hart, Oxford 2011) at 13.

²³⁷ *Ibid* at 7.

²³⁸ K Hollingsworth and H Stalford, 'Towards Children's Rights Judgments' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, Oxford 2017) 53.

²³⁹ F Donson, 'Commentary on *R (on the Application of Castle v Commissioner of the Police for the Metropolis)*' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, Oxford 2017) 275 at 279 – 281.

²⁴⁰ CRC Committee, GC No 14, para 39.

²⁴¹ J Eekelaar n 18 at 5.

²⁴² U Kilkelly n 45.

protected are the child's current interests or future interests or both. Peleg argues that because the CRC adopted a construction of childhood which focused on what children would become (i.e. adults), the CRC is concerned with a child's future interests as well as his or her current situation.²⁴³ Van Bueren suggests that the rights set out in the CRC may be signposts by which the best interests of the child may be identified.²⁴⁴ A child may have interests in the sense of having an inclination to pay attention to something (such as being interested in sport), interests connected with their own desires or interests connected with basic needs such as health, housing, food and education, material security, relationships and liberty or what Kleinig described as 'welfare interests'.²⁴⁵ In a similar vein, Eekelaar identifies three types of interest for a child:

Basic interests, for example to physical, emotional and intellectual care; developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.²⁴⁶

Arguably these three types of interest are covered by specific rights in the CRC and align with the protection which is appropriate for a child seeking international protection.²⁴⁷ It has been argued that because children have legal rights that require consideration of their best interests, this indicates not only that children have interests which particular rights are designed to protect, but also 'that the relevant interests are a reference point that is both integral, and at the same time external, to the rights in question.'²⁴⁸

However, the emphasis on interests may overshadow the right to which it relates by using the welfare or best interests of the child as a guide. Ross comments that the 'all-pervasive' best interests principle in the vocabulary of children's rights demonstrates that children's rights are part of the wider rights discourse. Children can be regarded as having interests which rights are designed to protect.²⁴⁹

Some commentators on children's rights have attempted to define and provide some content for the principle and to consider what kind of

²⁴³ N Peleg, n 51.

²⁴⁴ G van Bueren, n 46 at 48.

²⁴⁵ See J Kleinig, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27 at 28 - 30 for a discussion on different meanings of 'interests'.

²⁴⁶ J Eekelaar, 'The Importance of Thinking That Children Have Rights' (1992) 6 *International Journal of Law and the Family* 230 at 231.

²⁴⁷ See Chapter 5.

²⁴⁸ H Ross, n 21 at 680.

²⁴⁹ *Ibid.*

interests the principle should cover. Eekelaar rejected the notion that best interests could be defined by listing all the duties owed by adults to children, because this would reflect a negative view of human nature.²⁵⁰ The UNHCR Guidance on Best Interests, published in 2008 provided the following explanation for best interests principle:

The term “best interests” broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, gender, level of maturity and experiences of the child, as well as other factors such as the presence or absence of parents, quality of the relationships between the child and family/caretaker, physical and psychosocial situation of the child, and her/his protection situation (security, protection risks, etc.).²⁵¹

This description, which is directly relevant to children on the move, highlights that the principle of best interests cannot operate in a vacuum and demonstrates that it is closely interlinked with the ultimate goal of protecting children’s rights to ensure their well-being (Article 3(2)) and development (Article 6). Therefore, the aim of assessing best interests must be to ensure the protection and care as is necessary for a child’s well-being.

The CRC Committee asserts that the principle has a dual purpose: firstly, full and effective enjoyment of all the CRC rights and secondly, the holistic development of the child,²⁵² and I would argue that Article 3(2) provides the principle with its fundamental purpose – the well-being of a child. The policy objective of the principle is ‘to promote a real change in attitudes leading to the full respect of children as rights holders’.²⁵³ Llorens, who chaired the working group on General Comment No 14, said that the assessment and determination should be founded on objective criteria and not on what the decision-maker thinks is best for the child, instead a child’s best interests should ‘objectively, secure ... for the child both full and effective realisation of all the rights ... in the [C]onvention, *and his or her overall development*’.²⁵⁴ The Committee has also answered the criticisms of the principle’s paternalism by stating that ‘an adult’s

²⁵⁰ J Eekelaar, n 246 at 234.

²⁵¹ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018) at 26. The description first appeared in UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva 2008) at 14.

²⁵² CRC Committee, GC 14, para 4.

²⁵³ *Ibid*, para 12.

²⁵⁴ JC Llorens, n 117 at 12-13 (my emphasis).

judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention'.²⁵⁵

It could be contended that the basic premise of the entire Convention is that its provisions must be interpreted with the 'best interests of the child' constantly in the mind of the decision-maker and that the basic structure of the CRC is a combination of the rights of the child and the 'best interests' standard.²⁵⁶ As I will elaborate further in section 6 below, the best interests standard relates to the CRC as a whole, including all the rights of the child and state obligations.²⁵⁷

6. The Best Interests Principle: Challenges and Problems

The lack of a definition and imprecision in the concept has led to the best interests principle being described as a nebulous concept, acting as an 'alibi for individual arbitrariness'.²⁵⁸ The chief criticism levelled at the best interests or welfare principle is the fact that it is open-ended²⁵⁹ and indeterminate.²⁶⁰ The concept of best interests is so misunderstood, ambiguous and open to misinterpretation, that it can conceivably be used to serve adult or state interests rather than promoting the interests of the child which is evident in asylum cases. Ultimately, within a children's rights framework, the best interests of a refugee child should be about identifying their protection needs, ensuring the child's well-being and the respect, protection and fulfilment of the relevant rights of the child. Eekelaar and Tobin argue that the indeterminacy issue only arises in decisions about children, rather than decisions affecting children directly, such as adoption and separation from the family.²⁶¹ Where decisions are about children and require a court or decision-maker to balance different and competing interests, the indeterminacy of the principle could have a negative impact. To reduce this risk, the CRC Committee suggests an approach which requires an evaluation of all the relevant elements, assigning weight to each one and a procedure which 'ensures legal guarantees and proper

²⁵⁵ CRC Committee GC 13, para 61.

²⁵⁶ J Wolf 'The Concept of the 'Best Interest' in Terms of the UN Convention on the Rights of the Child' in M Freeman and P Veerman (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 125 at 129.

²⁵⁷ Ibid at 127.

²⁵⁸ They, 'The interest of the child and the Regulation of the post-Divorce Family' in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 78 at 82.

²⁵⁹ See the discussion of the *travaux préparatoires* in section 3.2 above.

²⁶⁰ S Parker, n 9 at 26.

²⁶¹ J Eekelaar and J Tobin n 97 at 83.

application of the right'.²⁶² Eekelaar and Tobin suggest considerations which reduce the principle's indeterminacy, including the child's views (applying appropriate safeguards and effective measures to ensure the child is heard), consideration of other CRC rights, (thus a decision cannot be in a child's best interests, if it is contrary to or violates a right), the views of parents and other adults in the child's life, the individual circumstances of the child (including developmental needs and relevant social, cultural or religious practices) and the availability of empirical evidence.²⁶³ The risks inherent in the best interests assessment can be diminished if a rights-based process is adopted.

Parker cautions against assuming that there is one standard of best interests. There is more than one standard within the CRC itself, for example there is a difference between best interests as a primary consideration in Article 3(1) CRC and as the paramount consideration in Article 21 CRC. Furthermore the principle is applied by state actors and state bodies at different levels of governance from border guards, social workers and first level decision-makers, who are making decisions concerning individual children up to all branches of government including the executive, legislature and judiciary, who are making decisions which will impact on individual children and children as a group.

The principle attracts criticism from those who believe it is 'necessary to know everything about the volume, density and composition of the child's interests for this principle to guide them.'²⁶⁴ However, there are numerous undefined, indefinite and indeterminate concepts in law such as equality, proportionality, reasonableness and justice and this is not fatal to their use or usefulness as concepts in a legal context.²⁶⁵ Alston, observes that a number of human rights norms are indeterminate and argues that they have to be in order to be universal and adaptable to different situations and flexible in a changing globalised world.²⁶⁶ Nevertheless the CRC Committee has fleshed out the principle with a detailed list of measures that states should implement²⁶⁷ in order to give effect to the principle and elements to be taken into consideration when assessing and determining best interests.²⁶⁸ Although onerous and broad in scope these

²⁶² CRC Committee GC 14, para 46.

²⁶³ J Eekelaar and J Tobin n 97 at 85 – 95.

²⁶⁴ J Fierens, n 168 at 36.

²⁶⁵ Ibid at 37.

²⁶⁶ P Alston, n 46 at 18.

²⁶⁷ CRC Committee GC 14, paras 13 – 15; JGC 3 and 22, para 27 – 33.

²⁶⁸ CRC Committee, GC 14, paras 52 – 79.

measures and guidance do not depend on a 'determinate perception of children's best interests'²⁶⁹ and can be implemented progressively.

The indeterminacy critique fails to take account of the balance that the CRC's conceptualisation of best interests is trying to achieve, in ensuring that a child's interests are considered and that the child has an opportunity to participate in decisions made about him or her. Determining best interests must include the wishes of the child, the relevance of other rights under the CRC, the particular circumstances of the child and any available empirical evidence which may be of relevance.²⁷⁰ Thus, '[b]y anchoring the best interests assessment in both a principled (rights-based) and objective (evidence based) framework the risk of subjective and/or speculative arbitrariness in the application of the best interests principle is considerably reduced'.²⁷¹ Additionally, as I argue in this thesis, Article 3(2) adds a protection, care and well-being layer to best interests which complements Article 3(1) and operates to reduce the indeterminacy of the principle. Alston has suggested that the CRC

provid[es] the broad ethical or value framework that is often claimed to be the missing ingredient which would give a greater degree of certainty to the content of the best interests principle.²⁷²

On the other hand, the principle is a broad church allowing for flexibility in its application, implementation and interpretation. A consequence of this flexibility is the responsiveness of the principle to an individual child's unique situation and the concept is able to evolve as knowledge about child development emerges.²⁷³ The Committee advocates a flexible approach to the application of the principle, but warns about the dangers of manipulation of the principle by governments and state authorities to promote racist policies, for example.²⁷⁴ Article 3(1) must be read in the context of the CRC as a whole.²⁷⁵ Crock argues that the 'imprecision or poly-centricity' of best interests is one of its strengths

²⁶⁹ J Eekelaar and J Tobin, n 97 at 82.

²⁷⁰ J Tobin, n 52 at 592.

²⁷¹ Ibid at 589-92.

²⁷² P Alston, n 46 at 19.

²⁷³ CRC Committee, GC 14 para 34.

²⁷⁴ Ibid.

²⁷⁵ JM Pobjoy n 192 at 350; See P Alston and B Gilmour-Walsh, n 8 at 1, for a summary of the key criticisms of the indeterminacy of best interests; CRC Committee, GC 14, para 4.

because it requires decision-makers to grapple with the needs and situation of the rights bearing individual before them.²⁷⁶

In truth, there will never be a mathematical formula or a scientific method for assessing a child's best interests as any assessment of best interests has to be fact sensitive and dealt with on a case-by-case basis,²⁷⁷ but reducing its indeterminacy and improving consistency in decision-making²⁷⁸ will ultimately be in the best interests of the child.

7. Conclusion

The aim of this chapter is to provide a brief history on the best interests principle and its protection and 'well-being' neighbour, examining how the principle has evolved into a key guiding principle in international law, specifically in the CRC. The best interests principle is now widely accepted, with almost universal ratification in the CRC and regarded as a guiding principle in all actions concerning children whether the impact of the decision affects a child or group of children directly or indirectly.

During the drafting of CRC, there was little discussion about what the principle would mean when it was elevated from a general principle applied by national jurisdictions primarily in family disputes to a principle in international law applied in a broad range of actions concerning children and how that transposition would operate in practice in different situations. The principle suffers from a lack of a conceptual foundation and grounding in a rights framework. It was never made clear what 'interests' were 'best' and what interests should be protected and how these were related to the rights set out in the CRC.

Another major concern with the best interests principle, which was an issue before it was inserted into the CRC, is the indeterminacy of the principle and the fact that it can act as a cloak for unfettered discretion in decisions made about children which are supposed to be in their 'best interests'.

Finally, can the best interests principle be justified in a human rights treaty which applies to children, when it does not appear in other international human rights treaties? The principle has some utility in the context of children's rights. It is so embedded in the CRC that it would be unthinkable to ignore the principle completely. A study carried out in 2012

²⁷⁶ M Crock and L Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edwards Elgar, Cheltenham 2018) at 88.

²⁷⁷ JGC 3 and 22, para 33.

²⁷⁸ See G Van Bueren, n 46 at 49.

into the legal implementation of the CRC in twelve countries found that Article 3(1) is the CRC provision most likely to be incorporated into domestic legislation (most commonly in areas of child protection, alternative care and family law).²⁷⁹ Given that it is a familiar principle in many domestic jurisdictions, where judges, decision-makers and state officials are required to refer to it, it should remind them that children are rights-holders, which can act as a gateway to other rights and it should reflect a common purpose to focus on the child and child-centered decision-making.²⁸⁰

Article 3(2) provides an additional layer which fully complements the best interests principle, ensuring the child's right to protection and care and the child's well-being. This should be a goal of assessing and determining the child's best interests, but this provision is often ignored and marginalised, allowing decision-makers to assess a child's best interests without reference to the child's well-being and right to protection or the broader framework of rights in the CRC. Whilst General Comment No 14 has bestowed on the best interests principle the twin purposes of securing children's rights and the holistic development of a child,²⁸¹ Article 3(2) CRC, I argue, is a crucial element of a child's right to protection and establishes the outcome of assessing and determining a child's best interests – the care and protection of a child as is necessary for his or her well-being. Where best interests of the child are closely linked to the well-being of the child, because there is a direct impact on the child's life, the best interests should be paramount²⁸² and the balancing of a child's interests against the interests of others should be rights-based only.²⁸³

²⁷⁹ L Lundy, U Kilkelly, B Byrne and J Kang, n 21 at 101.

²⁸⁰ U Kilkelly, n 45 at 65.

²⁸¹ CRC Committee, GC 14, para 4.

²⁸² *ZH (Tanzania) v SSHD* (2011), para 25.

²⁸³ CRC Committee GC 14, paras 4 and 5.

CHAPTER 3: Article 22 CRC, the Child as a Refugee or Asylum-Seeker

1. Introduction

This chapter focuses on the international framework for a refugee child, the conceptualisation of the 'refugee child' under Article 22 CRC and how this protects the 'refugee child'.¹ The dialogue between the CRC and the Refugee Convention is a central theme in this thesis and this chapter will begin to explore how the two international regimes of law interact. The interplay between the two Conventions sits within the broader relationship of international refugee law and the norms of international human rights law, which was first propounded by Grahl-Madsen² and developed by Hathaway in 2005³ and Foster in 2007.⁴ In 1991, Hathaway called for the alignment of the interim protection function of refugee law with a vision of refugeehood which conceptualises persecution as a failure by a state to provide basic human rights protection.⁵ Goodwin-Gill applied the 'alignment' approach to the CRC and IRL, and argued for a 'total realignment of protection [for child refugees], away from the formalities of 1951-style refugee status towards a complete welfare approach'.⁶

This chapter builds upon the approach adopted by Goodwin-Gill,⁷ McAdam⁸ and Pobjoy⁹ of reinterpreting the Refugee Convention using the CRC to fill protection gaps in international refugee law. However, it is not

¹ The UNHCR adopts an inclusive approach to refugees to include refugees, returnees, asylum-seekers and displaced persons of concern to the UNHCR (see UNHCR *Policy on Refugee Children* UN Doc. EC/SCP/82 (6 August 1993)). Article 22 includes asylum-seeking children and failed asylum seekers as well, see below.

² A Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1963)(UNHCR 1997).

³ JC Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005), see in particular page xiii.

⁴ M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge 2007).

⁵ JC Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113 at 120.

⁶ GS Goodwin-Gill, 'Who to Protect. How...and the Future?' (1997) 9 *International Journal of Refugee Law* 1 at 6.

⁷ GS 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* 40.

⁸ Eg J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 *The International Journal of Children's Rights* 251.

⁹ JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017).

simply a question of 'read[ing] children into the Refugee Convention'¹⁰ to provide an answer to the challenges of securing protection for children or to fill the gaps in refugee protection. The international protection of children on the move should be viewed through the lens of the CRC, which means that the rights and protection needs of the child are at the forefront, rather than focusing attention on whether a child's claim for asylum fits the narrow definition of 'refugee' in the Convention.¹¹

There is also an issue of the invisibility of children in the asylum process, which is a consequence of the approach adopted by many states in their refugee determination processes. Children are granted derivative status if their parents qualify for refugee status, but the other side of this is that a child will be rejected as a refugee if his or her parents fail to secure refugee status.¹² It is rare for children to be considered as having a separate claim from their parents or to be the principal applicant for refugee status if they are travelling with their parents or other members of their family, even if the child has a better claim.¹³

The CRC provides specific rights protection for 'refugee children' and children seeking refugee status under Article 22,¹⁴ alongside the catalogue of rights in the CRC including the obligation on the state to consider the best interests of the child (Article 3(1)) and to ensure the protection and care of the child (Article 3(2)). Children fleeing persecution or armed conflict who require protection is nothing new and international law recognises that such children require 'special protection', in, for example, the Fourth Geneva Convention.¹⁵ Article 22 CRC confirms that both the Refugee Convention and the CRC are interdependent and share a human rights foundation. My key argument in this chapter is that the protection

¹⁰ M Crock, 'Rethinking the Paradigms of Protection: Children as Convention Refugees in Australia' in J McAdam (ed), *Forced Migration, Human Rights and Security* (Hart, Portland, Oregon 2008) 155 at 161.

¹¹ See below.

¹² UNHCR, *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* HCR/GIP/09/08 (UNHCR, 22 December 2009) (*Guidelines on International Protection: Child Asylum Claims* (2009)), paras 1 and 2.

¹³ *Ibid*; JM Pobjoy n 9 at 3 and 46 - 52.

¹⁴ See JM Pobjoy, n 9 at 21; JM Pobjoy, 'Article 22: The Rights of the Refugee Child', in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 818 at 824.

¹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Fourth Geneva Convention).

and rights of a refugee child should be viewed through the lens of the CRC in preference to the Refugee Convention.¹⁶

The first part of this chapter outlines the legal framework for a refugee child. Secondly, I examine the main elements of Article 22(1) and Article 22(2) CRC, which will include a review of the *travaux préparatoires* for Article 22. Finally, I analyse the rights which are most pertinent for refugee children and asylum-seeking children.

2. The International Legal Framework for a Refugee Child

The appropriate legal framework for a refugee child should be the one which protects children's enforceable rights and provides such children with a means to access their rights.¹⁷ This framework should not be one which suits the state's agenda on migration control but one that meets the protection needs of the refugee or asylum-seeking child. The primary framework for children seeking international protection should be the CRC.¹⁸ However, when a child crosses an international border, international refugee law becomes the dominant legal regime determining a child's status and it is through domestic law that a state asserts its sovereignty and the right to control the entry, stay and departure of non-citizens.¹⁹ The child's right to remain in a host state will depend upon whether he or she fits the criteria (including the international definition of 'refugee' under the Refugee Convention²⁰) laid down in a state's immigration and asylum law (if the state has a functioning asylum system) and not on the basis of his or her rights under the CRC. If a CRC-first approach is taken, with the child's right to protection taking centre-stage, it should follow that the child is treated as a child first and as a migrant second.²¹

¹⁶ For a comprehensive examination and analysis of children's rights in IRL, see JM Pobjoy, n 9.

¹⁷ CRC Committee General Comment no. 13, 'The right of the child to freedom from all forms of violence', UN Doc. CRC/C/GC/13 (2011) (GC 13), para 59.

¹⁸ GS Goodwin-Gill (1995), n 7; GS Goodwin-Gill (1997), n 6; GS Goodwin-Gill, 'Introduction to the Expert Roundtable on The United Nations Convention of the Rights of the Child and its application to child refugee status determination and asylum processes' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 226.

¹⁹ Even in states which have not ratified the Refugee Convention, there is recognition that IRL applies, eg Bangladesh during the Rohingya crisis in 2016-2017. Also, the CRC Committee has declared that 'appropriate measures' under Art 22 entail a responsibility to have a functioning asylum system: CRC Committee, General Comment No 6, 'Treatment of unaccompanied and separated children outside their country of origin', UN Doc. CRC/GC/2005/6 (1 September 2005), para 64.

²⁰ See below in section 2.3.

²¹ F Crépeau, quoted in CRC Committee, Report on the Day of General Discussion 'The Rights of all Children in the Context of International Migration' (2012) (DGD 2012), para 5. This has been described as a right to be treated as a child first and foremost, regardless of his or her

Although the two key legal instruments are the CRC and the Refugee Convention, the next section will explore, briefly, the concept of asylum and to what extent it is a right which can be exercised by refugee children.

2.1 Right to seek and enjoy asylum

Asylum is a much older concept than both international refugee law and the international human rights framework and, in its strictest sense, asylum is an expression of state sovereignty, constituting the protection granted by states to individuals on their territory (territorial asylum) or otherwise within their jurisdiction, for example a foreign embassy (diplomatic asylum).²²

There is no legally enforceable right to asylum in international law. Under Article 14 of the Universal Declaration of Human Rights (UDHR) there is a (non-binding) right to 'seek and enjoy in other countries asylum from persecution',²³ which together with the right to leave one's own country²⁴ gives an individual the basis upon which to seek international protection. It is arguable that in the EU there is an emerging right to asylum for non-EU nationals or third country nationals under Article 18 of the EU Charter for Fundamental Rights.²⁵ Den Heijer argues that the right to asylum in addition to the prohibition on *refoulement* in Article 19 CFREU 'constitutes recognition of the autonomous meaning of asylum as [an] individual right'.²⁶

Edwards argues that the right to seek and enjoy asylum in Article 14 UDHR is implicit within the 1951 Convention and its 1967 Protocol and is 'an important emerging norm of customary international law'.²⁷ The right to seek asylum, which must be scrupulously observed, is reinforced by the prohibition on *refoulement*, including non-rejection at the border.²⁸

migratory status; see UN General Assembly, *Status of the Convention on the Rights of the Child, Report by the Secretary General*, UN Doc. A/71/413 (27 September 2016), para 9.

²² M Gil-Bazo, 'Asylum as a General Principle of International Law' (2015) 27 *International Journal of Refugee Law* 3 at 7.

²³ Article 14 UDHR.

²⁴ Article 13(2) UDHR.

²⁵ Charter of Fundamental Rights of the European Union *Official Journal of the European Communities* 2000/C 364/01 (18 December 2000) and 2012/C 326/02 (26 October 2012); see M Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 33 – 52.

²⁶ M den Heijer, 'Article 18- Right to Asylum' in S Peers, T Harvey, J Kenner and A Ward (eds), *The European Charter of Fundamental Rights: A Commentary* (Hart Publishing, Oxford 2014) 519 at 522.

²⁷ A Edwards, 'Human Rights, Refugees and the Right to 'Enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293 at 301.

²⁸ UNHCR, ExCom Conclusion 22, Protection of Asylum-seekers in Situations of Large-Scale Influx (XXXII) Un Doc A/36/12/Add.1 (21 October 1981), IIA, para. 2; see also Chapter 5.

According to Edwards, 'Articles 1 and 33 [of the Refugee Convention] read together place a duty on States parties to grant, at a minimum, access to asylum procedures for the purpose of refugee status determination'.²⁹ Although refugee status is a declaratory status not confirmatory, asylum procedures are still necessary to ensure the right to *non-refoulement* is not infringed.³⁰ A right to seek asylum ensures that people have access to international protection, in particular access to procedures and mechanisms to apply for asylum³¹ and states have a duty not to obstruct an individual's right to seek asylum.³² Additionally, children, in the context of best interests assessments and determination procedures, have the right to access to the territory of the state to have their best interests assessed in addition to accessing asylum procedures.³³

The second part of Article 14 UDHR refers to the right to 'enjoy' asylum which is implicit in the substantive rights set out in Articles 2 – 24 of the Refugee Convention and in the broader IHRL framework of which IRL is a part. Although the CRC has not explicitly indicated which rights are necessary for the child to 'enjoy' asylum,³⁴ the General Comments which deal with the rights of unaccompanied children and separated children³⁵ and the human rights of children in the context of international migration³⁶ specify certain rights in the CRC that a child ought to have access to in order to enjoy asylum. This is supported by the UNHCR position that states are under 'an obligation to treat asylum-seekers and refugees in accordance with applicable human rights and refugee law standards as set out in relevant international instruments.'³⁷ The rights and principles

²⁹ A Edwards, n 27 at 301. CRC Committee GC 6, paras 66 – 67.

³⁰ A Edwards, 'Tampering with Refugee Protection: The Case of Australia (2003) 15 *International Journal of Refugee Law* 192 at 197; see also chapter 5 on *Non-Refoulement*.

³¹ D Davitti and A La Chimia, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control' [2015] *The Irish Yearbook of International Law* 133 at 154.

³² GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford 2007) at 358.

³³ Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on 'State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return', UN Doc. CMW/C/GC/4 and CRC/C/GC/23 (2017) (JGC 4 and 23), paras 14 and 17(a).

³⁴ See my discussion on 'applicable rights' in section 4 below.

³⁵ CRC Committee GC 6.

³⁶ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the 'general principles regarding the human rights of children in the context of international migration', UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22) and JGC 4 and 23.

³⁷ UNHCR ExCom Conclusion No 82, Safeguarding Asylum (XLVIII) UN Doc A/52/12/Add.1 (17 October 1997), para (d)(vi).

specified by the CRC Committee in its General Comments include the four guiding principles of the CRC,³⁸ the principle of *non-refoulement*,³⁹ respect for the confidentiality of information and the right to privacy (including data protection and firewalls),⁴⁰ the right to education,⁴¹ the right to an adequate standard of living,⁴² the right to adequate healthcare,⁴³ protection from harm, violence, abuse and exploitation,⁴⁴ the right to liberty,⁴⁵ the right to birth registration, identity, nationality⁴⁶ and the right to family life, family unity and family reunification.⁴⁷ The right to 'enjoy' asylum is transformed from a vague and temporary admission or stay to one requiring states to adhere to minimum standards to ensure a child's right to enjoy and benefit from asylum.⁴⁸

The next two sections provide an overview of the two Conventions which provide the legal framework and operate to protect the refugee and asylum-seeking child.

2.2 The Convention on the Rights of the Child 1989

As I have discussed previously, the CRC is the most universally ratified treaty on human rights, and unlike other human rights treaties, it does not permit derogations of its provisions in times of national security or to justify securitisation of a state's border.⁴⁹ This means in some situations refugee children may be entitled to a broader range of rights than adults who are refugees.⁵⁰ For example the International Covenant on Civil and Political Rights (ICCPR) allows for the suspension of certain rights in situations which threaten the life of the nation.⁵¹ In the previous chapter, I argued that the central concern of the CRC is to protect the rights of the

³⁸ Non-discrimination, best interests, right to life, survival and development and right to be heard – CRC Committee GC 6, paras 18 – 25; JGC 3 and 22, paras 21 – 44.

³⁹ CRC Committee GC 6, paras 26 – 28; JGC 3 and 22, paras 45 – 47.

⁴⁰ CRC Committee GC 6, paras 29 – 30; JGC 4 and 23, paras 16 – 17.

⁴¹ CRC Committee GC 6, paras 41 – 43; JGC 4 and 23, paras 59 – 63.

⁴² CRC Committee GC 6, paras 44 – 45; JGC 4 and 23, paras 49 – 53.

⁴³ CRC Committee GC 6, paras 46 – 49; JGC 4 and 23, paras 54 – 58.

⁴⁴ CRC Committee GC 6, paras 50 – 60; JGC 4 and 23, paras 39 – 48.

⁴⁵ CRC Committee GC 6, paras 61 – 63; JGC 4 and 23, paras 5 – 13.

⁴⁶ JGC 4 and 23, paras 20 – 26.

⁴⁷ CRC Committee GC 6 paras 81 – 83; JGC 4 and 23, paras 27 – 38.

⁴⁸ A Edwards n 27, at 302.

⁴⁹ There is no derogation clause in the CRC, but Articles 13, 14 and 15 are qualified rights and can be limited to protect public safety, order, health or morals or to protect the fundamental rights and freedoms of others. Upon ratification of the CRC, six states entered reservations or made declarations seeking to limit the rights under the CRC to children lawfully on the territory or to national children only. The UK withdrew its reservation in 2008, but the other five remain in place.

⁵⁰ J McAdam, n 8 at 253.

⁵¹ International Covenant on Civil and Political Rights (adopted 19 December 1966, in force 23 March 1976) 999 UNTS 171 (ICCPR), Article 4.

child and to secure the child's protection and well-being, whereas the Refugee Convention is primarily concerned with surrogate state protection in response to people who are unable or unwilling because of persecution to avail themselves of the protection of their 'home' state.

The comprehensive framework of rights in the CRC is designed to ensure children achieve their potential, but this depends on states fulfilling their obligations and giving effect to children's rights, both in policy and law. This comes into sharp focus in the politicised arena of refugee and asylum law. The reasons for prioritising the rights and interests of refugee and asylum children are because of the vulnerable situation they find themselves in, their dependency on adults, their lack of an economic and political 'voice' and because they are disproportionately affected by violations of their socio-economic, civil and political rights,⁵² which they encounter on their journey. I have identified six reasons why the CRC should be the primary source of protection for refugee and asylum-seeking children. First, all children within a state's jurisdiction are entitled to rights and protection whatever their status, nationality, gender, age, ethnicity, religion or race (Article 2 CRC). Second, the CRC makes specific provision for refugee and asylum-seeking children (Article 22 CRC). Third, all states that have ratified the CRC accept that the best interests of the child should be a primary consideration in all actions concerning children (Article 3(1) CRC), which includes the children's right to care and protection to ensure their well-being (Article 3(2) CRC). Fourth, children have rights to protection from violence, harm and exploitation (Articles 19, 32, 34, 36 and 39 CRC). Fifth, all children have a right to life, survival and development (Article 6 CRC), which are important for refugee and asylum-seeking children who have had to flee because all three might be at risk if they stay. Finally, children have a right to be heard, in terms of being allowed to express their views in all matters affecting them and to participate in any decision about their lives (Article 12 CRC), subject to the principle of evolving capacities (Article 5 CRC).

All UN Member States have committed to respect, protect and fulfil the rights of all children including those children who are seeking international protection.⁵³ States' compliance with the CRC is supervised and monitored

⁵² A Nolan, *Children's Socio-Economic Rights: Democracy and the Courts* (Hart, Oxford 2011) at 7 and 13; see also Chapter 2, section 5.1.

⁵³ Article 3(1) CRC and Article 22(1) CRC. Although the USA has not ratified the CRC, it is a signatory (and has ratified one of the optional protocols) and thus must not act in a way which is contrary to the object and purpose of the CRC.

by the CRC Committee, and because of the specific protection of refugee and asylum-seeking children in the CRC, the Committee comments on the implementation of IRL standards in states' national law and encourages states, who are not parties, to ratify the Refugee Convention. The incorporation of IRL and the CRC into national law increases the scope of protection for children seeking international protection.⁵⁴

2.3 The Convention Relating to the Status of Refugees 1951 (The Refugee Convention)

The Refugee Convention is the primary instrument for determining refugee status in states which have ratified the Convention and is the mainstay of international protection.⁵⁵ There are 146 States Parties to the 1951 Refugee Convention and 147 to the 1967 Protocol.⁵⁶ The Convention provides the definition of 'refugee' in Article 1A(2):

[O]wing 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.

Although, adults and children who fulfil the criteria are entitled to be granted refugee status and benefit from protection, the Convention is 'age neutral' and does not refer to children's rights specifically.⁵⁷

The Refugee Convention does not have a supervisory or treaty monitoring body, unlike the CRC. States parties who have ratified the Refugee Convention have the flexibility to develop their own system of refugee status determination and in this sense, the Convention is

⁵⁴ In the context of incorporation of the CRC, see L Lundy, U Kilkelly, B Bryne and J Kang, *The UN Convention on the Rights of the Child: A study of legal implementation in 12 countries* (UNICEF and Centre for Children's Rights, Queen's University, Belfast 2012).

⁵⁵ UNHCR ExCom, Conclusion on the Provision of International Protection including through Complementary Forms of Protection No. 103 (LVI)(7 October 2005).

⁵⁶ For States Parties to the 1951 Convention see:

https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en [accessed 28 January 2019] and States Parties to the 1967 Protocol, see:

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en [accessed 28 January 2019].

⁵⁷ JM Pobjoy, n 9 at 3; see also chapter 1, section 6.2.

facultative.⁵⁸ Although there is no treaty monitoring body for the Refugee Convention, the UNHCR has a designated role for providing international protection to refugees who fall within the scope of the UNHCR Statute.⁵⁹ The UNHCR's role is to provide authoritative guidance on and interpretation of the Convention, to provide humanitarian assistance and carry out refugee status determination procedures where states are unwilling or unable to process claims.⁶⁰ There are 102 members of the UNHCR's Executive Committee (UNHCR ExCom)⁶¹ which oversees the UNHCR's programmes, approves its budget and advises on international protection and discusses a wide range of issues of concern. UNHCR's policy and guidance is monitored by UNHCR's ExCom. Although UNHCR policy and guidance is not international law, such 'standards have strong political authority as consensus resolutions of a formal body of government representatives'.⁶²

Some commentators argue that the Refugee Convention ought to be the basis of an international protection claim by a child and that as a bare minimum, all states who have ratified the CRC should consider whether the child meets the Refugee Convention's definition of refugee,⁶³ based on the interpretation of 'appropriate protection' under Article 22. However, this is problematic in states which have not ratified the Refugee Convention, because although the child may be a refugee under international law, he or she will not be recognised as a refugee in a state which is not a party to the Refugee Convention. Nevertheless, this does not diminish the state's obligation to provide 'appropriate protection and humanitarian assistance' under Article 22. In addition to being facultative, the Refugee Convention is also prescriptive because it places limits on any state practice which violates (directly or indirectly) the principle of *non-refoulement*.⁶⁴ As I outline in Chapter 5, there is a strong argument that the duty of *non-refoulement* is a norm of customary international law. At a minimum, this

⁵⁸ GS Goodwin-Gill, n 6 at 2.

⁵⁹ Article 1 of the Statute of the Office of the United Nations High Commissioner for Refugees adopted by the UN General Assembly Resolution 428 (V) (14 December 1950) (UNHCR Statute).

⁶⁰ Articles 8, 9 and 10 of the UNHCR Statute.

⁶¹ In October 2018, 48 observer states, in addition to the ExCom members, attended the UNHCR ExCom's annual plenary session in Geneva, See UNHCR ExCom Plenary sessions: 69th session of the Executive Committee of the High Commissioner's Programme 1-5 October 2018, available at: <https://www.unhcr.org/uk/2018-executive-committee-session.html> [accessed 14 May 2019].

⁶² JC Hathaway, n 5 at 113; JM Pobjoy, n 9 at 23.

⁶³ M Crock and L Benson (eds) *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar, Cheltenham 2018), 84; JM Pobjoy, n 14 at 826.

⁶⁴ GS Goodwin-Gill, n 6 at 3. I examine the principle of *non-refoulement* in Chapter 5.

provides a child with a temporary reprieve from being returned to the place where he or she is at risk of being persecuted or at risk of facing serious human rights violations.

Arguably, the Refugee Convention does not provide the best protection for children because even with refugee status, a child is not entitled to all of the rights under the Convention immediately. Most rights are granted incrementally and are based on the length of residence and/or attachment to the state. But there are a few rights, including the right to property,⁶⁵ right to tax equity,⁶⁶ right of access to courts,⁶⁷ right of non-discrimination⁶⁸ and *non-refoulement*,⁶⁹ which are not dependent on the refugee's physical presence on the territory of the host state.⁷⁰ The rights conferred by the Refugee Convention stand in stark contrast to the CRC which obliges states to protect and ensure all rights in the CRC to anyone under the age of 18 within the jurisdiction of the state (subject to Article 4 CRC). There is no best interests principle in the Refugee Convention, although the UNHCR has adopted the principle - along with the principle of family unity - as a guiding principle for decisions concerning refugee children.⁷¹ The UNHCR began to focus on refugee children in the late 1980s which coincided with the UNHCR's attendance at the CRC's Working Group sessions and its assistance in drafting Article 22.

3. Article 22 CRC

Refugee children are safeguarded by Article 22 CRC, which is the only provision in an international human rights treaty protecting both children seeking refugee status (asylum-seekers) and recognised refugee children.⁷² In international humanitarian law, the special protection needs of children were recognised in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁷³ Article 22 is unique

⁶⁵ Article 13 Refugee Convention.

⁶⁶ Article 29 Refugee Convention.

⁶⁷ Article 16(1) Refugee Convention.

⁶⁸ Article 3 Refugee Convention.

⁶⁹ Article 33 Refugee Convention.

⁷⁰ JC Hathaway, n 3 at 161-163.

⁷¹ See, for example UNHCR *Refugee Children: Guidelines on Protection and Care* 1994; UNHCR, *Guidelines on Determining Best Interests of the Child* (UNHCR, Geneva 2008); UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018).

⁷² See JM Pobjoy, n 14 at 822.

⁷³ Article 24(1) Fourth Geneva Convention.

among international human rights instruments because of its reference to IHL, IRL and IHRL.⁷⁴ Article 22(1) CRC provides:

State 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 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 Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 22(2) CRC provides:

For this purpose, State Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organisations or non-governmental organisations cooperating 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.

The article itself makes no direct reference to the Refugee Convention and the definition of refugee in Article 1A(2), but refers to a child who is 'considered a refugee in accordance with applicable international ... procedures', which includes the Refugee Convention. During the drafting of the CRC, there was little discussion of the definition of a refugee or what the Working Group understood by 'refugee child'. Van Bueren suggests that there was no appetite in the Working Group to revisit the definition of refugee.⁷⁵ The report of the Working Group in 1982 referred to the

⁷⁴ M Crock and H Martin 'First Things First: International Law and the Protection of Migrant Children in M Crock and L Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edwards Elgar, Cheltenham 2018) 75 at 83.

⁷⁵ G van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, The Hague 1998) at 361. Although Van Bueren makes this assertion and it is supported by other academics, there is little evidence in the *travaux préparatoires* that there was no appetite for revisiting the definition. A definition for 'refugee child' was discussed in 1982 (see below), but there was no follow up to these discussions in subsequent Working Groups. Note Japan's

protection of refugees under the Additional Protocol I 1977⁷⁶ rather than the Refugee Convention 1951.⁷⁷ It may not have been a lack of appetite by the CRC Working Group, but a reflection that by the mid-1980s,⁷⁸ state practice reflected a broader interpretation of 'refugee' influenced by IHRL and the Refugee Convention's humanitarian object and purpose.⁷⁹

On an ordinary literal interpretation of the wording, Article 22 CRC does not confer new rights on children, but simply reflects the extent of refugee protection available under IRL, IHRL and IHL. In other words, the protection for child refugees is what exists in international law already.⁸⁰ Pobjoy argues that Article 22 CRC provides a 'rights-plus' framework for children seeking refugee status or children who have been recognised as refugees.⁸¹ According to Pobjoy, the 'rights-plus' framework:

requires states to take into account any *additional* protection and humanitarian assistance that a refugee child...may, on account of their distinct vulnerabilities and developmental needs, require in order to *effectively* enjoy the rights guaranteed under the CRC and other international instruments.⁸²

Pobjoy's interpretation of Article 22 CRC, despite being framed as 'rights-plus', does not indicate that Article 22 CRC confers new rights on the child. Instead it imposes on the state an obligation to protect and assist and consider the 'additional' protection needs of the refugee child so that he or she can effectively enjoy his or her rights. It is not clear if the 'additional' protection Pobjoy refers to is additional to the protection a child receives under the CRC or protection over and above that enjoyed by an

declaration after the adoption of the CRC indicated that they accepted Article 22 on the 'understanding that this provision was not intended to request the States to take further measures in addition to the present procedures for the recognition of refugees in accordance with their international obligations and their national laws on refugees': UN Doc E/CN.4/1989/48 (1989) at para 722; the Netherlands made a declaration expressly providing that its government 'understands the term "refugee" ... as having the same meaning as in article 1 of the [Refugee Convention]': 1855 UNTS 420 at 421.

⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 (entered into force 7 December 1978) (Additional Protocol I).

⁷⁷ When I carried out my archival research at the UN Library at Geneva, notes from the smaller drafting working group which drafted Article 22 were not available and it is possible there was a discussion of the Refugee Convention there, but it is not cited in the reports of the main Working Group.

⁷⁸ JC Hathaway, *The Law of Refugee Status* (Butterworths, Canada 1991) at 21 – 27.

⁷⁹ J McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection* in J McAdam, (ed) *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford 2008) 263 at 270.

⁸⁰ G van Bueren, n 75 at 362.

⁸¹ JM Pobjoy, n 9 at 21; JM Pobjoy n 14 at 824 and 854.

⁸² *Ibid*, at 838 (my emphasis).

adult refugee under IRL. States already have an obligation to ensure the child receives 'appropriate protection' under Article 22(1) and this means the state has to acknowledge that because the beneficiary is a child, Article 1A(2) of the Refugee Convention must be interpreted to acknowledge the distinct rights, interests and protection needs of the child applicant.⁸³ The rights-plus framework expresses the 'long-standing recognition that refugee children are entitled to *special* protection and provides a treaty based mechanism to secure that protection'.⁸⁴ I am not convinced Article 22 provides any additional protection for a refugee child, but there is perhaps an argument for saying that there is a rights-plus framework for a child seeking refugee status, who is entitled to the same range of rights as a refugee child under Article 22 CRC, including any complementary or subsidiary forms of protection, if a child is not eligible for refugee status.⁸⁵ This frame work should challenge the practice of many EU states who grant more generous leave for people (including children) with refugee status than those granted subsidiary or complementary protection.⁸⁶ Such state practice places children who do not qualify for refugee status on a less secure footing than refugee and national children. It is my argument, which I develop further in Chapter 4, that both refugee and asylum-seeking children have the same right to protection under Article 3(2) and 22 CRC.

Whether or not Article 22 CRC confers new rights, it is clear from the wording that it situates the refugee or asylum-seeking child firmly within the rights regime under the CRC which confers rights-holding capacity on all children. Article 22 also applies to children who may never qualify for refugee protection and who may also fall outside a complementary protection scheme⁸⁷ and applies irrespective of whether or not the state is a party to the Refugee Convention.⁸⁸ This point also highlights the importance of incorporating of the CRC into domestic regimes and

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ CRC Committee GC 6, para 77.

⁸⁶ For example, in the UK, unaccompanied children are granted UASC leave which is for 30 months or until the child is 17½, whichever is sooner (UK Immigration Rules 352ZE). A refugee child is entitled to 5 years leave. In Belgium, refugees are granted a 5-year residence permit, whereas people with subsidiary protection are entitled to a 12-month permit, which can be renewed for up to 2 years (Article 49 of the Aliens Act).

⁸⁷ See J Mc Adam, n 8; Article 15 of the Council Directive 2011/95/EU (recast) 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 (13 December 2011) (Qualification Directive).

⁸⁸ JM Pobjoy, n 14 at 825.

legislative and constitutional frameworks. Only a handful of states have comprehensively incorporated children's rights,⁸⁹ although many have incorporated some articles of the CRC. It is difficult for a child to challenge the violation of their right to appropriate protection under Article 22, if the CRC is not incorporated or implemented adequately and the matter is not justiciable in the host state.

A review of the *travaux préparatoires* of Article 22 CRC provides some insight into how protection for refugee and asylum-seeking children under the CRC developed. This was not without controversy and throughout the negotiations, states were reluctant to extend the reach of the CRC to children who had no legal status and who might challenge states' sovereign right to control their borders.⁹⁰ However, the value of Article 22 in placing refugee and asylum-seeking children centre-stage should also be viewed through the lens of the empirical evidence on children's experiences of asylum processes which I referred to in Chapter 1 and the case law (referenced later in this chapter and in subsequent chapters) which demonstrates the routine marginalisation of children in the asylum proceedings. Due to the constraints of space and the scope of my thesis, I do not analyse this division between the ideal of the CRC and the lived reality of refugee children.

3.1 Travaux Préparatoires of Article 22 CRC

The Women's International Democratic Federation (WIDF), in their comments on the first draft of the Convention in February 1979, suggested that there should be some provision for the protection of the *children of refugees*.⁹¹ In its proposal, the WIDF made reference to the UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict,⁹² which states:

children belonging to the civilian population and finding themselves in circumstances of emergency or armed

⁸⁹ For example, Belgium, Norway and Spain. Sweden is in the process of incorporating the CRC. For more on this see the UNICEF-UK study based on the experiences of 12 countries at various degrees of CRC incorporation: L Lundy, et al, n 54.

⁹⁰ See below in section 3.3.

⁹¹ UN ECOSOC, Written Statement submitted by the Women's International Democratic Federation, a Non-Governmental Organisation in Category I Consultative Status (Commission on Human Rights, 35th Session, agenda item 13) UN Doc. E/CN.4/NGO/244 (19 February 1979), page 4. The WIDF referred to 'children of refugees' rather than refugee children.

⁹² UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict (General Assembly resolution 3318 (XXIX) (14 December 1974).

Chapter 3: Art 22 of the CRC: the Child as a Refugee or Asylum-Seeker
 conflict...shall not be deprived of shelter, food, medical aid or
 other inalienable rights⁹³

The Report of the Working Group in March 1979,⁹⁴ recorded that consideration should be given to (amongst other matters) children of refugees.⁹⁵ Denmark took up the WIDF's suggestion in 1981 and proposed a paragraph on *refugee children* as part of Article 11 [Article 11*bis*] of the draft Convention.⁹⁶ The proposed paragraph recognised that refugee children require 'special protection and assistance', with an emphasis on the principle of family unity or finding a place for the child 'within his own cultural and linguistic group' and that 'the best interests of the child shall in every case be the guiding principle'.⁹⁷ This proposal referred to 'refugee children' not the 'children of refugees' confirming that refugee children should be rights holders on their own account. Ensuring that refugee children are centre-stage and have access to their rights continues to be a challenge in domestic asylum procedures, where children (both accompanied and unaccompanied) are marginalised and receive derivative status based on their parents' claims, as opposed to being considered as asylum-seekers in their own right.⁹⁸ As Crock observes in the context of accompanied children:

... the norm among both legal advisers and government decision-makers has not been to insist on the articulation of separate refugee claims by children embedded in a family group. Until this occurs, it is difficult to see how the refugee claims of children will be given the attention they deserve.⁹⁹

By the time the article was discussed more fully by the Working Group in 1982,¹⁰⁰ there was strong support for the Danish proposal, and the Working Group agreed that the Convention should guarantee refugee

⁹³ Ibid, Article 6.

⁹⁴ UN ECOSOC, Commission on Human Rights, thirty-fifth session, Report of the Working Group to the Commission on Human Rights on a draft convention on the rights of the child UN Doc. E/CN.4/L.1468 (12 March 1979).

⁹⁵ Ibid, para 6.

⁹⁶ UN ECOSOC, Commission on Human Rights, thirty-seventh session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/L.1575 (17 February 1981 at 20 – 21, para 125 (c).

⁹⁷ Ibid.

⁹⁸ J Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers' (2001) 3 *European Journal of Migration and Law* 283 at 284-285. J Pobjoy, n 9 at 46 – 52 reviews the literature and caselaw highlighting the invisibility of child refugees.

⁹⁹ M Crock, n 10 at 178.

¹⁰⁰ UN ECOSOC, Commission on Human Rights, thirty-eighth session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1349 (14 January 1982).

children protection and assistance. However, there was no commitment on granting children a legally binding right to seek and enjoy asylum, nor was there any suggestion that the definition of refugee should be reconsidered from a child's perspective.¹⁰¹ There was a proposal, by several speakers at the 1982 Working Group, that there should be a definition of 'refugee child' in the Convention,¹⁰² but this was not followed up in 1982 nor when this provision was considered again by the 1988 Working Group. It is not possible to ascertain from the report of the 1982 Working Group what the delegates understood by 'refugee child'. The smaller drafting group, tasked with redrafting this Article,¹⁰³ relied on the concept of 'refugee' taken from Article 73 of Section III of Protocol I additional to the Geneva Convention.¹⁰⁴

The original wording of Article 22 CRC (Article 11*bis*) indicated that the best interests of the child must be *the guiding principle* in every decision about refugee and asylum-seeking children, in contrast to a *primary consideration* under Article 3(1) CRC. When the Working Group discussed the best interests of placing an unaccompanied child within the child's cultural and linguistic group, the UNHCR advocated for the removal of the best interests wording, but offered no explanation about why this should be removed.¹⁰⁵ The Australian delegate at the same Working Group proposed that the obligation to ensure reunification of the child with his family should be based on the best interests of the child, however, this proposal was withdrawn at a later stage.¹⁰⁶ There is no further elaboration in the Working Group's 1982 report as to why the best interests of the child as a guiding principle was removed and did not feature in the provision on refugee children. By 1987, the ExCom had adopted the best interests of the child as a guiding principle for all action taken on behalf of

¹⁰¹ UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982) at para 92.

¹⁰² *Ibid*, para 94.

¹⁰³ This small group consisted of delegations from Denmark and India and an observer from UNHCR. In a later part of the Working group report, it was noted that the working party were joined by the USA, see: UN ECOSOC, Commission on Human Rights, Considerations of the Working Group 1982, E/1982/12/Add.1.C para 93 and 99.

¹⁰⁴ *Ibid*, para 97. Additional Protocol I, Article 73 states: "Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the legislation of the State of refuge or State of residence shall be protected persons ...in all circumstances and without any adverse distinction" Protected persons are defined in Article 27 Fourth Geneva Convention.

¹⁰⁵ UN ECOSOC, Report (15 March 1982), paras 97 and 98.

¹⁰⁶ *Ibid*, para 102.

refugee children,¹⁰⁷ and the principle continues to be central to the UNHCR's policies on refugee children and child asylum claims.¹⁰⁸

As I discussed in Chapter 2, the formulation of the best interests principle in Article 3(1) CRC means that states can treat the interests of a refugee child as part of a balancing decision where the interests of the child are set against the immigration control interests of the state. If the original wording of Article 22 had been adopted, there would be strong grounds for arguing that the best interests of refugee and asylum-seeking children should not be weighed against the state interest in border/immigration control and a child's best interests carries the greater weight. In Chapter 2, in the context of best interests, I discussed the reasons for prioritising children's interests first. In this context, the final text of Article 22 does not prioritise a child's best interests and rights, but allows state interests and potentially the interests and rights of other family members to be weighed against the child's interests. I would argue that the rationale behind including Article 22 in the CRC and the protection of children's rights in the context of forced migration is to ensure that their status as rights holders is recognised, their voice is heard against the state's immigration priorities and their interests are identified and factored into decision-making.¹⁰⁹

The text of Article 11*bis* was not discussed again until the first reading of the Convention in 1988. However, before this, there were two proposals, both of which reflect the concerns of some states about extending Convention rights to 'alien' children. The first proposal, raised by the Permanent Representative of Bangladesh, suggested that the paragraph on refugee children was redundant, because the rights of refugee children had been protected elsewhere by existing international instruments.¹¹⁰ The Bangladeshi representative predicted that there would

¹⁰⁷ UNHCR ExCom Conclusion No 47, Refugee Children (XXXVIII) UN Doc. A/42/12/Add.1 (12 October 1987), para (d). The *travaux préparatoires* indicate that the UNHCR observers at the Working Group in 1988 did not mention the ExCom's Conclusion on Refugee Children when Article 11*bis* was discussed again.

¹⁰⁸ See for example, UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva May 2008), UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018) and UNHCR, *Guidelines on International Protection: Child Asylum Claims* (2009).

¹⁰⁹ This rationale echoes Hollingsworth and Stalford's argument for re-writing judgements through a children's rights lens, K Hollingsworth and H Stalford, 'Towards Children's Rights Judgments' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, Oxford 2017) at 53.

¹¹⁰ This proposal was made in 1986, even though Bangladesh has never ratified the Refugee Convention or the 1967 Protocol and thus is not legally obligated to establish a refugee protection system!

be problems with interpretation and that the provision on refugee children in the Convention may conflict with other international instruments (although the representative was not specific about which instruments).¹¹¹ Bangladesh was not (and never has been) a party to the Refugee Convention, and the representative was concerned that there would be an obligation to apply Refugee Convention rights to children. The Working Group did not discuss the proposal submitted by the Bangladeshi Permanent Representative in 1986 and there is no response to it in any subsequent reports of the Working Group. It is noteworthy that Bangladesh was not one of the states which entered a reservation in respect of Article 22, when it ratified the CRC in 1990.¹¹²

The second proposal was raised by the representatives of the Netherlands, the USA and the UK in respect of non-discrimination. The proposal sought to insert a qualifying/restrictive provision to apply to the whole of the Convention on the admission and expulsion of aliens from a state's territory.¹¹³ This would allow states to restrict the entry of refugee or asylum-seeking children to a state's territory and to legitimise discrimination against non-national children. The UK was concerned that it would be impossible to reconcile some of the articles adopted in the Convention with the UK's law and practice, which does not allow 'unrestricted entry into the country'.¹¹⁴ A number of delegations (mainly from the Global South) questioned the appropriateness of this proposal and because the Working Group could not reach a consensus on the proposal, it was dropped.¹¹⁵ By this stage of the negotiations, some states were 'aware of the Convention's potentially radical implications concerning the rights of alien children and immigration law,'¹¹⁶ but nevertheless, committed to recognising the rights of this group of children. This acknowledgement of the potential impact of Article 22 on a state's immigration laws is further

¹¹¹ UN ECOSOC, Commission on Human Rights, forty-second session, Report of the Working Group to the Commission on Human Rights on a draft convention on the rights of the child, UN Doc. E/CN.4/1986/39 (13 March 1986), annex IV.

¹¹² Bangladesh ratified the CRC on 3 August 1990 (signed on 26 January 1990): UN Treaty Collection (Depositary), Status of Treaties: Convention on the Rights of the Child, 1577 UNTS 3, Chapter IV, 11 (status as at 29 December 2018).

¹¹³ UN ECOSOC, Report (13 March 1986), para 9.

¹¹⁴ UN ECOSOC, Commission on Human Rights, forty-third session, Report of the Working Group Commission on Human Rights on a draft convention on the rights of the child, UN Doc. E/CN.4/1987/25 (9 March 1987), para 134.

¹¹⁵ *Ibid*, para 138.

¹¹⁶ EF Abram, 'The Child's Right to Family Unity in International Immigration Law' [1995] 17 *Law and Policy* 397 at 417.

confirmed by the number of states,¹¹⁷ which made reservations in relation to the applicability of the CRC to non-citizen children when ratifying the CRC. Such reservations created the conditions in those states for distinguishing between national and non-national children and excluding non-national children from the protection of the CRC.

In 1989, a drafting group, composed of the Federal Republic of Germany, Senegal, the USA, the USSR and Venezuela, finalised the text of Article 22 and split the article into two paragraphs.¹¹⁸ This group proposed broadening the scope of 'family' to include 'other members of the family' for reunification purposes, aligning it with the concept of family in Article 5 CRC. The main amendment to the text related to the cooperation with non-governmental organisations (NGOs) based on consent of the State Party. The final version of Article 22 was agreed in 1989.¹¹⁹

Although Article 22 CRC confirms that children should be recognised as refugees in their own right and acknowledges that there are rights flowing from that status,¹²⁰ an opportunity was missed to shape children's rights in an area where historically children have been overlooked and marginalised. Article 22 does not specifically address the right to asylum or the right to access the territory of a state in order to claim asylum or access to that state's refugee status determination procedures. At the very least, Article 22 confirms a child's right to appropriate protection, humanitarian assistance and tracing family members for family reunification purposes.

My archival research on the *travaux préparatoires* revealed that there was little acknowledgement in the discussion of the Working Group that children may seek refugee status on their own account, either as an unaccompanied child or as part of a family fleeing persecution.¹²¹ Additionally, there was no discussion of the Refugee Convention and how it

¹¹⁷ Germany, Japan, Switzerland, Singapore, UK and New Zealand also entered reservations or made declarations seeking to limit rights available to non-citizen children: UN Treaty Collection (Depositary), Status of Treaties: Convention on the Rights of the Child, 1577 UNTS 3, Chapter IV, 11 (status as at 29.12.18); JM Pobjoy, n 9 at 15. The UK's reservation remained in place for 20 years.

¹¹⁸ UN ECOSOC, Commission on Human Rights, forty-fifth session, Report of the Working Group on a draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48 (2 March 1989), para 383.

¹¹⁹ *Ibid*, paras 377 – 395.

¹²⁰ Once a person has been granted refugee status, he or she has access to rights under the Refugee Convention, which compensate for the loss of protection of his country of origin. M den Heijer, n 26 at 528.

¹²¹ It was acknowledged in the context of tracing family members under Article 22(2) that children may arrive on a state's territory unaccompanied by their parents or other family members.

ought to be interpreted from a child's perspective nor acknowledgement of the challenges children face trying to fulfil the criteria of Article 1A(2) of the Refugee Convention. Article 22 CRC, because it confirms international refugee law as set out in the Refugee Convention, requires children to face the same complex asylum and refugee procedures as adults do. Article 22 applies no geographical restrictions; in other words the Article applies to all children within the jurisdiction of a state and a state may have obligations in relation to children who have not yet reached the border, but to whom that state owes a duty to ensure 'appropriate protection and humanitarian assistance'.¹²²

3.2 Article 22(1) – Scope and Parameters

There are different elements of Article 22 which need to be examined in order to discover whether it is simply confirmation of the rights of refugee children under international refugee law or if it confers additional rights on refugee children or children seeking refugee status, such as a 'rights-plus' framework for children.¹²³

In the following sections, I analyse the key phrases of Article 22 and what this means for the rights of a child seeking international protection.

3.2.1 'Child seeking refugee status or who is considered a refugee'

As I have discussed above, Article 22 CRC does not provide a definition of a refugee child, nor is there a specific reference to the 1951 Refugee Convention in the CRC. Article 22 CRC does not provide the basis on which a child will qualify for refugee status.¹²⁴ The wording in Article 22(1) obliges the state to provide the child with *appropriate protection*, and both the UNHCR and the CRC Committee have interpreted this in the context of IRL and the rights under the CRC.¹²⁵ When looked at in isolation, Article 22(1) does not confer on a child seeking refugee status a right to enter a state to claim refugee status or a right to seek and enjoy asylum, he or she must fulfil the criteria in Article 1A(2) of the Refugee Convention in order to prove refugee status. However, as I discuss in

¹²² I examine the question of the jurisdictional reach of refugee protection and *non-refoulement* in Chapter 5.

¹²³ JM Pobjoy, n 14 at 824, 838 and 854; see above under section 3 (Article 22 CRC).

¹²⁴ For example, the Netherlands at the time they ratified the CRC made a declaration that its government 'understand the term "refugee" ... as having the same meaning as in Article 1 of the [Refugee Convention], see 1855 UNTS 420,421.

¹²⁵ CRC Committee GC 6; UNHCR, *Guidelines on International Protection: Child Asylum Claims* (2009), n 13; JM Pobjoy, n 9, at 22.

Chapter 5, the child's right to protection and the *non-refoulement* principle provide children with a right of access to asylum procedures which includes access the territory of the state.

The fact that Article 22(1) CRC covers both refugee children and children seeking refugee status was considered to be one of the more radical aspects of Article 22.¹²⁶ Arguably, Article 22(1) applies only to children who have crossed an international border and are seeking international protection. This is because Article 1A(2) of the Refugee Convention requires a child to be outside their country of origin or habitual residence to be considered a refugee and Article 22(1) focuses on the *refugee* child or the child *seeking refugee status*. In contrast, the African Charter on the Rights and Welfare of the Child (ACRWC)¹²⁷ explicitly extends the reach of protection to children who are internally displaced, 'whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused'.¹²⁸ The UNHCR considers that the protection under Article 22(1) also encompasses all children seeking some form of international protection, including internally displaced children.¹²⁹ The scope of this chapter or indeed this thesis does not include the internally displaced child,¹³⁰ but the analysis offered by this thesis may have implications for the operation of the best interests principle and the rights to protection in the context of internally displaced children, given that their protection needs will be similar to children crossing international borders.

Article 22(1) CRC confirms that both children who have been recognised as refugees and children who are seeking refugee status are entitled to the same 'applicable rights' under the CRC. However, Article 22(1) does not overcome two of the most fundamental weaknesses of the Refugee Convention: 'the out-dated definition of refugee ... and the absence of a duty on states to provide asylum'.¹³¹

¹²⁶ G van Bueren, n 75 at 362.

¹²⁷ African Charter on the Rights and Welfare of the Child, opened for signature 1 July 1990 OAU Doc. CAB/LEG/24.9/49 (entered into force 19 November 1999)(ACRWC).

¹²⁸ Article 23(4) ACRWC.

¹²⁹ UNHCR stated the term 'refugee children' includes any child of concern to the High Commissioner, including those children who are refugees, returnees, asylum-seekers and displaced persons of concern, UNHCR *Policy on Refugee Children*, (1993), para 3.

¹³⁰ The concept of internally displaced persons (IDPs) was not contemplated by the Working Group during the drafting of the CRC. General Comment 6 also only covers children who have crossed an international border, but the Committee encourages states to adopt aspects of the General Comment in relation to children displaced within their own countries, see para 5.

¹³¹ G van Bueren n 75 at 362.

3.2.2 'Who is considered a refugee in accordance with applicable international or domestic law procedures'

State Parties to the Refugee Convention have their own procedures for refugee status determination. How child-specific or child-friendly these procedures are depends on the discretion of the state, but must comply with their obligations under international law, in particular the CRC. Article 22(1) CRC does not stipulate a determination procedure, but instead defers to 'international or domestic law procedures'. The Refugee Convention is also silent on an *international procedure* for determination of refugee status. As I have stated earlier in this chapter the UNHCR has a limited role in terms of supervision of the Refugee Convention, but has been active in publishing policy and guidelines for states to assist in the implementation of their obligations towards refugees, including policy and guidance on refugee children,¹³² guidance on policies and procedures for dealing with unaccompanied children seeking asylum,¹³³ determining refugee status under Article 1A(2) of the Refugee Convention,¹³⁴ interpretation of the definition from a child's perspective¹³⁵ and guidance on the determination of a child's best interests.¹³⁶

Where a state has not ratified the Refugee Convention, the child will still be considered a refugee under international law¹³⁷ and entitled to 'appropriate protection and assistance'. Additionally, the phrase 'international or domestic law procedures' affirms the IRL principle that a person's status as a refugee is not dependent on a domestic determination procedure.¹³⁸ Thus, Article 22 CRC should protect a child on the move, even if the state is not bound by international refugee law instruments, but as I highlighted earlier, this depends on whether the CRC has been incorporated. Nevertheless, the EU's Asylum system (CEAS) has incorporated children's rights into its measures, especially best interests, the right to participate and family unity/reunification/non-separation.¹³⁹ CEAS is an important example of how measures can provide the bridge

¹³² UNHCR *Policy on Refugee Children* (1988) UNHCR Doc. EC/SCP/82; UNHCR, *Refugee Children: Guidelines* (1994).

¹³³ UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children seeking Asylum* (Geneva 1997).

¹³⁴ UNHCR *Refugee Children: Guidelines* (1994) at 17 -18.

¹³⁵ UNHCR, *Guidelines on International Protection, Child Asylum Claims* (2009), n 13.

¹³⁶ UNHCR, *Guidelines on Determining Best Interests of the Child* (UNHCR, Geneva 2008); UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018).

¹³⁷ JM Pobjoy, n 14 at 825.

¹³⁸ *Ibid.*

¹³⁹ Primarily through Article 24 of the EU's Charter on Fundamental Rights.

between the CRC and domestic incorporation/implementation. However, even though on paper the CEAS provisions do provide this link, implementation is poor and EU member states, 'may have lost sight of the plight of unaccompanied migrant children'.¹⁴⁰ Child refugees on the move in Europe continue to face dangers faced while entering the EU irregularly, lack of protection, lack of safe reception, measures to prevent movement to their preferred country of destination, procedural and other obstacles to family reunification, the risk of administrative detention, vulnerability to exploitation, exposure to violence, trafficking and lack of legal advice and representation.¹⁴¹

3.2.3 'whether accompanied or unaccompanied'

Article 22(1) CRC does not define accompanied or unaccompanied children, nor are they defined anywhere else in the CRC. During the drafting of the CRC, the Italian representative proposed an amendment to include 'accompanied' as well as 'unaccompanied children in relation to family reunification processes'.¹⁴² The representative of the Federal Republic of Germany suggested that the paragraph should reflect the fact that family reunification applies to all refugee children and proposed removing the word 'unaccompanied' in Article 22(2).¹⁴³ The Working Group agreed to this and to the addition of the word 'any' before 'refugee child' to broaden the scope of this provision as much as possible.¹⁴⁴

The CRC Committee did not provide guidance on what was meant by accompanied or unaccompanied children in Article 22 until the publication of General Comment No. 6 in 2005.¹⁴⁵ The UNHCR, since 1987, had been using the term 'unaccompanied children' to describe children separated from their parents.¹⁴⁶ In General Comment No 6, the CRC Committee defined unaccompanied children as 'children ... who have been separated from both parents and other relatives and are not being cared for by an

¹⁴⁰ UK House of Lords European Union Committee, 'Children in Crisis: Unaccompanied Migrant Children in the EU' (2016) at 3.

¹⁴¹ *Ibid* at 10 - 11.

¹⁴² The delegate argued that a refugee child with a disability is known as 'an accompanied child' and requires particular protection and assistance: Report of the Working Group to the Commission on Human Rights 1989 (E/CN.4/1989/48), para 387.

¹⁴³ *Ibid*, para 391.

¹⁴⁴ *Ibid*, para 394.

¹⁴⁵ CRC Committee, GC 6.

¹⁴⁶ UNHCR ExCom, *Conclusion on Refugee Children*, 12 October 1987, No 47(XXXVIII), para (i); see also UNHCR *Policy on Refugee Children* (1993), para 14 and UNHCR *Refugee Children Guidelines* (1994), at 52.

adult who, by law or custom, is responsible for doing so'.¹⁴⁷ By 2005, the term 'separated child' was also used and defined as 'children ... who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members'.¹⁴⁸ General Comment No. 6 did not elaborate on the meaning of accompanied children, but the UNHCR considers that the term 'accompanied child' refers to a child who is fleeing persecution with family members (usually parents).¹⁴⁹

3.2.4 'Shall take appropriate measures to ensure that a child ...shall... receive appropriate protection and humanitarian assistance'

This wording has to be read in conjunction with Article 4 CRC, which obliges states to undertake all appropriate legislative, administrative and other measures for the implementation of rights. This is a broad obligation covering the activities of a state at all levels of government and public services. However, the state also has a broad discretion as it is the state which decides the *appropriateness* of the measures, the *appropriateness* of protection and how much humanitarian assistance to give or to seek from other states or international organisations. Nevertheless, the appropriateness of protection and humanitarian assistance is dictated by the state's international obligations under the CRC, IHRL and the Refugee Convention.

The CRC Committee emphasises that states have obligations to establish national legislation and administrative structures and to carry out research, to collate data and information, as well as providing training to support 'appropriate' measures.¹⁵⁰ Under Article 22(1) CRC, the 'appropriate measures' are not specified, but there are certain procedural guarantees which should be applied to any administrative or judicial proceedings involving children, whether accompanied or unaccompanied. At the minimum, states should adhere to the four principles identified by the CRC Committee:¹⁵¹ that is, measures should not be applied in a discriminatory manner (Article 2); the best interests of the child shall be a

¹⁴⁷ CRC Committee GC 6, para 7.

¹⁴⁸ Ibid.

¹⁴⁹ UNHCR ExCom, *Conclusion on Refugee Children*, para (h); UNHCR *Guidelines on International Protection* (2009), para 8.

¹⁵⁰ CRC Committee, GC 6, para 13.

¹⁵¹ See also CRC Committee, GC 6, paras 18 – 25.

primary consideration in any action (Article 3), which must be respected during all stages of the displacement cycle;¹⁵² the child's rights to life, survival and development must be protected (Article 6), including protection from violence and exploitation to the maximum extent possible¹⁵³ and the child's right to be heard must be given effect in all matters concerning children (Article 12). The non-discrimination principle allows for differentiation on the basis of the different protection needs, for example those arising from age or gender.¹⁵⁴ When it comes to unaccompanied or separated children in the context of forced migration, the UNHCR, the CRC Committee and the CMW have recognised that a key procedural safeguard for such children is the appointment of a guardian to ensure a child's best interests are protected throughout the process and to ensure the child has an opportunity to express his or her views in a language he or she understands.¹⁵⁵ In order to fulfil this, the child should also be provided with all the relevant information in relation to his or her claim and to enable him or her to give informed views.¹⁵⁶ In addition, if they have to go before a judicial or administrative authority, they should be provided with a legal representative.¹⁵⁷ The EU's CEAS system incorporates many of these safeguards and were part of the EU's Action Plan on Unaccompanied Children 2010-2014, but as a recent report indicated, implementation in the EU is poor, with a lack of burden sharing and solidarity among Member States.¹⁵⁸

States have a responsibility to introduce laws which address the treatment of unaccompanied and separated children, 'in accordance with applicable rights codified in the Convention, and in other international human rights, refugee protection or humanitarian instruments, to which the state is a party'.¹⁵⁹ The CRC Committee has not restricted this requirement to State Parties to the Refugee Convention only - it is an obligation for *all* states which have ratified the CRC. Therefore, even states that do not recognise refugees in accordance with the Refugee Convention are, nevertheless, under an obligation to ensure a child seeking

¹⁵² Ibid, para 19.

¹⁵³ Ibid, para 23.

¹⁵⁴ Ibid, para 18.

¹⁵⁵ Ibid, para 71; UNHCR *Guidelines on International Protection: Child Asylum Claims* (2009), para 69; JGC 3 and 22, para 36.

¹⁵⁶ CRC Committee GC 6, para 25; JGC 3 and 22, para 35.

¹⁵⁷ CRC Committee GC 6, para 21; JGC 3 and 22, para 36.

¹⁵⁸ UK House of Lords EU Committee's Report n 140 at 90 – 97.

¹⁵⁹ CRC Committee GC 6, para 64.

asylum receives 'appropriate protection' and that 'appropriate measures' are in place, which the Committee has interpreted as including a 'functioning asylum system'.¹⁶⁰ The CRC and CMW Committees expect states to adopt a

dynamic interpretation of the Conventions based on a child-centred approach [which] is necessary to ensure their effective implementation and the respect, protection and fulfilment of the rights of all children in the context of the increasing number of challenges that migration poses for children.¹⁶¹

Appropriate protection refers to the obligations of states under the Refugee Convention and also covers human rights protection accorded to children where they are seeking international protection.¹⁶² Immigration and asylum measures and deterrent strategies adopted by states to try to stop children, accompanied or unaccompanied, from crossing borders or to make life 'hostile' or as uncomfortable as possible in the host state,¹⁶³ violate the most basic of children's rights¹⁶⁴ and are unlikely to fall into the category of 'appropriate measures'.¹⁶⁵

Humanitarian assistance is closely aligned with appropriate protection in Article 22(1) CRC, a fact acknowledged during the drafting of the CRC, when members of the Working Group in 1982 suggested that 'protection should not be considered less important than assistance'.¹⁶⁶ The *travaux préparatoires* of the CRC indicate that 'assistance' was discussed frequently by the Working Group and in general was referred to in the context of 'financial assistance', which may have been the meaning attributed to the wording 'humanitarian assistance' in Article 22(1). 'Assistance' also refers to the provision of food, shelter and medical care.¹⁶⁷ The Working Group agreed to approach the question of refugee children 'in a purely

¹⁶⁰ Ibid.

¹⁶¹ JGC 3 and 22, para 20.

¹⁶² See Chapter 4.

¹⁶³ See R Brittle, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in UK Asylum Law' (2019) 19 *Human Rights Law Review* [forthcoming].

¹⁶⁴ For example, the right to be heard (Article 12), right to non-separation from parents and right to family reunification (Articles 9 and 10), right to liberty (Article 37) and is incompatible with the best interests of the child.

¹⁶⁵ Articles 4 and 22(1) CRC.

¹⁶⁶ UN ECOSOC, Commission on Human Rights, thirty-eighth session, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982), para 94.

¹⁶⁷ CRC Committee, GC 6, paras 44, 46 – 48.

humanitarian spirit',¹⁶⁸ but did not elaborate on what was meant by a 'humanitarian spirit'.¹⁶⁹

3.2.5 'In the enjoyment of applicable rights'

The *travaux préparatoires* reveal that there was little discussion of what was meant by 'applicable rights'. The only specific right talked about was education following a proposal by UNESCO, but this was removed because some states felt that it was wrong to focus on one right and education was dealt with elsewhere in the Convention.¹⁷⁰ As I have said already, Article 22(1) does not give a child a right to be recognised as a refugee,¹⁷¹ nor a right to asylum, but all children, whatever their status, are entitled to enjoy all of the rights under the CRC within the jurisdiction of a state.¹⁷² Children do not leave their rights behind in their country of origin: '[w]here conflict or disaster, neglect, abuse or marginalization drive children to move, their rights move with them.'¹⁷³

Thus, if it is acknowledged that refugee children are entitled to enjoy all of the rights in the CRC, why would there be a reference to 'applicable rights' in Article 22? The wording seems to have been accepted without discussion in the *travaux préparatoires*, but may have reflected nervousness by some delegates on the Working Group about providing non-national children access to all of the rights in the CRC.¹⁷⁴ It has been argued that '[t]he word 'applicable' in paragraph 1 [of Article 22] was used to make distinctions between the various treaties to which it refers, and

¹⁶⁸ UN ECOSOC, n 161, para 92.

¹⁶⁹ This might have been a reference to the humanitarian principles of the International Red Cross and International Red Crescent. See the Fundamental Principles of the International Red Cross and Red Crescent Movement, proclaimed in Vienna in 1965 by the 20th International Conference of the Red Cross and Red Crescent Movement; UN OCHA *Humanitarian Principles* (June 2012), available at: https://www.unocha.org/sites/dms/Documents/OOM-humanitarianprinciples_eng_June12.pdf [last accessed 19th December 2018].

¹⁷⁰ UN ECOSOC, Commission on Human Rights, forty-fifth session, Report of the Working Group on a draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48 (2 March 1989), para 379.

¹⁷¹ UNHCR *Guidelines on International Protection* (2009), para 4.

¹⁷² Non-discrimination principle in Article 2 CRC.

¹⁷³ UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (UNICEF, New York 2017) 51.

¹⁷⁴ This is evident in the reservations entered and statements made following the adoption of the CRC. See, for example Japan expressed doubts as to the consequences for the national immigration laws of Article 22 and declared that the provision was accepted by Japan on the grounds that it did not require states to take further measures in addition to the procedures in place for the recognition of refugees: see Report of the Working Group to the Commission on Human Rights (1989) UN Doc. E/CN.4/1989/48, paras 22 and 722; During the drafting of Article 2 CRC, the USA delegate advocated that the Convention should only apply to children *lawfully* on the territory of a state: see Report of the Working Group on a draft convention on the rights of the child', (1981) UN Doc E/CN.4/L.1575, paras 40 and 44.

not for the purpose of limiting the rights of refugee children'.¹⁷⁵ Pobjoy argues that this interpretation is consistent with the drafters' intention as the word 'applicable' was introduced into the provision at the same time as the reference to 'other international human rights or humanitarian instruments'.¹⁷⁶

Smyth argues that the question may not be about what rights are 'applicable' but what rights are relevant.¹⁷⁷ However, I would argue that for a child refugee, all rights are relevant and applicable, but some rights become more important than others at different stages of their journey to a destination country, during the asylum process, after a decision has been made by the host state, when return decisions are being made and when considering a durable solution. *All* the rights in the CRC are applicable to *all* children seeking international protection. As Crock has argued, '[t]he rights of those children inhere because they are children. They should apply regardless of citizenship, ethnicity or immigration status'.¹⁷⁸

3.3 Article 22(2) – Scope and Parameters

Article 22(2) CRC was added during the final reading of the Convention, although the concept of state cooperation with international organisations had been included in an earlier draft of the Article.¹⁷⁹ The purpose of Article 22(2) is threefold:¹⁸⁰ first, states are to cooperate 'as they consider appropriate' with the UN and any intergovernmental organisation or NGOs working with the UN, in order to 'protect and assist' a child. Therefore, if a state does not have the resources or specialist training to protect and assist child refugees or asylum-seeking children, they should seek the assistance of the UN and organisations working with the UN. However, as the discussion on the *travaux préparatoires* above

¹⁷⁵ C Price-Cohen, 'The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children' (1990) 3 *International Journal of Refugee Law* 675, 689.

¹⁷⁶ See: UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982), para 99; Pobjoy, n 14 at 838.

¹⁷⁷ C Smyth, *European Asylum Law and the Rights of the Child* (Routledge, Oxford 2014) at 32. Although, she accepts that a 'cursory glance' at the CRC reveals that all the rights are potentially relevant to asylum-seekers.

¹⁷⁸ M Crock, 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child' in S Mahmoudi, P Leviner, A Kaldal and K Lainpelto (eds) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff, Leiden and Boston 2015) 221 at 241. I examine specific relevant rights later in this chapter at section 4 below.

¹⁷⁹ See UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982), para 97.

¹⁸⁰ JM Pobjoy, n 14 at 849 – 850.

indicates, this was subject to some discussion as there were concerns about the extent to which international organisations could interfere with a state's response to refugees. The compromise was to insert the wording 'as they [State Parties] consider appropriate'. This introduced an element of discretion which states could rely upon and unfortunately 'it makes a state the ultimate arbiter of their own behaviour'.¹⁸¹

Second, Article 22(2) CRC requires states to assist with tracing the parents or other members of the child's family and to obtain information to assist with reunification of the family. It has been worded carefully so that there is no obligation on the state to ensure reunification of the family on their territory, but it needs to be read in light of Articles 9 and 10 CRC. The original provision obliged states to investigate as soon as possible whether the child had family and to recognise a child's right to family reunification,¹⁸² but this was watered down to an obligation to cooperate with the UN and international organisations to provide information to assist with tracing family members. Although not explicit, the obligation to cooperate is imposed upon the state which is protecting the child and the state where members of the family are living, which might be the country of origin or a safe (or unsafe) third country.

Pobjoy interprets this part of Article 22(2) CRC as applying only to refugee children (not to asylum-seeking children) because this is the specific wording in that part of the paragraph.¹⁸³ But if he is correct, this would mean that the drafters of the CRC intended to create a distinction between children with recognised refugee status and children seeking asylum. He argues that only *refugee* children have the right to assistance from the state to trace his or her family, whereas the duty to cooperate to protect and assist refers to *such a child* which refers back to both refugee and asylum-seeking children in Article 22(1) CRC.¹⁸⁴ This interpretation is wrong on several grounds. First, it is incompatible with the non-discrimination principle in Article 2 CRC and the approach of Article 22(1) which applies to both refugee children and asylum-seeking children. Second, there is nothing in the *travaux préparatoires* to indicate that this is what the Working Group intended. Third, if Pobjoy is correct, then a child

¹⁸¹ JM Pobjoy, n 14 at 851.

¹⁸² UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982), para 94.

¹⁸³ JM Pobjoy, n 14 at 850.

¹⁸⁴ *Ibid.* Also, it must be the case that a state's duty to protect and assist includes reuniting a child with his or her family if the child has become separated from his or her family on the journey.

would have to wait until his or her status as a refugee is determined before steps are taken to trace his or her family, which might be too late to find the child's family and this would not be in the child's best interests. The CRC Committee acknowledged the urgency of family tracing for unaccompanied or separated children and where possible, if it is in the child's best interests, to reunite children with their families as soon as possible.¹⁸⁵ The CRC Committee does not distinguish between refugee and asylum-seeking children and indicates that the process should start when an unaccompanied or separated child is identified as such at the border.¹⁸⁶ The duty to assist the child with tracing family members continues throughout the asylum process.¹⁸⁷ Finally, this interpretation of Article 22(2) is not consistent with the interpretation by the CRC Committee of the state's obligations on family reunification and the UNHCR's core principle of family unity.¹⁸⁸ The family is regarded as one of the most fundamental groups in society and essential for the growth and well-being of the child¹⁸⁹ and reunification of a child with his or her parents, whatever his or her status, is generally regarded as being in the best interests of the child.¹⁹⁰

The third purpose of Article 22(2) CRC is to ensure that a child whose parents cannot be traced is given the same protection as any other child permanently or temporarily deprived of his or her family environment. Article 20 CRC which obliges states to provide 'special protection' and assistance to a child who has been temporarily or permanently deprived of his or her family environment will be relevant in this context. The child is entitled to alternative care, in accordance with the laws of the state.¹⁹¹ The state should provide a refugee or asylum-seeking child with the same level of care and protection as is necessary for the child's well-being (Article 3(2) CRC) that any other child in the state would receive.

The next section examines the rights which are most relevant to a child forced to migrate and seeking international protection. It is beyond the scope of this chapter to discuss in depth all of the rights applicable to a refugee or asylum-seeking child. My objective here is to highlight the

¹⁸⁵ CRC Committee GC 6, paras 13, 31(v) and 80; JGC 4 and 23, paras 32 - 35. The CRC Committee do not restrict the need for prompt action on family tracing to refugee children only.

¹⁸⁶ CRC Committee GC 6, paras 13 and 79.

¹⁸⁷ CRC Committee GC 6, paras 13 and 80.

¹⁸⁸ See UNHCR *Note on Refugee Children* 1987.

¹⁸⁹ See 5th preambular paragraph CRC.

¹⁹⁰ CRC Committee GC 6, para 81; see also JGC 4 and 23, para 35 on family reunification procedures in the best interests of the child. I analyse this right more fully below in section 4.5.

¹⁹¹ Article 20(2) CRC.

rights which play a significant role when a child is a refugee or seeking refugee status and fulfil the right to *appropriate protection* under Article 22(1) CRC.

4. Specific (Applicable) Rights under the CRC

In their joint General Comment, the CRC and CMW Committees attached a high priority to the four guiding principles of the CRC¹⁹² and reiterated that states should be guided by these 'overarching' principles and

should adopt measures, including legislative and other policy tools, aimed at ensuring that those principles are upheld in practice and brought into the mainstream of all policies affecting children in the context of international migration.¹⁹³

General Comment No. 6, although it specifically deals with unaccompanied and separated children, sets out 'applicable principles' which the CRC Committee considers important for any child seeking international protection. These include the four guiding principles of the CRC plus *non-refoulement*¹⁹⁴ and confidentiality.¹⁹⁵ The General Comment also covers specific rights which should be respected in response to the unaccompanied or separated child's general and specific needs. These include care and protection, access to a legal representative or guardian and access to asylum procedures, full access to education, right to adequate standard of living, right to health, protection from all forms of violence, abuse and exploitation, prohibition of military recruitment and protection against effects of war and right to liberty and non-detention.¹⁹⁶ Joint General Comment No 4 and 23 adds to this list by including the right to education and professional training, as well as due process guarantees and access to justice, right to a name, identity and to a nationality and a right to family life.¹⁹⁷ Refugee and asylum-seeking children cannot be denied rights because of their status or lack of status.

¹⁹² CRC Committee General Comment No 5, para 5. I cover 3 out of the 4 general principles here. I do not cover best interests, as I have examined it in detail in Chapter 2.

¹⁹³ JGC 3 and 22, para 19.

¹⁹⁴ JGC 3 and 22 adds the prohibition on collective expulsion: see para 47.

¹⁹⁵ CRC Committee, GC 6, paras 12 – 30.

¹⁹⁶ *Ibid*, paras 31 – 63.

¹⁹⁷ JGC 4 and 23. The legal obligations of states parties to protect the rights of children in the context of international migration are set out in paras 3 - 61.

4.1 Non-discrimination (Article 2 CRC)

Article 2 CRC provides the basis of the non-discrimination principle from a child rights perspective: it prohibits discrimination on the basis of the child's status or that of his or her parents or legal guardians.¹⁹⁸ There was an attempt by the USA delegation at the Working Group to limit the scope of this article, and the CRC as a whole, to children *lawfully* on the territory of the state, but a number of other delegations at the Working Group were uncomfortable with this and the word 'lawfully' was removed.¹⁹⁹

Refugee and asylum-seeking children face multiple and intersectional forms of discrimination and are denied access to food, shelter, housing, health services and education.²⁰⁰ States have a positive obligation to ensure children are protected from discrimination and take positive measures to ensure access to social and economic rights²⁰¹ and to combat xenophobia, racism, bullying, harassment and violence against non-citizens and promote social inclusion and integration of children and their families in the host community.²⁰²

Non-discrimination should be at the centre of all policies and procedures which impact on refugee children and asylum-seeking children, including border control measures.²⁰³ Where differential treatment of migrants is required, it must be lawful and proportionate, in pursuit of a legitimate aim and to ensure the best interests of the child.²⁰⁴ For example, differentiation on the basis of different protection needs such as those

¹⁹⁸ CRC Committee GC 6, para 18; JGC 3 and 22, para 21.

¹⁹⁹ See in particular the discussions in 1981: UN ECOSOC, Commission on Human Rights, thirty-seventh session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/L.1575 (17 February 1981), at paras 40 and 44. Other delegates did not agree that the application of the CRC should be limited to children lawfully in the territory of a state party, at para 40. The Polish representative suggested a provision that '[t]he State parties...recognize the right of alien children staying in their territories to enjoy the rights provided for in this Convention', see Note Verbale Addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva, (5 October 1979) UN Doc E/CN.4/1349. The USA delegate agreed to remove the word 'lawfully' from its proposed text, on the understanding that the Polish proposal was dropped, see Report of the Working Group on a Draft Convention on the Rights of the Child' above at para 47. The United Kingdom and German representatives expressed their concerns about the extension of the CRC to non-nationals, eg UN ECOSOC, Report of the Working Group on a draft convention on the rights of the child, (1984) UN Doc. E/CN.4/1984/71, paras 9 and 11.

²⁰⁰ CRC Committee, GC 6, para 3.

²⁰¹ Committee on Economic, Social and Cultural Rights, General Comment No. 20 on non-discrimination in economic, social and cultural rights (art 2, para 2), UN Doc. E/C.12/GC/20 (2 July 2009).

²⁰² JGC 3 and 22, para 23.

²⁰³ JGC 3 and 22, para 22.

²⁰⁴ *Ibid.*

deriving from age and/or gender may be necessary,²⁰⁵ but it would not be lawful to differentiate on the grounds of a child's or his or her parents' immigration status.²⁰⁶ One of the key challenges to a child's right to non-discrimination, both at the border and once the child arrives on the territory of the state, is that border control measures are sometimes carried out by private organisations or non-state actors who are not duty-bearers under the CRC. States, such as the UK outsource immigration control as part of a deterrence policy and non-state actors are often not held accountable if they unlawfully discriminate against a child on the basis of the child's migration status.²⁰⁷ But states cannot diminish or outsource their human rights responsibility: they are accountable for failures to ensure that the outsourcing they mandate or permit complies with their obligation to protect human rights and ensure effective remedies.²⁰⁸

4.2 Right to life, survival and development (Article 6 CRC)

The right to life, survival and development, which includes the physical, mental, moral, spiritual and social dimensions of a child's development,²⁰⁹ obliges a state to take measures to protect the child from violence, abuse, exploitation, smuggling and trafficking, which a child may experience on the journey or when he or she arrives on the territory of the state.²¹⁰ At any point during the 'migratory process', a child's right to life and survival may be at risk owing to violence, organised crime, push-backs or interception at sea operations, excessive use of violence at the border or in refugee camps and limited access to basic services.²¹¹

'Appropriate protection and humanitarian assistance' under Article 22 CRC require a state to ensure measures are implemented to reduce and/or eliminate the risk of violence, exploitation and abuse which a refugee or asylum-seeking child faces, whether the child travels alone or with members of his or her family. Children should be safe where they live, learn and play and safeguarded from all forms of violence, abuse, neglect

²⁰⁵ CRC Committee, GC 6, para 18.

²⁰⁶ Article 2(2).

²⁰⁷ See R Brittle, n 163 (forthcoming).

²⁰⁸ A Nolan, 'Privatization and Economic and Social Rights, (2018) 40 *Human Rights Quarterly* 815 at 825 - 826.

²⁰⁹ CRC Committee, General Comment no. 5, 'General Measures of Implementation of the Convention on the Rights of the Child' UN Doc. CRC/GC/2003/5 (27 November 2003) (GC 5), para 12.

²¹⁰ CRC Committee, GC 6, para 23.

²¹¹ JGC 3 and 22, para 40.

and exploitation²¹² and 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'.²¹³ Both the CRC and CMW Committees emphasise the paramount importance of the survival of the child and that this is a precondition for the enjoyment of any other rights.²¹⁴

A lack of regular and safe routes for children and their families contribute to them undertaking risky and life-threatening journeys to get to safety²¹⁵ and children migrating through irregular channels are at greater risk of sexual and gender-based violence, family separation, psychological distress, trauma, health complications, physical harm and of exploitation,²¹⁶ all of which threaten the child's life, survival and development. Measures designed to deter such journeys and to stop asylum-seekers and refugees from arriving at a state's borders do not reduce the risks children face. Ultimately such measures do not stop people who are desperate to save their lives and their children's lives. Draconian deterrence measures result in a 'cat and mouse' game between state authorities and people smugglers who devise more creative (and dangerous) ways to avoid states' deterrent measures,²¹⁷ which result in more dangerous and life-threatening journeys for children. The obligations of states include the prevention and reduction of migration-related risks faced by children which may jeopardise the child's right to life, survival and development under Article 6.

States should implement policies to accelerate the provision of rights-based assistance and protection²¹⁸ for children facing such risks and 'facilitate their ability to resume their lives with their rights as children fully respected, protected and fulfilled'.²¹⁹ This includes implementing safe and legal routes to resettlement in a safe country. Inevitably, on a forced migration journey, children will lose access to education, healthcare and

²¹² UNHCR *Framework for the Protection of Children* (UNHCR, Geneva 2012), goal 1 at 18 and 19; UN High Commissioner's Dialogue on Protection Challenges: Children on the Move Background Paper (28 November 2016), paras 24 – 27.

²¹³ CRC Committee, General Comment no. 7, Implementing Child Rights in Early Childhood, UN Doc. CRC/GC/7 Rev.1 (20 September 2006) (GC 7), para 10.

²¹⁴ CRC Committee, GC 6, para 82.

²¹⁵ JGC 3 and 22, para 41; UN Secretary General's Report to the General Assembly on the Status of the Convention on the Rights of the Child, UN Doc. A/71/413 (27 September 2016), at para 21.

²¹⁶ *Ibid*, at para 23.

²¹⁷ T Gammeltoft-Hansen and JC Hathaway 'Non-Refoulement in a World of Cooperative Deterrence', (2015) 53 *Columbia Journal of Transnational Law* 235 at 246.

²¹⁸ UN Secretary General's Report (27 September 2016), n 215 at para 20.

²¹⁹ Joint General Comment No 3 and 22, para 42.

adequate shelter, all of which are rights under the CRC²²⁰ and are essential for the survival and development of the child. A child's right to social and economic rights and the obligations of the state to ensure a refugee or asylum-seeking child has access to these rights is emphasised by the CRC Committee.²²¹

At the other end of the migratory process the right to life, survival and development plays an important role in any decision to return a child particularly in the context of the principle of *non-refoulement*. If there is a risk that this fundamental right will be violated because of, for example, conflict or indiscriminate violence, then return is not an option.²²² I examine the *non-refoulement* principle more fully in Chapter 5.

4.3 Right to be heard and participation (Article 12 CRC)

A right which is particularly relevant for a child seeking international protection, is the right to have his or her views taken into consideration according to age or maturity (Article 12 CRC). This right applies in *all* matters affecting the child. The CRC Committee emphasises that this provision applies to all relevant proceedings, both judicial and administrative including proceedings involving refugee and asylum-seeking children.²²³ Proceedings which involve a child or which will impact on a child must be accessible and age-appropriate; a child 'cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age'.²²⁴ Joint General Comment No 3 and 22 emphasises the need to recognise a child's agency in migration and that policies and decisions about children, who are migrating for whatever reason, can only be effective or appropriate with the child's participation.²²⁵

IRL does not provide a procedural guarantee or a substantive right for a child to be heard when he or she makes a claim for international protection. It is only relatively recently that the UNHCR has urged states to ensure that children should be able to make claims for refugee status in their own right and to acknowledge that children are active subjects of

²²⁰ Article 24 CRC: Right of the child to the highest attainable standard of health; Article 28 CRC: the right of the child to education; Article 27 CRC: the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

²²¹ CRC Committee, GC 6; JGC 4 and 23.

²²² *Ibid*, para 82 and 84.

²²³ CRC Committee, General Comment no. 12, The Right of the Child to be Heard, UN Doc. CRC/C/GC/12 (1 July 2009) (GC 12), para 32.

²²⁴ *Ibid*, para 34.

²²⁵ JGC 3 and 22, para 35.

rights.²²⁶ This has been pushed to the fore because of the growing phenomenon of children travelling across international borders alone.²²⁷ Crock notes that 'for a long time children have been unseen and unheard in refugee status determination processes around the world'.²²⁸ Yet, because of Article 12 CRC, children have a right to have their views listened to and to be given due weight on any matter affecting them. However, much of the research on children's experiences of participating in asylum proceedings reveals that their views and interests are not heard against the louder political and economic agenda which is not conditioned to hear the voice of the child and take account of children's rights.²²⁹ Article 12 has a positive, purposive tone, giving children the space and freedom to make their views known, but this contrasts with the growing body of research which reveals that children's experiences of the asylum process have little do with expressing views *freely* and in an atmosphere conducive to full participation and respecting children's rights.²³⁰

The impact of Article 12 CRC requires adequate measures to guarantee implementation of the right, including the right to express views on all aspects affecting their lives as an integral part of asylum proceedings.²³¹ In addition proceedings should be 'child-friendly and accessible'.²³² A refugee or asylum-seeking child should be provided with the opportunity to present his or her claim for asylum and why he or she requires international protection and to express views on his or her educational and health needs.²³³ Children should be heard independently of their parents, with a specific best interests assessment to include the child's reasons for migrating to be taken into account.²³⁴ States are reminded that there can be no correct application of Article 3 if Article 12 is not respected and Article 3 reinforces the functionality of Article 12, thus facilitating the role for children in decisions affecting their lives.²³⁵

²²⁶ UNHCR ExCom *Conclusion on Children at Risk* (2007).

²²⁷ See eg J Bhabha, M Crock, N Finch and S Schmidt, *Seeking Asylum Alone: A Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (The Federation Press, Annandale 2007).

²²⁸ M Crock, n 10 at 179; JM Pobjoy n 9 at 46.

²²⁹ H Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258 at 263.

²³⁰ *Ibid.* There is extensive literature on the reality of children's participation in asylum proceedings and Stalford refers to UK and Swedish research on this in her article.

²³¹ JGC 3 and 22, para 35.

²³² CRC Committee GC 12, para 66.

²³³ CRC Committee GC 12, para 123.

²³⁴ JGC 3 and 22, para 37.

²³⁵ JGC 3 and 22 para 37; CRC GC 12, paras 74 and 123-124.

However, this presents a dilemma in terms of a child's asylum claim, because on the one hand the child should have a voice in his or her claim and participate in the proceedings, but that requires a child to face a difficult process to prove to the national authorities that he or she has a well-founded fear of persecution and thus requires the protection of the state. Stalford comments that, 'it is fair to say that children's right to be heard is more poorly implemented in asylum proceedings than in almost any other legal sub-context'.²³⁶ A child's participation in a complex and adversarial process may not be in his or her best interests and he or she is not able to give his or her opinion 'freely'.²³⁷ Proving the objective element of the test is problematic for a child 'most particularly when there are adult voices of authority in conflict with the child's view'.²³⁸ State authorities will have access to 'objective' evidence about the child's country of origin which the child may have little hope of knowing or ascertaining and cannot challenge an assertion by the state that the situation is safe now and he or she can be returned.²³⁹ However, a child's own account of his or her experience is often essential for the identification of his or her protection needs and the child will often be the only source of this information.²⁴⁰ This will also be important for identifying who should be the principal applicant where a child is travelling with his or her family and whether or not the asylum process is the appropriate one to address the child's protection needs.

Rap argues that in order to implement and interpret the right to participation in an asylum or migration context, it is important to focus on the conditions and safeguards required to participate effectively, this includes the right to information, the right to legal representation and access to justice and remedies.²⁴¹ The child must have access to all the relevant information in a language he or she understands and to give full effect to this right a guardian should be appointed as soon as possible after arrival to represent the child's views at all stages of the asylum process as well as an interpreter, so the child can 'express [him or herself] fully in their native language and receive support from someone familiar with the

²³⁶ H Stalford, n 229 at 263.

²³⁷ Ibid 265 -266.

²³⁸ M Crock n 10 at 163.

²³⁹ Ibid.

²⁴⁰ UNHCR *Guidelines on International Protection: Child Asylum Claims* (2009), n 13, para 70.

²⁴¹ S Rap, 'The Right to Effective Participation of Refugee and Migrant Children: A Critical Children's Rights Perspective' (2019) UN University Working Paper Series W-2019/3 at 11.

child's ethnic, religious and cultural background'.²⁴² The professionals involved with the child going through the asylum process must be trained on the specific needs of children in this situation including gender, cultural, religious and 'other intersecting aspects'.²⁴³ The participation of children should extend to the 'design, implementation and evaluation of policies' which directly or indirectly affect refugee children or asylum-seeking children as individuals or as a group.²⁴⁴ Thus states should seek to actively include children who are excluded from participating by reason of their status. However, this should only be from a rights-based perspective and must take account of the child's best interests. This should also take into account a child's right not to participate and remain silent, which should not be used as a reason to undermine the credibility of a child or to dismiss a child's claim.²⁴⁵ The child's right to be heard and participate should be centred on a child's right to protection and what is in their best interests.²⁴⁶

4.4 Right to liberty/freedom from detention (Article 37(b))

Many states as part of their immigration control policy detain people who enter the state via irregular routes. 'Irregular migrants'²⁴⁷ whose claims for asylum or leave to remain are refused will also often be detained pending removal or deportation. This will include children who are unaccompanied as well as children travelling with their families. The right of the child not to be deprived of his or her liberty is protected by Article 37(b) CRC. However, according to the CRC Committee's initial interpretation of Article 37(b), if the detention is lawful and not arbitrary, the state was not in violation of this right, as long as it was used as a measure of last resort and for the shortest period of time (*ultima ratio* principle).²⁴⁸ In General Comment No. 6, the CRC Committee stated that children should not, as a general rule, be deprived of his or her liberty or be detained solely on account of or lack of status or the fact that he or she is unaccompanied.²⁴⁹ A more robust position was taken by delegates at

²⁴² CRC Committee, GC 12, para 124; JGC 3 and 22, paras 35 and 36.

²⁴³ JGC 3 and 22, para 36.

²⁴⁴ JGC 3 and 22, para 39.

²⁴⁵ H Stalford, n 229.

²⁴⁶ S Rap, n 241.

²⁴⁷ This term is also used to refer to anybody who has entered the state illegally. Referring to migrants as illegal, and/or prosecuting them for illegal entry, contravenes the prohibition on penalisation of refugees under Article 31 of the Refugee Convention.

²⁴⁸ Article 37(b) CRC; CRC Committee GC 10, para 79.

²⁴⁹ CRC Committee, GC 6, paras 40 and 61; UN Human Rights Committee, General Comment no. 35, *Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35 (16 December 2014), paras 18 and 62.

the CRC Committee's Day of General Discussion, which recommended that detention of a child because of their migration status is never in their best interests and is rarely justifiable.²⁵⁰ Detention of a child because of their parents' migration status violates a child's right to liberty and contravenes the best interests principle.²⁵¹ States should 'expeditiously and completely cease or eradicate the immigration detention of children. Any kind of immigration detention should be forbidden by law'.²⁵²

Both the CRC and CMW Committees have asserted that detention can never be justified in a migration context, because Article 37(b) CRC only applies in the context of juvenile justice, where a child is being prosecuted or has been found guilty of a criminal offence.²⁵³ Thus the general principle that detaining children as a measure of last resort and for the shortest appropriate period of time, does not apply in immigration proceedings and conflicts with the child's best interests and right to development.²⁵⁴

Crossing a border in an unauthorised manner or without proper documentation or overstaying a visa may constitute administrative offences but they are not criminal offences²⁵⁵ and irregular entry or stay in a host state should not incur the same consequences as offences relating to the commission of a crime against persons, property or national security.²⁵⁶ Article 31(1) of the Refugee Convention precludes states from imposing penalties for illegal entry and presence in the host state,²⁵⁷ thus children should not be criminalised solely for reasons of illegal entry or illegal stay in the host state.²⁵⁸

Joint General Comment 4 and 23 does not characterise the detention for immigration purposes as arbitrary, but both Committees indicate that criminalising irregular entry and stay exceeds a state's legitimate interest

²⁵⁰ CRC Committee, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration (28 September 2012) (DGD 2012) para 32 and 78.

²⁵¹ JGC 4 and 23, para 5.

²⁵² JGC 4 and 23, para 5; CRC Committee, DGD 2012 n 238, para 78. Unfortunately, the proposed EU Directive on Reception Conditions does not include a prohibition on the detention of children and invokes the *ultima ratio* rule. The proposal suggests states should follow due diligence procedures when deciding whether or not to detain: Art 24 EUCFR and Article 37 CRC.

²⁵³ JGC 4 and 23, para 10.

²⁵⁴ JGC 4 and 23, para 10.

²⁵⁵ CMW Committee General Comment no. 2 on the Rights of Migrant Workers in an irregular situation and Members of their Families, UN Doc CMW/C/GC/2 (28 August 2013), para 24.

²⁵⁶ JGC 4 and 23, para 7.

²⁵⁷ Refugee Convention, Article 31.

²⁵⁸ CRC Committee, GC 6, para 62.

to control and regulate migration, which may lead to arbitrary detention.²⁵⁹

The UN Special Rapporteur on Torture has declared that detention of children in an immigration context, based on the migratory status of their parents is never in the best interests of the child, as it 'exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman and degrading treatment of migrant children'.²⁶⁰ In the early 2000s, the UN's Human Rights Committee did not consider that all detention of children in the context of immigration is arbitrary: if a state can prove that the detention is reasonable, necessary and proportionate in the particular circumstances of the case and give a reason for detention which is not solely based on the migration status of the parents, or on the fact that the child is unaccompanied or separated,²⁶¹ then the detention will not be arbitrary.

The impact of immigration detention has been well-documented and there is strong evidence that the prolonged indefinite detention of children poses unacceptable risks to the health, well-being and development of children and violates a state's human rights obligations.²⁶² It has been demonstrated that even short periods of detention can have a negative and profound impact on children's health and well-being.²⁶³ Immigration detention has 'undeniable immediate and long-term mental health impacts on asylum-seeking children and families'.²⁶⁴ The effects on children include heightened rates of suicide, suicide attempts and self-harm, mental disorder, and developmental problems, including severe attachment disorder.²⁶⁵

²⁵⁹ JGC 4 and 23, para 7.

²⁶⁰ UN General Assembly Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/22/53 (5 March 2013), para 80; UN Special Rapporteur on Torture, *Thematic Report on Torture and Ill-Treatment of children deprived of their liberty*, UN Doc. A/HRC/28/68 (5 March 2015), para 80.

²⁶¹ See UNHRC, *Jalloh v The Netherlands* Communication No 794/1998 (23 March 2002) and UNHRC, *Baban v Australia* Communication No 1014/2001 (6 August 2003).

²⁶² Australian Human Rights and Equal Opportunity Commission: *A Last Resort? National Inquiry into Children in Immigration Detention* (2004); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2015); see also G Triggs, 'The Impact of Detention on the Health, Well-being and Development of Children: Findings from the Second National Inquiry into Children in Immigration Detention', in M Crock and L Benson (eds), n 63 at 396.

²⁶³ See for example, D Corlett, G Mitchell, J Van Hove, L Bowring, and K Wright, *Captured Childhood* (International Detention Coalition, 2012) at 48; M Dudley, Z Steel, S Mares and L Newman, 'Children and young people in immigration detention.' (2012) 25 *Current Opinion in Psychiatry* 285.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

The underlying approach to children waiting for determination of their status should be the ethic of care and protection, not enforcement.²⁶⁶ States should seek solutions which avoid the deprivation of liberty²⁶⁷ and children and their families should live in non-custodial, community-based contexts, while their immigration status is being resolved.²⁶⁸ The approach advocated by the two committees is consistent with the requirements of Article 22(1) obliging states to take appropriate measures, ensuring the child receives appropriate protection in the enjoyment of his or her rights. Non-custodial facilities are likely to fulfil a child's best interests and secure access to and protection of the child's rights, including the child's right to family life.²⁶⁹

4.5 Right to family Life: Articles 9, 10, 16 and 22(2) CRC

The right to family life in the CRC is covered primarily by Articles 9, 10 and 16, but for refugee children, Article 22(2) provides further protection. There are two key elements to this right – a right to family unity (which includes the right of parents and children not to be separated) and a right to family reunification, if the family does get spilt up on the journey.

4.5.1 Right to family life

The right to family life is a key right for the protection of refugee children. This right, when considered from the perspective of the CRC, challenges state sovereignty with regard to the right of states to control their borders. One of the key elements of the CRC, set out in the Preamble is that the family is 'the fundamental group of society and the natural environment for the growth and well-being of all its members, particularly children.'²⁷⁰ The CRC acknowledges the importance of relationships for children as they develop and grow and children's rights are placed both in the context of parental rights and duties²⁷¹ and the obligations of the wider

²⁶⁶ CRC Committee, GC 6, para 63; JGC No 4 and 23, para 12.

²⁶⁷ Article 4(2) Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237 (adopted on 18 December 2002, entered into force 22 June 2006).

²⁶⁸ JGC 4 and 23, para 11.

²⁶⁹ See also C Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1.

²⁷⁰ CRC 5th Preambular paragraph.

²⁷¹ Articles 5, 14 and 18.

community.²⁷² The child has a right to protection from 'arbitrary or unlawful interference' with his or her family.²⁷³

There is little consensus in international law as to what is meant by family²⁷⁴ and the CRC does not define family, even though it is fundamental to the conceptualisation and implementation of many of the rights of the child. The CRC recognises 'family' to extend beyond parents to 'the members of the extended family or community as provided for by local custom'.²⁷⁵ In General Comment No 14, the CRC Committee restated that 'the term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents'.²⁷⁶ Furthermore in *YB and NS v Belgium*²⁷⁷ the term 'family' must be interpreted to comprise not only biological or adoptive parents but also those given responsibility to care for the child who have formed *de facto* family ties with the child.²⁷⁸ Regional human rights courts and institutions have urged states to adopt a broad approach to the concept of family in the context of family reunion. For example, the IACtHR has suggested that family goes beyond the traditional notion of parents and their children to include other blood and non-blood relations who have close personal ties with the child.²⁷⁹

In Europe, the Parliamentary Assembly of the Council of Europe (PACE) notes that the concept of family in Europe varies according to the importance attached to the principle of dependence.²⁸⁰ PACE recommends that member states interpret 'family' to include 'de facto family members (natural family)... as well as elderly, infirm or otherwise dependent relations'.²⁸¹ The ECtHR have held that the essential ingredient of family life is the right to live together so that family relationships may develop

²⁷² Articles 5, 13, 14, 15, 20, 29, 30; UNHCR, *Refugee Children: Guidelines on Care and Protection* (UNHCR Geneva 1994), Chapter 2, section II.

²⁷³ Article 16 CRC. See also Article 17 ICCPR and Article 8 ECHR.

²⁷⁴ See: F Nicolson, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' in UNHCR *Legal and Protection Policy Research Series* (January 2018) at 16 -18.

²⁷⁵ Article 5 CRC.

²⁷⁶ CRC Committee GC 14, para 59.

²⁷⁷ CRC Committee, *YB and NS v Belgium* (12/2017), Views, CRC/C/79/D/12/2017 (27 September 2018).

²⁷⁸ *Ibid.* para 8.11.

²⁷⁹ IACtHR Advisory Opinion, OC-21/14 (August 19 2014) *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, para 272.

²⁸⁰ PACE Recommendation 1686 (2004) on Human Mobility and the Right to Family Reunion, 23 November 2004, para 7.

²⁸¹ *Ibid.* para 8; PACE Recommendation 1327 (1997) on Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe, para 8.7(o).

normally.²⁸² Whether or not family life exists is essentially a question of fact depending upon the real existence in practice of close personal ties.²⁸³

In EU asylum and immigration law, a narrower approach to the concept of 'family' has been adopted, but there has been an attempt to adopt a more CRC-compliant definition of family. The definition of 'family members' includes immediate, 'nuclear' family members, in other words spouses or civil partners of the applicant for international protection and the children of the couple (including adopted children) or the children of the applicant.²⁸⁴ In the context of unaccompanied and separated children, family members includes the 'father, mother or another adult responsible' for the unaccompanied minor, who is a beneficiary of international protection.²⁸⁵ Article 10(3)(a) of the Family Reunification Directive²⁸⁶ requires member states to authorise the entry and residence of an unaccompanied *refugee*²⁸⁷ child's first degree relatives (in other words the child's parents),²⁸⁸ with a discretion to admit a guardian or other member of the family, if there are no relatives in direct ascending line or if they cannot be traced.²⁸⁹ The CJEU in interpreting this Directive has held that any limitations on the general rule on authorising family reunification should be interpreted strictly and states' 'margin for manoeuvre ... must not be used by them in a manner which would undermine the objective of the Directive, which is to promote family reunification, and the effectiveness thereof'.²⁹⁰

In the context of international refugee law, the UNHCR recognises that what constitutes a family is a question of fact and needs to be determined on a case-by-case basis, taking into account social and cultural factors and economic and emotional dependency factors: '[f]or the purposes of family reunification, 'family' includes, at the very minimum,

²⁸² *Marckx v. Belgium*, para 31.

²⁸³ *Paradiso and Campanelli v. Italy*, para 140.

²⁸⁴ Article 2(j) of the Qualification Directive; Article 2(c) of the Reception Directive; Article 2(g) of the Dublin III Regulation.

²⁸⁵ *Ibid.*

²⁸⁶ Council Directive 2003/86/EC on the Right to Family Reunification, OJ L 251/12, 3 October 2003 (FRD). Although the FRD covers the family reunification rights of refugees and subsidiary protection beneficiaries, it is not part of the EU asylum acquis.

²⁸⁷ The FRD makes a distinction between refugees (who are excluded from the derogation provisions) and subsidiary protection beneficiaries (who are treated as third country nationals).

²⁸⁸ Article 10(3)(a) FRD.

²⁸⁹ Article 10(3)(c) FRD.

²⁹⁰ CJEU *Chakroun v Minister van Buitenlandse Zaken*, C-578/08, 4 March 2010 at para 43.

members of the nuclear family (spouses and minor children)'.²⁹¹ The UNHCR urges states

to adopt inclusive definitions of family members, in recognition of the severe hardship separation causes to individuals who depend on the family unit for social and economic support even if they [do not] ... belong to what is known as the "nuclear family".²⁹²

The right to family life draws on articles in the CRC which have different concepts of 'family': in Articles 9 and 10 CRC, which deal with family unity and family reunification, the only family members referred to are the child's parents. In Article 16, 'family' is not qualified and in Article 22(2), the family includes parents or 'other members of the family', for family reunification purposes.

Both 'family unity' and 'family reunification' are used interchangeably in literature and case law concerning immigration and refugee rights. They are interlinked, but it is important to note that, under the CRC, they operate in different contexts and are separate rights. The right to a family life is the overarching right and is recognised in several international and regional instruments.²⁹³ Inherent in the right to family life is a right to family unity which applies to everyone regardless of status. 'Family unity' under the CRC is about a child not being separated from his or her parents. The state must not interfere with this right through its actions or omissions or those of others and must take positive measures to ensure realisation of this right.²⁹⁴ Whereas family reunification is concerned with reuniting families who have become separated because of forced migration, the right to family unity for refugees and asylum-seekers implies a right to family reunification in the country of asylum because the refugee cannot safely return to their country of origin to enjoy the right to family life there.²⁹⁵

²⁹¹ UNHCR, Global Consultation on International Protection, *Summary Conclusions – Family Unity*, Geneva Expert Roundtable, November 2001, para 8.

²⁹² UNHCR ExCom, Conclusion No 24, Family Reunification (XXXII) UN Doc. A/36/12/Add.1 (21 October 1981), para 5.

²⁹³ For example, Articles 17 and 23 of the ICCPR, Article 10 ICESCR and Article 8 ECHR.

²⁹⁴ EF Abram, n 116 at 418.

²⁹⁵ K Jastram and K Newland, 'Family Unity and Refugee Protection' in E Feller, V Turk, and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003, reprinted 2005) 555 at 556; for a comprehensive survey of the ECtHR caselaw on family reunification, see F Nicholson, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification', in UNHCR *Legal and Protection Policy Series* (January 2018) at 12-23.

4.5.2 **Right to family unity**

The right to family unity 'is one of the oldest and most consistent statement[s] of rights that inhere in human society'.²⁹⁶ Smyth has described the right as a 'meta-norm' in the CRC for ideological reasons, emphasising the importance of family in society and for practical reasons associated with child rearing responsibilities.²⁹⁷ The UNHCR, since 1987, has emphasised the importance of family unity for the protection of refugee children and have put it on an equal footing with the principle of best interests in relation to any action taken on behalf of refugee children.²⁹⁸

Article 9 CRC obliges a state to guarantee the non-separation of the child from his or her parents or guardian, the only exception is if separation is in the best interests of the child (Article 9(1) CRC). This differs from the formulation of the right in Article 17 ICCPR and Article 16 CRC which prohibit 'arbitrary and unlawful' interference with family life. If a state has a justifiable (necessary and proportionate) reason for interfering with family life, the state will not violate Article 17 ICCPR or Article 16 CRC. But under Article 9 CRC, if such interference is not in the best interests of any of the children in the family, then the interference is unlawful. Thus, Article 9(1) departs fundamentally from the position in general international human rights law that allows for interference with family life which is not arbitrary or unlawful.²⁹⁹ The fact that best interests is the only exception to the right of non-separation means that,

[the] flexible and relativistic formula [in article 3] is transformed by article 9 into a standard that makes the child's best interests the single overriding factor determining whether a child may be separated from parents against their will.³⁰⁰

Although this right is not in the Refugee Convention, Recommendation B of the Conference of Plenipotentiaries, recognised that 'the unity of the family... is an essential right of the refugee'.³⁰¹ The UNHCR through its ExCom Conclusions³⁰² has fleshed out the bare bones of this

²⁹⁶ M Crock, n 178 at 233.

²⁹⁷ C Smyth, n 177 at 141.

²⁹⁸ UNHCR, EX Com Conclusion *Refugee Children* no 47, para (d).

²⁹⁹ Article 17 ICCPR.

³⁰⁰ EF Abram, n 116 at 419.

³⁰¹ Final Act of the UN Conference of Plenipotentiaries on the status of Refugees and Stateless persons, UN Doc. A/CONF.2/108/Rev.1, 26 Nov 1952, Recommendation B (Principle of Family Unity), para 1.

³⁰² For example, UNHCR Ex Com, *Refugee Children* (1987) at 127, para d.

principle of family unity, but there is no binding obligation on the state under the Refugee Convention to ensure non-separation of the family or to guarantee reunification. Article 9 CRC, on the other hand, does provide a binding obligation on states to ensure that children are not separated from their parents, 'in unambiguous and largely unqualified terms'.³⁰³

The right to family unity is problematic in refugee law because there is a tendency to link the rights of refugee children to the status of the adults in their family unit.³⁰⁴ However, a child refugee or asylum-seeker may have a stronger claim than the adult family members, but may not have access to separate asylum procedures to allow his or her claim to be determined. A state has a positive obligation to implement measures to ensure the family stays together, in the best interests of the child, even though only one family member may have a valid refugee claim.³⁰⁵ The absolute obligation in Article 9 should provide 'a robust and principled safety net to prevent the separation of families'.³⁰⁶

The best interests principle is not framed in terms of 'a primary' or a 'paramount' consideration in Article 9, but is the single consideration when a state is considering the separation of the child from his or her parents.³⁰⁷ The CRC does not recognise any public interest or competing interests of others which can be weighed against involuntary separation of the child from his or her parents, only the private (best) interests of the child can justify any separation.³⁰⁸ The language of Article 9 indicates that state immigration control interests cannot justify separation of the child and parent,³⁰⁹ although a state can justify sending both child and parent back to their country of origin on the grounds that they should not be separated in the child's best interests, provided there is no violation of the *non-refoulement* principle.³¹⁰

The obligation of the state not to interfere with the right to family unity is particularly relevant in a situation where a member of the family is facing deportation or has been detained for immigration purposes. Article 9(4) obliges states, where separation of the family is due to its actions,

³⁰³ JM Pobjoy, n 9 at 72.

³⁰⁴ M Crock, n 178 at 221 and 233-234; Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Recommendation B indicates that the unity of the family will be maintained where the 'head of the family has fulfilled the necessary conditions for admission to a country.

³⁰⁵ JM Pobjoy, n 9 at 45.

³⁰⁶ *Ibid.*

³⁰⁷ EF Abram, n 116 at 418, where he sets out the 'test' for best interests under Article 9 CRC.

³⁰⁸ *Ibid.*

³⁰⁹ JM Pobjoy, n 9 at 74; EF Abram, n 116 at 418; JM Pobjoy, n 14 at 843.

³¹⁰ CRC Committee, GC 6, para 82.

such as 'detention, imprisonment, exile, deportation or death', to 'provide... the essential information concerning the whereabouts of the absent member of the family'. Article 9(4) is engaged wherever 'such separation results from any action initiated by a State Party' and the list of examples is expressly non-exhaustive. The only exception to this is if provision of the information 'would be detrimental to the well-being of the child'.

There are also procedural guarantees for the child, if separation from his or her parents is threatened by the state. Article 9(1) guarantees a hearing and the right to judicial review and Article 9(2) provides the child with a right to participate in any proceedings and make their views known, if he or she is capable of forming his or her own views (in accordance with Article 12 CRC).

Separating the family by returning or deporting a family member or refusing a family member the right to enter or remain on the state's territory may amount to an arbitrary or unlawful interference with family life.³¹¹ The UK is the only state in the EU which does not allow parents to be beneficiaries of refugee protection where a child is recognised as a refugee and the parents are not.³¹² If the parent fails to secure another form of protection, then parents are faced with the unpalatable choice of separating or returning with the child who has refugee status to the country of origin.³¹³ States, who have conferred refugee status on a child and thus recognised its protection duties towards the child, have a positive duty to act to maintain the family unit in that state.³¹⁴ The 'virtually un rebuttable'³¹⁵ right to family life/family unity must be maintained in the host state in the best interests of the child, 'returning the child to the country being fled from cannot serve that child's best interests'.³¹⁶

For a child travelling alone or with relatives, but not their parents, family reunification, which I deal with next, is a key feature in securing

³¹¹ JGC 4 and 23, para 28.

³¹² The UK, along with Denmark and Ireland opted out of the EU Family Reunification Directive, but both Denmark and Ireland allow children to sponsor parents to reunite with them.

³¹³ JM Pobjoy, n 9 at 77.

³¹⁴ JGC 4 and 22, para 27; Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and the General Comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014), para 55; *IAM (KYM) v Denmark* (2018), para 11.4: the CRC Committee held that a state should provide protection for a parent where a child cannot be returned to a state of origin.

³¹⁵ EF Abram, n 116 at 426.

³¹⁶ *Ibid.*

their protection³¹⁷ and Article 22(2) gives the opportunity for a broader category of persons to be reunited with the child.

4.5.3 Right to family reunification

There is an emerging consensus that family reunification in the country of asylum is a right of refugees,³¹⁸ on the basis that refugees cannot return to their country of origin because of the principle of *non-refoulement*.³¹⁹ If family reunification in the child's country of origin is not in the best interests of the child or if there are other obstacles to return, this triggers operation of Articles 9 and 10 CRC which govern the state's decisions on family reunification.³²⁰ If the child is granted refugee status in the host country this 'constitutes a legally binding obstacle to return to the country of origin' and thus an obstacle to family reunification there.³²¹

States owe both negative and positive obligations in relation to the right to family reunification in the same way as they do in relation to family unity. Not only must the state refrain from arbitrary interference with family life and refrain from actions which would split a family, a state must also allow a dispersed family to reunite, cooperate with other states and UN agencies to trace family members (Article 22(2) CRC) without forcing family members to return to a country where there is a risk of persecution.³²²

Article 10 CRC obliges states to allow applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification, and such applications 'shall be dealt with by State Parties in a positive, humane and expeditious manner'.³²³ Article 22(2) obliges states to cooperate with international and non-governmental organisations in order to trace parents or other members of the family for the purposes of family reunification. The CRC Committee has emphasised the importance of tracing a child's family members as part of a durable solution for

³¹⁷ UNHCR have stated that 'Family reunification, where feasible, should generally be regarded as being in the best interests of the child': UNHCR *Guidelines on Best Interests* 2008.

³¹⁸ K Jastram and K Newland, n 295 at 557.

³¹⁹ *Ibid*, 556; CRC Committee GC 6, para 83. The CRC Committee encourages it rather than making it compulsory; JGC 4 and 23, para 35: 'Family reunification in the country of origin should not be pursued where there is a 'reasonable risk' that such return would lead to a violation of the human rights of the child'.

³²⁰ CRC Committee GC 6, para 83; JGC 4 and 23, para 35.

³²¹ CRC Committee GC 6, para 82.

³²² K Jastram and K Newland, n 295 at 557-558.

³²³ Article 10 CRC.

unaccompanied or separated children except where the tracing or act of tracing family members would not be in the best interests of the child.³²⁴

However, in limited circumstances, children could be reunited with their families in a safe third country as an alternative,³²⁵ but only if it is in the children's best interests. The decision about where reunification should take place,

should be based on a robust assessment in which the child's best interests are upheld as a primary consideration and family reunification is taken into consideration, and which includes a sustainable integration plan where the child is guaranteed to participate in the process.³²⁶

There is a strong argument that states which have restrictive reunification laws violate their obligations under the CRC because they force children and their families to migrate in an irregular and dangerous manner. States should develop 'effective and accessible reunification procedures that allow children to migrate in a regular manner'³²⁷ and facilitate family life, ensuring restrictions are legitimate, necessary and proportionate³²⁸ thus a blanket ban on children reuniting with family members will not fulfil this obligation.³²⁹ In *YB and NS v Belgium*, the CRC Committee said that Belgium's failure to consider the child's *de facto* family ties for the purposes of a family reunification application was held to be in breach of Article 10 and in particular the obligation to deal with family reunification in a 'positive, humane and expeditious manner'.³³⁰

The operation of Articles 9, 10 and 22(2) CRC provide the refugee child with a secure and robust right to family unity and family reunification which a state can only interfere with if it is not in a child's best interests.

³²⁴ CRC Committee, GC Comment No 6, para 80; JGC No 4 and 23, para 34.

³²⁵ JM Pobjoy, n 9 at 75.

³²⁶ JGC 4 and 23, para 34.

³²⁷ JGC 4 and 23, para 37.

³²⁸ *Ibid.*

³²⁹ The UK, as a general rule does not allow reunification of children who receive refugee status with family members who are outside the UK: Home Office, Immigration Rules, n 162 at paras 352A – FJ; Home Office Guidance: Family Reunion for Refugees and those with Humanitarian Protection (Version 2.0, 29 July 2016) at 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/541818/Family_reunion_guidance_v2.pdf

³³⁰ CRC Committee, *YB and NS v Belgium* (12/2017), Views, CRC/C/79/D/12/2017 (27 September 2018), para 8.12.

5. Conclusion

This chapter examined the rights of refugee and asylum-seeking children under Article 22 CRC which confirms the alignment of IRL and IHRL and acknowledges protection for children which goes beyond the narrow definition of refugee protection under the Refugee Convention. The usual starting point for an assessment of the protection needs of refugee children is to consider their claim for international protection under the Refugee Convention first and then turn to how the CRC might plug any protection gaps. However, this chapter argues for a different perspective: namely by putting the framework of the rights of the child to the forefront. Article 22 CRC provides a refugee child with a right to receive 'appropriate protection and humanitarian assistance' in addition to their rights under IRL and provides the child with access to a comprehensive framework of rights under the CRC. A child on the move seeking international protection in a country other than his or her own has distinct vulnerabilities and developmental needs which need to be recognised and supported in the host state so that the child can fully realise and enjoy his or her rights. A refugee child requires a rights-based framework which will protect the child from harm and a risk of being *refouled*, but additionally a child should be admitted into a state to have his or her best interests assessed and determined and have access to asylum procedures.³³¹ Article 22 CRC is crucial to a refugee and asylum-seeking child's right to protection and enjoyment of all of his or her rights under the CRC.

The next chapter examines the concept of protection under international law and why this is an appropriate paradigm to secure the rights of a refugee or asylum-seeking child.

³³¹ See Chapter 6 below.

CHAPTER 4: Protection in International Law - IRL, IHRL and CRC

1. Introduction

Since the 1920s, the forced displacement of people because of conflict and persecution has shaped international law's approach to the concept of protection.¹ The concept of 'protection' is prominent in IHL, IRL and IHRL and protection is a theme running throughout the CRC.² Hammarberg in 1990 noted that the CRC is strongly oriented towards protection rights.³ This chapter examines the different meanings of protection within IRL, IHRL and ICRL in order to establish the normative content of the right to protection for a child seeking asylum. This analysis is key to a central theme of this thesis: the best interests principle and its role in defining the parameters of protection for a refugee or asylum-seeking child. Although this chapter pays less attention to the best interests principle, it remains a cross cutting theme throughout.

States have an obligation to protect in various contexts,⁴ but the normative content of a child's right to protection is not immediately clear from the text of the CRC.⁵ In Chapter 2, I argued that the foundational element of this right is found in Article 3(2) CRC⁶ and is closely linked with the best interests principle as it is articulated in Article 3(1) CRC.⁷ Establishing the normative content and meaning of the child's right to protection gives direction to the interpretation of best interests, particularly in the context of a child seeking asylum. I argue that there are three strands to the right to protection in the CRC: the child's right to protection from harm, protection for well-being and development and a right to a

¹ E Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution Press, Washington DC 2011) at 271.

² There are 27 references to the word 'protect' or 'protection' in the CRC.

³ T Hammarberg, 'The UN Convention on the Rights of the Child-and How to make it work' (1990) 12 *Human Rights Quarterly* 97 at 100 – 101. Hammarberg categorised the CRC rights as 'provision', 'protection' and 'participation' rights as part of his 'three Ps' classification model, but its use as a tool to examine children's rights has been criticised, see for example, A Quennerstedt, 'Children, but not really humans: Critical Reflections on the Hampering Effect of the 3Ps' (2010) 18 *International Journal of Children's Rights* 619.

⁴ For example, there are a number of Articles in the CRC which protect children from harm and exploitation such as Articles 11, 19, 32, 33, 34 and 38.

⁵ Article 24(1) of the EU Charter of Fundamental Rights provides that a child has a right to protection and care.

⁶ However, this is not the only basis for this right, as I discuss in section 5 below.

⁷ See Chapter 2 above.

protective environment conducive to enjoying rights.⁸ My analysis in this chapter acknowledges the parameters of a child's right to protection, which is important to ensure that the concept of protection is not stretched so far that it risks becoming meaningless.⁹

As I discussed in Chapter 3, for a child seeking international protection, Article 22(1) CRC obliges states to provide the refugee or asylum-seeking child with 'appropriate protection and humanitarian assistance'.¹⁰ It is Article 3(2) alongside Article 22 CRC which forms the basis of the *refugee* child's¹¹ protection right. The protection of a child in international law, and in particular in the context of a refugee child, is broader than simply focusing on the best interests of the child. For a refugee or an asylum-seeking child, international protection will mean protection from harm or persecution in a state which provides surrogate protection in order to ensure a child's well-being and to fulfil a child's rights to education, health, housing, social welfare, liberty, access to justice and family life.¹² If states only focused on best interests, which are a primary consideration, the child's interests are liable to be balanced against state interests. But alongside the child's right to care and protection as is necessary or his or her well-being, the child's best interests has a firmer protection base, which is particularly important for a children refugee or asylum-seeker.

In section 2, I consider different definitions of protection, examining those proposed by international organisations. Section 3, focuses on protection in IRL, including the interpretation of 'state protection' under the Refugee Convention, the theories of protection in IRL, the influences of IHRL and the development of complementary protection. In section 4, I examine the obligation to protect under IHRL, mapping a brief history of the obligation to protect within the tripartite typology of obligations. In

⁸ See section 5 below.

⁹ E Ferris, n 1 at 275.

¹⁰ I discuss the meaning of Article 22 in Chapter 3.

¹¹ Article 22 CRC is clear that the scope of protection extends to both children with a recognised refugee status and to children seeking asylum, including children who have failed to secure asylum status but remain in the host state (see Chapter 3).

¹² See for example, Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22), para 42 and Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4 and CRC/C/GC/23 (2017) (JGC 4 and 23), paras 5 - 63.

section 5, I examine the protection paradigm for refugee children, as conceptualised in children's rights law. From this analysis I identify the normative content of a child's right to protection.

2. What is Protection?

'Protection' in the common everyday sense of the word and in the dictionary sense means to shield from danger or harm. The Oxford English Dictionary defines it as '[t]he action of protecting someone or something; the fact or condition of being protected; shelter, defence, or preservation from harm, danger, damage, etc.; guardianship, care; patronage.'¹³ The concept of 'child protection' also incorporates the notion of safeguarding.¹⁴ Article 3(2) CRC encapsulates this approach to protection. Protection in this sense is not limited or read in negative terms, but ought to be considered 'in relation to the comprehensive ideal of ensuring the child's "well-being" and development'.¹⁵ This includes a child's basic, material, physical, educational and emotional needs, as well as their need for affection and safety.¹⁶

In IHRL (including children's rights) protection not only includes provisions ensuring preservation from harm and danger, implying a negative obligation, but also includes ensuring safety and care, which indicates an active, positive obligation on the part of the protector or safeguarder, thus, 'protection [is] a shield and an embrace'.¹⁷

Protection is also an important concept in IHL but it is beyond the scope of this chapter to discuss protection in situations of armed conflict and in post-conflict contexts. Nevertheless, the approach to 'protection' in IHL provides a useful starting point for this chapter. Caverzasio (International Committee of the Red Cross (ICRC)) states that protection covers

all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law. Human rights and

¹³ Oxford English Dictionary, 3rd Edition, June 2007.

¹⁴ In particular in UK, there is a duty to safeguard and promote the welfare of children: s 17 Children Act 1989, s 11 Children Act 2011 and s 55 of the Borders, Citizenship and Immigration Act 2009.

¹⁵ CRC Committee GC 14, para 71.

¹⁶ Ibid.

¹⁷ R Kohli, *Protecting Asylum Seeking Children on the Move* (2014) 30 *Revue Européenne des Migrations Internationales*, 83 at 91.

humanitarian organizations must conduct these activities in an impartial manner.¹⁸

It is arguable that Caverzasio does exactly what I want to avoid, being so broad that the concept of 'protection' becomes meaningless. However, I am not necessarily seeking a definition of 'protection' but a description of an approach to protection which transverses IHRL, IHL and IRL. Caverzasio's description acknowledges that protection is not just about physical safety, but about protecting all rights including civil, political, economic and social rights.¹⁹ The protection framework proposed by the ICRC sets out three protection activities, which may occur separately or simultaneously, depending on the humanitarian situation: *responsive* action to prevent immediate harm or abuse; *remedial* action to restore people's dignity and adequate living conditions; and *environment-building* activities intended to promote an environment conducive to full respect for the rights of the individual.²⁰ There is no hierarchy and all three are essential to enhance enjoyment of human rights, which is the outcome of protection.²¹ This highlights that in a humanitarian context, which includes forced migration situations, the concept of protection goes beyond simply protecting from harm. As I discuss in this chapter, there is emerging practice that international protection in the IRL sense means more than protection from persecution.²² In addition the influence of IHRL points to an obligation on the state to ensure an environment which protects and fulfils a person's rights.

In the context of the international protection of child refugees, it is important to be clear about the meaning of 'protection' and how, ultimately, protection should be the goal of a refugee child's best interests assessment and determination and to ensure that his or her rights are meaningfully upheld in a forced migration situation. For child refugees or asylum-seekers, protection has 'an exact and immediate definition in terms of security of legal status, as well as [a]... more diffused meaning in relation to caring for children who have sought asylum or are refugees in a

¹⁸ SG Caverzasio (ed), *Strengthening Protection in War: A Search for Professional Standards* (ICRC Geneva 2001) 19; see also *Protection of Internally Displaced Persons*, Inter Agency Standing Committee Policy Paper, December 1999.

¹⁹ E Ferris, n 1 at 275.

²⁰ SG Caverzasio (ICRC), n 18 at 20 – 24.

²¹ M O'Flaherty (ed) *Guiding Principles for Human Rights Field Officers Working in Conflict and Post-Conflict Environments* (University of Nottingham Human Rights Law Centre, Nottingham 2008), Principle 2, page 6.

²² See section 3.1 below.

lifelong, capacious way'.²³ My argument is that focusing on the child's right to protection provides a firmer base for securing the rights of a refugee children and as I discuss in Chapter 6, is crucial in the interpretation and operationalisation of the best interests principle.

Child protection in most domestic systems is about safeguarding from harm and thus responding to a child's immediate needs. International child protection agencies support this narrow concept of protection which includes protection from violence, exploitation, abuse and neglect,²⁴ but UNICEF has acknowledged that protection approaches must include prevention and developing a protective environment as well as a response.²⁵ UNICEF's global child protection strategy promotes an environment,

where girls and boys are free from violence, exploitation, and unnecessary separation from family; and where laws, services, behaviours and practices minimize children's vulnerability, address known risk factors, and strengthen children's own resilience.²⁶

In the CRC, the concept of protection co-exists with the enhancement of children's agency by introducing empowerment rights for children,²⁷ such as the right to be heard and to express views, alongside other rights including freedom of expression and information, freedom of thought and freedom of association which were child specific and recognised the evolving capacities of the child to claim these rights.²⁸ The CRC, as well as recognising the need to protect children, provides the framework to protect the rights of children in order to empower them because children are recognised as rights holders with evolving capacities.²⁹

There are different meanings of protection in international law, depending on context and who is the subject of protection. Goodwin-Gill argues, the 'word "protection" has become something of a term of art obscuring the scope of an activity which ought to be fundamentally clear'.³⁰

²³ R Kohli, n 17 at 91.

²⁴ E Ferris, n 1 at 276.

²⁵ UN ECOSOC, UNICEF Child Protection Strategy, UN Doc. E/ICEF/2008/5/Rev.1 (20 May 2008).

²⁶ *Ibid*, para 2.

²⁷ On 'empowerment rights', see, for example, L LeBlanc, *The Convention on the Rights of the Child* (University of Nebraska Press, Lincoln 1995) at 157 – 182.

²⁸ See Articles 12, 13, 14 and 15 CRC.

²⁹ Article 5 CRC.

³⁰ GS Goodwin-Gill, 'The Language of Protection' (1989) 1 *The International Journal of Refugee Law* 6.

I examine the aspects of protection which are relevant to a child refugee in more detail later in the chapter. In the next section, I review the meaning of protection under IRL, looking at both 'international protection' and 'state protection' under the Refugee Convention.

3. Protection under International Refugee Law (IRL)

In IRL, protection is focused on state protection³¹ which means a state providing protection to people who are outside their countries of origin and are unable or unwilling, owing to a well-founded fear of persecution to avail themselves of the protection of their government.³² Protection under IRL has been expanded by the influence of IHRL, and is not just a negative obligation by the state to shield nationals and non-nationals from harm or persecution.³³ It includes positive obligations flowing from the international human rights treaties which protect an individual's fundamental rights and freedoms.³⁴ Inevitably this expansive human rights approach to the concept of protection clashes with states' priorities of stricter border control and a narrowing of obligations towards non-nationals on their territory.³⁵ In the next section, I examine what is meant by international protection, which is key to the scope and content of state protection under IRL.

3.1 What is international protection?

The term 'international protection of refugees' was the first used in resolutions on the establishment of the UNHCR in 1949.³⁶ It was written into the Statute of the Office of the UNHCR in 1950,³⁷ but the phrase 'international protection' did not appear in the Refugee Convention. Today, it has become synonymous with the type of protection a person seeks when they have a well-founded fear of persecution in their home state or

³¹ JC Hathaway and M Foster, *The Law of Refugee Status* (Cambridge University Press, Cambridge 2014); H Storey, 'The Meaning of 'Protection' within the Refugee Definition' (2016) 35 *Refugee Survey Quarterly* 1, 15.

³² JC Hathaway and M Foster, n 31 at 288. I examine this when I discuss state protection in the Refugee Convention in section 3.2 below.

³³ JC Hathaway and H Storey, 'The Meaning of Protection in Refugee Law' (2016) 28 *International Journal of Refugee Law* 480 at 482.

³⁴ V Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R Rubio-Marin (ed), *Human Rights and Immigration* (Oxford University Press, Oxford 2014) 19.

³⁵ D. Stevens, 'What Do We Mean by Protection?' (2013) 20 *International Journal on Minority and Group Rights* 233 at 234.

³⁶ UN ECOSOC Resolution 248(IX)A (6 August 1949); General Assembly resolution 319(IV) A (3 December 1949).

³⁷ Article 1 of the Statute of the Office of the United Nations High Commissioner for Refugees 1950 (UNHCR Statute).

when they are fleeing conflict or generalised violence. Although international protection is not specifically mentioned in the Refugee Convention, the objective of international protection is set out in its Preamble: 'to assure refugees the widest possible exercise of ... fundamental rights and freedoms' to be enjoyed without discrimination.³⁸

The UNHCR describes international protection as beginning with:

securing admission, asylum and, respect for basic human rights, including the principle of *non-refoulement*, without which the safety and even survival of the refugee is in jeopardy; it ends only with the attainment of a durable solution, ideally through the restoration of protection by the refugee's own country.³⁹

International protection, in its broadest sense, means to shield from danger (and not to return to harm - *non-refoulement*), which is the basis of the Refugee Convention, but this description also encapsulates 'safety', 'survival' and 'durable solution', none of which are within the definition of refugee in Article 1A(2) of the Refugee Convention and goes beyond the narrow persecution basis of Article 1A(2). It implies both a negative obligation (absence of persecution) owed to the individual and a positive guarantee of basic human rights.⁴⁰ Given the current context of *non-entrée* and deterrence, it is important to be conscious of this understanding of protection as ending 'only with the attainment of a durable solution'. Alienkoff and Zamone propose five principles of international protection, which they suggest provides a dynamic interpretation of the concept of international protection – safety, enjoyment of asylum, solutions, mobility and voice. The first three mirror the UNHCR's concept of international protection, whereas the last two – the ability of displaced people to pursue opportunities for economic, educational and social advancement (mobility) and ensuring displaced people have a role in crafting international and domestic responses to their displacement (voice) – seek to protect refugee agency.⁴¹ Unfortunately in the current state practice of containment and deterrence, characterised by closed borders, restrictive visas, carrier sanctions, interception at sea, push-backs and pull-backs,⁴² such idealistic

³⁸ Preamble to the Refugee Convention 1951; UNHCR, *Note on International Protection* (1994) n 43, para 11.

³⁹ UNHCR, *Note on International Protection* UN Doc. A/AC.96/830 (7 September 1994), para 12.

⁴⁰ H Storey, n 31 at 1.

⁴¹ A Alienkoff and L Zamone, *The Arc of Protection: Toward a New International Refugee Regime* (Public Seminar Books 2018) Chapter 3.

⁴² See more on this in Chapter 5.

and optimistic principles will be no match for the 'muscular assertions of state sovereignty'.⁴³

The need for international protection is a 'tragic consequence of the inability or unwillingness of [the refugee's] Government to fulfil their responsibility of ensuring respect for human rights ... of all the individuals and groups within their territory'.⁴⁴ Refugee flows are a symptom of a lack of state protection, aligned with no or limited human rights protection in the state.⁴⁵ A different perspective views international protection as the collective responsibility of the international community to aid people fleeing situations where they face serious harm.⁴⁶ The overall aim of international protection should be to remedy the harms which result from forced displacement.⁴⁷

In the context of the CRC, international protection should include protection from harm, to ensure such care and protection as is necessary for the child's well-being and a protective environment which enables a child to enjoy their rights. Refugees seek admission to another state for protection not out of choice but out of an absolute necessity, to escape threats to their fundamental rights because their home authorities are unable or unwilling to protect them and their human rights.⁴⁸ But lesser forms of harm may cumulatively amount to persecution and discrimination if life is made intolerable for the person or the situation is substantially prejudicial.⁴⁹ Thus, international protection is premised on human rights principles.⁵⁰

To ensure full international protection, asylum-seekers require admission to the territory of the host state,⁵¹ access to asylum

⁴³ Alienikoff and Zamone, n 41, Chapter 3.

⁴⁴ UNHCR, *Note on International Protection* (1994), para 1.

⁴⁵ Ibid.

⁴⁶ A Alienikoff and L Zamore, n 41; See also UN General Assembly, Report of the UN High Commissioner for Refugees: Global Compact on Refugees, UN Doc. A/73/12 (Part II) (13 September 2018, affirmed by UNGA on 17 December 2018): whilst this ought to be the ideal and is reflected to a limited extent in the Global Compact on Refugees: there is little evidence of state practice reflecting this perspective.

⁴⁷ Ibid.

⁴⁸ UNHCR, *Note on International Protection* (1994), para 8.

⁴⁹ UNHCR, *Guidelines on International Protection No 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions* HCR/GIP/16/12 (2 December 2016), para 11.

⁵⁰ The alignment between refugee law and international human rights law has been recognised since the early days of the Refugee Convention, but the significance of this alignment was not acknowledged until 1991 in Hathaway's first edition of *The Law of Refugee Status* (Butterworths, Vancouver 1991). See also UNHCR, *Note on International Protection* (1994), para 11.

⁵¹ JGC 4 and 23, paras 12 and 17(a).

procedures,⁵² a guarantee of *non-refoulement*,⁵³ the right to a means of subsistence including shelter, health care, authorisation to work or access to humanitarian assistance, social benefits and respect for other fundamental rights without discrimination and a long-term durable solution.⁵⁴ There is broad acceptance⁵⁵ that a human rights approach is the correct approach to interpreting the refugee definition including protection.⁵⁶ The development of 'complementary' or 'subsidiary protection'⁵⁷ demonstrates that states are willing to recognise the protection needs of other displaced persons who fall outside the narrow remit of the Refugee Convention.⁵⁸ IHRL transforms the Refugee Convention into a living instrument capable of responding to the changing protection needs of refugees, who are facing new types of persecution and life-threatening dangers which were not contemplated by the drafters of the Refugee Convention.⁵⁹

It is argued that IRL is no longer relevant and is unable to respond to the protection needs of the more vulnerable groups in the refugee populations such as children.⁶⁰ I do not agree that the Refugee Convention is irrelevant nor is it true to say that IHRL has assumed a more important role in the protection of refugees.⁶¹ Rather, IHRL has added a significant and important layer to IRL, which enhances refugee protection.⁶²

⁵² UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UNHCR, Geneva 26 January 2007), para 24; JGC no 4 and 23 paras 14 – 19.

⁵³ JGC 3 and 22, paras 45 and 46.

⁵⁴ UNHCR, *Note on International Protection* (1994), para 9 and 12.

⁵⁵ JC Hathway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113; JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017); JC Hathway and M Foster, n 31; GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford 2007).

⁵⁶ H. Storey, n 31 at 9. He also sets out what he means by a 'human rights approach' at 9, footnote 32.

⁵⁷ See section 3.3 below.

⁵⁸ J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007) at 8.

⁵⁹ V Turk and F Nicolson, 'Refugee Protection in International Law: an Overall Perspective' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003 (reprinted 2005)) at 38; UNHCR *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva April 2001), para 16.

⁶⁰ GS Goodwin-Gill, 'Editorial: Asylum 2001 – A Convention and A Purpose' (2001) 13 *International Journal of Refugee Law* 1 at 1.

⁶¹ See above in Chapter 3.

⁶² See below section 3.2.2.

3.2 State Protection in the Refugee Convention

The refugee has 'emerge[d] as a result of the state's unwillingness or failure to secure the ordinary protection offered to its citizens'.⁶³ Protection under the Refugee Convention prevalently refers to state protection and refers to the ability or willingness of the individual to avail him or herself of state protection if he or she fears being persecuted for one (or more) of the five reasons set out in the Refugee Convention.⁶⁴ An applicant for refugee status must prove a fear of serious harm and a failure by the state to protect against the harm: 'persecution = serious harm + failure of state protection'.⁶⁵ As a result of the lack of state protection in his or her home state, a person is forced to migrate to seek international protection and the purpose of the Refugee Convention is to provide 'back up to the protection one expects from the [s]tate of which an individual is a national'.⁶⁶ State protection in IRL focuses on the meaning of 'being persecuted' in Article 1A(2) of the Refugee Convention. This requires evidence of a 'sustained and systemic violation of basic human rights demonstrative of a failure of state protection'.⁶⁷

One approach argues that a state ought to protect its citizens by conferring nationality which 'provides the essential means by which individuals are able to avail themselves of the full range of protections established by international law'.⁶⁸ This relationship between the individual and their state is framed as a bond of trust, loyalty, protection and assistance, which is the 'normal basis of society' and where a person has become a refugee, this bond has been severed.⁶⁹ Thus refugee law is primarily concerned with providing a person with remedial protection where the relationship has broken down between the individual and their home state and the individual is outside their country of origin.⁷⁰ The state is the focus of Article 1A(2) of the Refugee Convention because it is accountable in international law and it is the state which can provide surrogate protection, relative safety and human rights guarantees.⁷¹

⁶³ T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, Cambridge 2011) at 12.

⁶⁴ Article 1A(2) Refugee Convention.

⁶⁵ *Horvath v Secretary of State for the Home Department* [2000] UKHL 37, [2001] 1 AC 489, 497 - 498.

⁶⁶ *Ward v Canada (Attorney General)* [1993] 2 SCR 689 at 709.

⁶⁷ JC Hathaway, n 50 at 102; JC Hathaway and M Foster, n 31 at 185, 196-197.

⁶⁸ JC Hathaway and M Foster, n 31 at 289.

⁶⁹ AE Shacknove, 'Who is a Refugee' (1985) 95 *Ethics* 274 at 275.

⁷⁰ JC Hathaway and M Foster, n 31 at 288; D. Stevens, n 35 at 237.

⁷¹ JC Hathaway and M Foster, n 31 at 291.

However, the traditional concept of state protection has shifted to some extent by the introduction of the EU Qualification Directive⁷² which provides for protection from persecution and serious harm by the state *or* 'parties or organisations, including international organisations...provided they are willing and able to offer protection... [that is] effective and non-temporary'.⁷³ The non-state entity must be in control of the state or a substantial part of the territory and operate an effective legal system for the detection, prosecution and punishment of persecutory acts.⁷⁴ As Hathaway and Foster observe, it is hard to think of situations in which a non-state entity could confer protection on these terms.⁷⁵ Under the Qualification Directive, it is conceivable that a state may contract out means of protection to private entities, but in international law, the state remains fully accountable.⁷⁶

The next subsection discusses three theories of state protection emerging from national jurisprudence, which delineates the scope of protection in IRL from a state's perspective.

3.2.1 Theories of State Protection

The literature on state protection in IRL contemplates three theories of protection or approaches to state protection: the accountability theory, the protection theory and the alleviation of risk theory.⁷⁷ The jurisprudence and academic discussion on these theories has arisen, primarily, in response to dealing with the risk of persecution by non-state actors.⁷⁸

According to the accountability theory, the decision-maker or court attributes responsibility for the acts of persecution to the state of origin in order to grant refugee status.⁷⁹ This approach arose (mainly in civil law jurisdictions⁸⁰) as a consequence of an interpretation of Article 1A(2) of the Refugee Convention that read 'being persecuted' as being persecuted by

⁷² EU Council Directive 2011/95/EU (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), OJ L 337/9 [Qualification Directive].

⁷³ Article 7(1) Qualification Directive.

⁷⁴ Article 7(2) Qualification Directive.

⁷⁵ Hathaway and Foster, n 31 at 289; see also Hathaway and Storey, n 33 at 485 – 486.

⁷⁶ *Ibid* at 486.

⁷⁷ JM Pobjoy, n 55 at 110 – 116.

⁷⁸ *Ibid* at 110; *Horvath v SSHD* at 497-8.

⁷⁹ W Kalin 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415 at 417.

⁸⁰ See, for example, R. Marx, 'The Notion of Persecution by Non-State Agents in German Jurisprudence' (2001) 15 *Georgetown Immigration Law Journal* 447 at 449.

the state but not non-state actors.⁸¹ The accountability theory proposed that refugee status was only recognised where the home state was directly accountable or responsible for the serious harm.⁸² This required an analysis of the international rules on state responsibility and attached blame for human rights violations on the home (refugee producing) state.⁸³ This approach has been discredited in some jurisdictions, including the UK⁸⁴ and Australia.⁸⁵ This approach was problematic because the wording in Article 1A(2) of the Refugee Convention does not require a finding of any direct responsibility by the home state for its failure to provide protection.⁸⁶ Hathaway and Foster argued that the accountability theory could not be justified by reference to the rules of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT),⁸⁷ as the text of the Refugee Convention and the *travaux préparatoires* of the Refugee Convention, do not support the insertion of the words 'by the state' after 'being persecuted'.⁸⁸

Traditionally, asylum was not regarded as an unfriendly act towards the country of origin, but an exercise of state sovereignty by the host nation, reflecting the 'neutral character of the institution of asylum'.⁸⁹ The accountability theory presupposes condemnation of the country of origin for its failure to protect its nationals from acts of persecution.⁹⁰ State protection should not be about the system of government in the country of origin or its willingness or intention to provide protection.⁹¹ A refugee's need for surrogate protection will be just as pressing in the case of a state's inability (for example, because of the lack of state infrastructure or resources) to provide protection from persecution by a non-state actor.⁹² The recognition of a broader interpretation of the capacity of the state to protect and the recognition that non-state actors can also be responsible for acts of persecution led to the development of protection theory.⁹³

⁸¹ W Kalin, n 79 at 417.

⁸² JC Hathaway and M Foster, n 31 at 303.

⁸³ *Ibid*, 304.

⁸⁴ *R v Secretary of State for the Home Department exp Adan* [2001] 2 AC 477.

⁸⁵ *Minister for Immigration and Multicultural Affairs v Respondents*, S152/2003 (2004) 222 CLR 1.

⁸⁶ W Kalin, n 79 at 423.

⁸⁷ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 Jan 1980) 1155 UNTS 331 (VCLT).

⁸⁸ JC Hathaway and M Foster, n 31 at 304-305.

⁸⁹ W Kalin, n 79 at 423.

⁹⁰ *Ibid*.

⁹¹ GS Goodwin-Gill and J McAdam, n 55 at 10.

⁹² JC Hathaway and M Foster, n 31 at 305.

⁹³ JM Pobjoy, n 55 at 110.

Protection theory draws on IHRL and a state's obligation to protect,⁹⁴ but also recognises that persecution 'includes situations where the state is not in strictness an accomplice to the persecution, but is simply unable to protect its citizens'.⁹⁵ The protection approach or protection theory is well established in common law jurisdictions, especially in the UK, Canada and Australia,⁹⁶ which endorse the use of IHRL standards to assess the scope of a state's protection obligations. The notion that persecution may consist of the failure or inability of a state to protect the basic human rights of its citizens⁹⁷ dominates the jurisprudence of common law countries. For example in Australia, the High Court defined a failure of state protection as 'a failure to meet the standards of protection required by international standards'.⁹⁸ In the UK case of *Horvath*, Lord Clyde noted that what the Refugee Convention 'seeks to achieve is the preservation of those rights and freedoms for individuals where they are denied them in their own state'.⁹⁹ However, not all violations of IHRL amount to persecution within the meaning of this word in the Refugee Convention. In addition, protection is only provided in relation to those violations which the state has a duty to prevent.¹⁰⁰ Nevertheless, the failure of state protection is demonstrated through the denial of core, internationally recognised rights,¹⁰¹ since 'there are certain basic rights, including freedoms from interference and entitlements to resources which all states are bound to respect as a minimum condition of legitimacy'.¹⁰² The Committee on Economic, Social and Cultural Rights (CESCR) has said that the 'essential minimum content of each right' (under ICESCR) must be 'extended to all people under the effective control of the State'.¹⁰³ The core obligations include securing freedom from hunger, access to water, access to essential drugs and access to education, complying with the 'minimum educational standards'.¹⁰⁴ The emphasis on basic rights should focus the decision-makers enquiry on whether the fear is well-founded, not on whether the

⁹⁴ Ibid; See below on IHRL and the obligation to protect.

⁹⁵ *Ward v Canada* at 717.

⁹⁶ W Kalin, n 79 at 424 and JM Pobjoy, n 55 at 111.

⁹⁷ JC Hathaway, n 50 at 127.

⁹⁸ *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at para 27.

⁹⁹ *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 508-509.

¹⁰⁰ D Anker, *Law of Asylum in the United States* (Thompson Reuters 2015) 239-240.

¹⁰¹ JC Hathaway, n 50 at 105 – 106.

¹⁰² Ibid at 106.

¹⁰³ CESCR, Statement on the Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2017/1 (13 March 2017), para 9.

¹⁰⁴ Ibid.

risk of 'being persecuted' relates to persecution committed, condoned or tolerated by the state.

Protection theory has been criticised because some jurisdictions require an applicant for refugee status to prove that the state has failed in its duty to protect by reference to 'due diligence' standards borrowed from the rules on state responsibility and diplomatic protection,¹⁰⁵ which is unsuited to IRL.¹⁰⁶ The question posed is whether the home state is 'unable or unwilling to discharge its duty to establish and operate a system for protection against persecution of its own nationals'.¹⁰⁷ In essence, '[t]he sufficiency of state protection is not measured by the existence of a real risk of an abuse of rights, but by the availability of a system for the protection of the citizen and a reasonable willingness by the state to operate it'.¹⁰⁸ A state which seems to be addressing human rights violations or reducing the risk of persecution, may lead a decision-maker or judge to conclude that the state is willing and able to protect the applicant which shifts the focus away from the well-founded fear of persecution of the individual to focus on the 'home' state's actions. Since the UK decision in *Horvath*, appellate courts in different jurisdictions have adopted a less formalistic approach to the 'due diligence' standard, focusing instead on what protection is in fact available in practical terms to the applicant in their home country and requiring such protection to be 'effective',¹⁰⁹ 'meaningful'¹¹⁰ or 'adequate'.¹¹¹

The notion of 'effective' protection permeates the language of refugee law,¹¹² for example, the EU's Qualification Directive states that protection against persecution or serious harm must be 'effective and of a non-temporary nature'.¹¹³ This includes enquiring whether the state has taken reasonable steps to prevent the persecution or suffering or serious harm, by operating an *effective* legal system.¹¹⁴ The phrase 'effective protection' which has also been adopted by the UNHCR since the 1990s, begs the question, effective for what?¹¹⁵ According to the UNHCR effective protection

¹⁰⁵ JC Hathaway and M Foster, n 31 at 307. This 'practical standard' of due diligence was adopted by the House of Lords in *Horvath v SSHD*.

¹⁰⁶ JC Hathaway and M Foster, n 31 at 310.

¹⁰⁷ *Horvath v SSHD* at 495, per Lord Hope.

¹⁰⁸ *Horvath v SSHD* at 516, per Lord Clyde.

¹⁰⁹ *Atkinson v Secretary of State for the Home Department* [2004] EWCA Civ 846 at para 39.

¹¹⁰ *Mehmood v Minister for Immigration and Multicultural Affairs* [2000] FCA 1799 at para 14.

¹¹¹ *DK v Secretary of State for the Home Department* [2006] EWCA Civ 682 at para 27.

¹¹² D Stevens, n 35 at 247.

¹¹³ Article 7 Qualification Directive 2011.

¹¹⁴ Article 7(2) Qualification Directive 2011.

¹¹⁵ D Stevens, n 35 at 247.

requires states of asylum to take action on behalf of the refugees, which means protecting refugees within their territory and admitting onto their territory people seeking international protection at the borders, 'who may be refugees'.¹¹⁶ Effective protection is supported by the fact that the conferral of refugee status is declaratory and that a person has the right to seek asylum under Article 14 UDHR.¹¹⁷

The recast EU Qualification Directive contains five qualities of protection including willingness to protect, ability to protect, access to protection, effectiveness of protection and non-temporary duration.¹¹⁸ Storey concludes that 'effective protection' means more than the absence of persecution and 'protection cannot exist unless basic rights are secured either generally or sufficiently in a particular case'.¹¹⁹

There may be cases where adhering to protection theory may mean that a person is not granted protection where there has been no human rights violation, but he or she still fears a risk of persecution or serious harm if returned.¹²⁰ The alleviation of risk theory, has evolved from the concept of effective protection and according to Pobjoy has been developed to 'deal with the potential under-inclusivity of the protection theory'.¹²¹ This approach considers whether a state is able to offer a level of protection that will reduce the underlying risk of harm to a level where fear of persecution is not well-founded. Pobjoy cites two cases, one from New Zealand¹²² and the other from Australia¹²³ which endorsed this approach. The New Zealand case concerned an Iranian national and her child, who sought asylum in New Zealand after enduring years of domestic violence and harassment at the hands of her first husband who was a senior officer in the Iranian Revolutionary Guard. In the Australian case a husband and wife who were Ukrainian nationals feared religious persecution because of they were Jehovah Witnesses and claimed the Ukrainian authorities would not protect them.

¹¹⁶ UNHCR, *Note on International Protection* (1994), para 13. Later in this document the UNHCR refers to the fact that it is called upon to provide 'protection and humanitarian assistance' in areas of conflict (para 17).

¹¹⁷ I discussed the right to seek and enjoy asylum in Chapter 3, section 2.1.

¹¹⁸ H Storey, n 31 at 11. Note Article 1A(2) of the Refugee Convention indicates the it is the inability or unwillingness of the individual to avail themselves of protection which is the focus, but the recast QD, certainly for European state practice, has repositioned the emphasis on the willingness and ability of the state to provide protection – Article 7 QD.

¹¹⁹ H Storey, n 31 at 11.

¹²⁰ JM Pobjoy, n 55 at 114.

¹²¹ *Ibid.*

¹²² *RSAA Refugee Appeal No 71427/99* (16 August 2000), para 63.

¹²³ *MIMA v Respondents, S152/2003* (2004) 222 CLR 1.

The alleviation of risk approach argues that the well-founded fear test applies to both serious harm and the failure of state protection. Thus, there must be a real chance the person will suffer persecution or serious harm and that there is a real risk the home state is unwilling or unable to provide protection.¹²⁴

In the New Zealand case, Haines QC dismissed the protection theory and due diligence standard established in previous jurisprudence¹²⁵ on the basis that it was at odds with the fundamental obligation of *non-refoulement* in Article 33(1),

[t]his obligation cannot be avoided by a process of interpretation which measures the sufficiency of state protection ... against the availability of a system for the protection of the citizen and the reasonable willingness by the state to operate that system.

Even if the state can operate a system to protect individuals residing on its territory, it may not be able to prevent persecution of that individual and thus refugee status should not be denied. The tribunal found that 'the proper approach to the question of state protection is to inquire whether the protection available from the state will reduce the risk of serious harm to below the level of 'well-foundedness'.¹²⁶

However, if states adopt the alleviation of risk theory, this may require a reconsideration of the relationship between IHRL and the definition of 'being persecuted', because this theory removes the assessment of state protection from the 'being persecuted' element of the refugee definition.¹²⁷ This theory is most relevant in relation to persecution or harm perpetrated by non-state actors in a state which seems to uphold internationally recognised standards of human rights protection.¹²⁸ For example, in the first case under the CRC's Communication procedure, *IAM (KYM) v Denmark*¹²⁹ the Danish authorities argued that because Somalia had prohibited the practice of FGM throughout the state, the author of the communication did not have a well-founded fear of her daughter being subject to serious harm. The state argued that the issue was whether the mother had the willingness and ability to protect her daughter and to resist

¹²⁴ JC Hathaway and M Foster, n 31 at 318 - 319.

¹²⁵ For example, *Horvath v SSHD*.

¹²⁶ *RSAA Refugee Appeal*, para 66.

¹²⁷ JM Pobjoy, n 55 at 115.

¹²⁸ *Ibid*.

¹²⁹ CRC Committee, *IAM (KYM) v Denmark* (25 January 2018).

local pressure to subject her daughter to FGM.¹³⁰ However the author argued that she would not be able to withstand the social pressure to subject her daughter to FGM, because despite the prohibition on FGM, the legislation was not enforced in practice. Although the CRC Committee's main findings were on the duty to protect the child from violence and the best interests of the child as a primary consideration in the context of *non-refoulement*, the Committee concluded that where there are reasonable doubts that the home state is able to provide protection, the host state should refrain from returning the child and her mother.¹³¹ This case is an example of where the home state abides by international human rights standards by prohibiting the practice of FGM (and thus the state, theoretically, is willing and able to provide protection), but because the legislation is not enforced in practice, this particular child is at risk of being subjected to serious harm and thus has a well-founded fear of persecution.

The alleviation of risk theory, which the CRC Committee seems to adopt in *IAM*, focuses on whether the home state has the infrastructure and enforcement measures to provide effective, meaningful and adequate protection. The question is not whether the home state has complied with a standard of *conduct* but with a standard of *result*: the risk of harm must be reduced below the well-founded fear threshold. If a home state's measures and actions do not reduce the risk below the threshold, then the applicant is entitled to protection.¹³² It follows that a child is entitled to protection from his or her home state, which includes a child's best interests (Article 3(1) and such protection and care as is necessary for his or her well-being (Article 3(2) CRC) as well as 'appropriate protection' under Article 22 CRC, which I would argue goes beyond the IRL's concept of state protection discussed in this section. The result is that where there is a failure by the state to ensure the child's right to protection, that child will be entitled to refugee protection.

3.2.2 The human rights dimension

Hathaway's characterisation of 'being persecuted'¹³³ as 'the sustained or systemic violation of basic human rights',¹³⁴ recognises the close alignment between both IRL and IHRL and has been cited by senior judges

¹³⁰ Ibid, para 4.10.

¹³¹ Ibid, para 11.8(c).

¹³² JC Hathaway and M Foster, n 31 at 319.

¹³³ Ibid at 185, fn 18 sets out the case law citing this formula for defining 'being persecuted'.

¹³⁴ JC Hathaway, n 50 at 101.

in Australia,¹³⁵ Canada,¹³⁶ UK¹³⁷ and New Zealand.¹³⁸ The test for sufficiency of protection, in order to show that the risk of persecution threshold has not been reached, and discussed above, is based on human rights principles. Hathaway and Foster explored the question of rights violations which would reach the threshold of a failure of state protection and concluded that there is no conceptual framework which can give an absolute answer to which rights are 'fundamental' or 'basic' and those which are not.¹³⁹ IHRL is used and should be used as an interpretative tool for the Refugee Convention to assist decision-makers and courts in determining what is meant by 'being persecuted'.¹⁴⁰ Similarly, the CRC should also be used as an interpretative tool for adopting a child rights approach to persecution under the Refugee Convention.¹⁴¹

The concept of state protection should be based on the object and purpose of the Refugee Convention that 'human beings shall enjoy fundamental rights and freedoms without discrimination'¹⁴² and the commitment by states parties to 'assure refugees the widest possible exercise of... fundamental rights and freedoms'.¹⁴³ However, not every failure by a state to promote and protect human rights will justify conferring refugee status nor will it indicate a failure of state protection.¹⁴⁴ Hathaway argues that the human rights framework in the context of IRL should be restricted to binding legal standards (as opposed to 'soft-law' standards) and the 'being persecuted' element of the refugee definition should be interpreted only by reference to human rights standards which have widespread international support.¹⁴⁵ Goodwin-Gill and McAdam indicate that violations of rights which require progressive implementation¹⁴⁶ and those which are subject to permissible derogations,

¹³⁵ *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

¹³⁶ *Ward v Canada*.

¹³⁷ *Horvath v SSHD*.

¹³⁸ *Re MN, Refugee Appeal No.2039/93* (NZ RSAA, Feb 12 1996).

¹³⁹ JC Hathaway and M Foster, n 31 at 204.

¹⁴⁰ *Ibid* at 200.

¹⁴¹ JM Pobjoy, n 55 at 28; M Crock and P Yule, 'Children and the Convention Relating to the Status of Refugees' in M Crock and L Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar, 2018) 97 at 99.

¹⁴² Refugee Convention, Preamble.

¹⁴³ *Ibid*.

¹⁴⁴ Goodwin-Gill and McAdam, n 55 at 133; This view is contestable, see M Foster, *International Refugee Law and Socio-Economic Rights* (Cambridge University Press, Cambridge 2007) at 168 – 169 and 192 and CESCR Statement, n 103, paras 1 and 2.

¹⁴⁵ JC Hathaway, 'The Relationship between Human Rights and Refugee Law: What Refugee Judges can Contribute?' (1998) International Association of Refugee Law Judges: *The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*.

¹⁴⁶ Article 2(1) ICESCR.

may not indicate a failure of state protection.¹⁴⁷ This begs the question, which human rights violations do satisfy the 'being persecuted' test and entitle a person to refugee status? The five grounds of persecution were traditionally regarded as referring to violations of civil and political rights. However, Shacknove perceived 'refugeehood' as going beyond persecution and argued that refugees whose basic needs are unprotected by their country of origin have no choice but to seek restitution of their needs and international assistance.¹⁴⁸ Shacknove also discusses the 'minimal social bond' between citizens and state which is severed when the state has failed to protect an individual's basic needs. He defines the basic needs as physical security, vital subsistence, liberty of political participation and physical movement.¹⁴⁹ Shacknove argues that to the extent a life-threatening situation, such as a drought or a flood or lack of healthcare and housing, occurs because of human action, the state 'has left unfulfilled its basic duty to protect the citizen from the actions of others'.¹⁵⁰ CESCR's Statement, which I referred to earlier, indicates that the human rights protected must go beyond the traditional civil and political rights specified in the Refugee Convention.¹⁵¹ The core obligations include the rights to food, water, health and education and a state cannot argue lack of resources as a failure to provide the minimum core, because 'core obligations are non-derogable [and] they continue to exist in situations of conflict, emergency and natural disaster'.¹⁵²

As I have indicated earlier in this chapter, one of the major influences of IHRL on the Refugee Convention is expanding the sources of protection for a refugee or an asylum-seeker and in particular its role in developing the concept of complementary protection.

3.3 Complementary Protection

In the last twenty years, there has been a growing recognition that the protection offered by the Refugee Convention alone is not enough and there are people outside their country of origin who need protection but they do not fulfill the narrow parameters of the 'being persecuted'

¹⁴⁷ Article 4 ICCPR.

¹⁴⁸ AE Shacknove, n 69 at 277.

¹⁴⁹ Ibid at 281.

¹⁵⁰ Ibid at 280.

¹⁵¹ CESCR Statement, n 103, paras 1 - 4.

¹⁵² Ibid, paras 9 and 10.

requirement under Article 1A(2) of the Refugee Convention.¹⁵³ According to Goodwin-Gill and McAdam, states have *always* recognised the protection needs of a category of person, who falls outside the narrow definitional confines of Article 1A(2) of the Refugee Convention, but only recently as a matter of international law have states 'consciously sought to articulate such protection' as being based on their human rights obligations, rather than it being left to the discretion or goodwill of governments under IRL.¹⁵⁴

'Complementary protection' means any act by a state which seeks to widen the application of refugee protection or any protection granted by a state to individuals who fall outside the protection of the Refugee Convention.¹⁵⁵ It is primarily based on obligations under IHRL, but crucially, complementary protection derives from legal obligations not to return an individual to serious harm because there is a risk of serious or irreparable harm triggering the state's duty of *non-refoulement* rather than for compassionate reasons or practical obstacles to removal.¹⁵⁶ This additional source of protection rooted in IHRL is known as complementary, subsidiary or humanitarian protection in the domestic law of a number of states, but there seems little consistency in state practice about the use of these terms.¹⁵⁷

The state's legal protection obligations are complementary to those under the Refugee Convention.¹⁵⁸ McAdam argues that because some states have approached complementary protection as being outside refugee protection and does not confer a status equivalent to refugee status, complementary or subsidiary protection is, in some states, an incomplete form of protection or a lesser form of protection with fewer rights attached to it. This is because the protected individual does not benefit from the rights under the Refugee Convention and the state's obligations consist of allowing an individual to exist and subsist.¹⁵⁹ At the most basic level, all the state has to provide is safety from *refoulement*.¹⁶⁰ Complementary protection has become little more than a 'tolerated

¹⁵³ See in particular the work of J McAdam, n 58.

¹⁵⁴ GS Goodwin-Gill and J McAdam, n 55 at 285.

¹⁵⁵ J. McAdam, n 58 at 2.

¹⁵⁶ J. McAdam, 'The Refugee Convention as a Rights Blueprint for persons in Need of international Protection' in J. McAdam (ed) *Forced Migration, Human Rights and security* (Hart Publishing, Oxford 2008) 263 at 264. Although some protection is discretionary and temporary.

¹⁵⁷ *Ibid* at 264 - 265.

¹⁵⁸ J McAdam, n 58 at 2.

¹⁵⁹ *Ibid* at 17.

¹⁶⁰ *Ibid*.

status'.¹⁶¹ Some states have approached this in terms of a 'protection hierarchy'¹⁶² in order to deny people in need of international protection their rights under the Refugee Convention, even though this may have a knock-on effect on the appeals system, where beneficiaries of subsidiary or complementary protection try to 'upgrade' their status.¹⁶³ For instance, the EU's Qualification Directive has established subsidiary protection as a form of protection,¹⁶⁴ but McAdam argues that because it does not confer the same level of rights as the Refugee Convention, it should not be considered a form of protection status.¹⁶⁵ For McAdam, human rights law is interconnected with the Refugee Convention and complementary protection cannot be seen as providing a discrete form of protection status.¹⁶⁶ Instead it provides an additional *source* of protection for persons seeking international protection and strengthens refugee status, '[a]ccordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status'.¹⁶⁷

The Refugee Convention already provides legal status for additional groups of refugees¹⁶⁸ and in fact Recommendation E of the Final Act of the Conference of Plenipotentiaries¹⁶⁹ envisaged complementary protection, which would extend the scope of the Convention, as far as possible to persons who did not fall within Article 1A(2) of the Refugee Convention.¹⁷⁰

¹⁶¹ J McAdam, n 58 at 5.

¹⁶² GS Goodwin-Gill and A Hurwitz, 'Memorandum' reprinted in Minutes of Evidence Taken before the European Union Committee (Sub-Committee E) (10 April 2002) in House of Lords Select Committee on the European Union, 'Defining Refugee Status and Those in Need of International Protection', House of Lords Paper No 156, Session 2001-02 (2002) Appendix 2.

¹⁶³ J McAdam n 156 at 266.

¹⁶⁴ Articles 2(f) and 15 of the Qualification Directive.

¹⁶⁵ J McAdam, n 156 at 273.

¹⁶⁶ McAdam argues that human rights law does not provide a form of status or protection but is a trigger for protection, *ibid.*

¹⁶⁷ *Ibid.*, at 280; But rights in the Refugee Convention are based on a person's attachment to the state (aside from a handful of rights including *non-refoulement*) and thus a better basis for rights, especially for a child would be the CRC.

¹⁶⁸ In Article 1 of the Refugee Convention there is reference to previous categories of refugees which were recognised in international law.

¹⁶⁹ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Final Act, Recommendation E.

¹⁷⁰ J McAdam, n 156 at 275 - 278. The UNHCR accepts a broader notion of refugee - in particular those fleeing conflict and generalised violence. Also encompasses the wider definitions of refugee recognised regionally by the African Union and the Inter-American system: See UNHCR, *Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions* HCR/GIP/16/12 (2 December 2016).

Although originally the Refugee Convention was conceived as a 'Magna Carta for the persecuted',¹⁷¹ the expansion of international protection to those who are not persecuted in terms of the Refugee Convention, reflects the human rights pedigree of the Refugee Convention.¹⁷² McAdam argues for a holistic and integrated system of human rights law for refugee protection, relying not on the source of the harm for status but on the basis of a refugee's need.¹⁷³ Foster notes that over the last decade there has been a recognition that states have an obligation, not a discretion, to provide protection to a wider group of persons seeking international protection.¹⁷⁴

State practice on complementary protection is *ad hoc* and responses to people who fall outside the narrow refugee definition are based on executive discretion and not on an agreed international approach.¹⁷⁵ For example, Denmark grants 'protected status' on basic *non-refoulement* grounds – where the applicant would face capital punishment, torture or inhuman or degrading treatment or punishment. Temporary protection will be granted on the grounds of instability and indiscriminate violence against civilians.¹⁷⁶ Beneficiaries of both these statuses are granted an initial protection permit for 1 year. The UK grants Unaccompanied Asylum Seeking Child leave (UASC)¹⁷⁷ to unaccompanied and separated children who do not meet the criteria for refugee status. This is a limited, temporary form of protection granted for 30 months or until a child turns 17½, whichever is sooner. This does not recognise such children as refugees, but acknowledges that the children cannot be returned to their 'home' state because of the risk of serious or irreparable harm.

Under the CRC, states have obligations towards *all* children in their jurisdiction,¹⁷⁸ so there should not be a 'hierarchy of protection' for children seeking international protection, in other words children who are recognised as refugees or are asylum-seekers do not have less protection

¹⁷¹ Conference of Plenipotentiaries on the Status of Refugees and stateless persons, 'Summary record of the 19th meeting' (Geneva 13 July 1951) UN Doc A/CONF.2/SR19 (26 November 1951).

¹⁷² J McAdam, n 156 at 273.

¹⁷³ *Ibid*, at 280-282.

¹⁷⁴ M Foster n 144 at 260.

¹⁷⁵ Goodwin-Gill and McAdam, n 55 at 289. However, there is evidence of state practice which offers some protection to people who cannot return to their countries of origin because their lives or freedom are at risk due to conflict or generalised violence: see eg UNHCR, *Note on International Protection* (1994), para 39.

¹⁷⁶ Articles 7(2) and 7(3) of the Aliens Act.

¹⁷⁷ An unaccompanied asylum-seeking child is defined by section 352ZD of the UK Immigration Rules. UASC leave is considered under sections 352ZD C-F of the rules.

¹⁷⁸ Article 2(1) CRC.

than national children of the state because of their non-citizen status. Goodwin-Gill and Hurwitz argued that 'a *duty to protect* may arise, absent any well-founded fear of persecution or possibility of serious harm'.¹⁷⁹ Thus, children seeking international protection should receive protection, whether or not they are entitled to refugee status or complementary protection. Additionally, a state must comply with the duties under Article 22(1) CRC to provide 'appropriate protection and humanitarian assistance' and Article 3(2) CRC to provide 'such protection and care as is necessary for his or her well-being'. The protection of the refugee child to ensure his or her well-being is especially important for a child who escaped a situation in which their well-being and protection were marginalised or ignored.

The CRC Committee confirms that children should benefit from complementary protection in situations where they are unable to secure refugee status.¹⁸⁰ The Committee stresses that just because a child has been granted complementary protection, this 'does not obviate States' obligations to address the [child's] particular protection needs',¹⁸¹ nor should there be any depletion of a child's rights. The Committee confirms that complementary protection means that an asylum-seeking child is entitled to enjoy all human rights granted to children in the territory or subject to the jurisdiction of the state.¹⁸² However, in the EU, for example, most children granted subsidiary protection receive protection for between 1 and 3 years and have to apply to renew their residence permits in the same way as adults do, which can prevent such children from accessing education and health services, where proof of identity is required. It is appropriate to consider next the meaning of 'protection' under IHRL, focusing on the 'obligation to protect'.

4. Protection under International Human Rights Law (IHRL)

In IHRL, it is recognised that states have an obligation to protect their citizens or nationals from a violation of their rights.¹⁸³ The obligation

¹⁷⁹ GS Goodwin-Gill and A Hurwitz, n 162, Appendix 2 (my emphasis). 'Duty to protect' in this context refers to the protection concept within the Refugee Convention as opposed to the IHRL understanding of obligation to protect – see discussion in this chapter.

¹⁸⁰ CRC Committee, GC 6, para 77, but see also para 53 (trafficked children) and para 66 (access to asylum procedures). It is unclear here, whether the CRC Committee regards complementary protection as a separate form of status or whether they agree with McAdam that complementary protection is a source of protection not a status.

¹⁸¹ CRC Committee GC 6, para 77.

¹⁸² Ibid.

¹⁸³ See for example A Eide, UN Special Rapporteur for the Right to Food, 'The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide', UN Doc E/CN.4/Sub.2/1987/23 (1987).; CESCR General Comment No 24 on State Obligations under

to protect under IHRL is essentially an obligation on states to ensure that third parties or non-state actors do not interfere with individual rights, that is, states must take all necessary measures to ensure that individuals under their jurisdiction are protected from infringements of rights by third parties (including individuals, armed groups, business enterprises and other non-state actors).¹⁸⁴ In the context of a child's right to protection, the tripartite typology of obligations, discussed below, developed under IHRL is relevant. For example, the element of a child's right to protection which signposts the obligation to ensure a protective environment for the enjoyment of rights mirrors the obligation to fulfil and this is discussed further in this section.¹⁸⁵ The CRC Committee have adopted the typology in some of its more recent General Comments.

4.1 Obligation to protect and the tripartite typology of obligations

This conceptualisation of the obligation to protect in IHRL can be traced back to the late 1980s when Eide wrote about the 'tripartite typology' of obligations: obligations to respect, protect and fulfil.¹⁸⁶ Eide described the obligations as follows: (1) the obligation to 'respect' requires states to abstain from violating a right; (2) the obligation to 'protect' requires states to prevent third parties from violating that right; and (3) the obligation to 'fulfil' requires the state to take measures to ensure that the right is enjoyed by those within the state's jurisdiction.¹⁸⁷ Eide considered that the obligation to protect requires a state and its agents to implement measures 'necessary to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual.'¹⁸⁸ The state is required to both abstain from interfering with rights as well as being obliged to be active in its role as 'protector and provider'.¹⁸⁹ Thus, a state's obligation to protect is a positive obligation to

the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities UN Doc. E/C.12/GC/24 (10 August 2017) (CESCR GC 24).

¹⁸⁴ For example, CESCR GC 24, paras 30 - 35.

¹⁸⁵ See also A Nolan, 'Privatization and Economic and Social Rights, (2018) 40 *Human Rights Quarterly* 815 for a discussion on the relationship between the obligation to protect and the obligation to fulfil in the context of economic and social rights.

¹⁸⁶ This can be traced back to Asbjørn Eide, who acted as the UN's Special Rapporteur for Food during the 1980s, see A Eide, n 183.

¹⁸⁷ *Ibid*, paras 67 - 69.

¹⁸⁸ *Ibid*, para 68.

¹⁸⁹ *Ibid*, para 70; MM Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp, Oxford, New York 2003). For more on the scope of the obligation see A Nolan, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional

safeguard against the intrusive and harmful action by a third party (parties).¹⁹⁰ Measures which give effect to the obligation to protect must include establishing an effective regulatory regime, providing access to legal remedies and imposing penalties for breaches of the measures.¹⁹¹ CESCR, in General Comment no 24 on obligations in the context of business activities, has adopted a broad approach to the obligation to protect. This obligation

means that States parties must prevent effectively infringements of economic, social and cultural rights ... [which] requires States parties [to] adopt legislative, administrative, educational and other appropriate measures to ensure effective protection against Covenant rights violations ... and that they provide victims ... with access to effective remedies.¹⁹²

The tripartite typology of obligations has also been adopted by the UN High Commissioner for Human Rights (OHCHR) in advising states about the nature of their obligations under human rights treaties. For example, in 2014, the OHCHR confirmed 'the obligation of States to protect, respect and fulfil [the] human rights of all migrants at international borders'.¹⁹³ Underpinning and the OHCHR's guidelines 'is a recognition that respecting the human rights of all migrants, regardless of their nationality, migration status or other circumstances, facilitates effective border governance'.¹⁹⁴

The CRC Committee has also actively engaged in delineating a state's obligations according to the tripartite typology of obligations in relation to the impact of the business sector¹⁹⁵ and public budgeting for the realisation of children's rights.¹⁹⁶ The CRC Committee points to Article 4 CRC (on measures of implementation of children's rights) as incorporating the

Approaches to the 'Obligation to Protect' (2009) 9 *Human Rights Law Review* 225; A Nolan n 185.

¹⁹⁰ MM Sepulveda, n 189 at 165; O De Schutter, A Eide, A Khalfan and M Orellana, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 *Human Rights Quarterly* 1084 at 1134.

¹⁹¹ A Nolan n 189 at 229 – 230 and accompanying footnotes; CESCR, GC 24, para 14, 15 and 19; CRC Committee, General Comment No 16, on State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16 (17 April 2013) (GC 16), para 28.

¹⁹² CESCR GC 24, para 14.

¹⁹³ OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (OHCHR, Geneva 2014) at iv.

¹⁹⁴ *Ibid*, at 2.

¹⁹⁵ CRC Committee GC 16, paras 26 - 29.

¹⁹⁶ CRC Committee, General Comment No 19 on Public Budgeting for the Realization of Children's Rights (art.4) UN Doc CRC/C/GC/19 (20 July 2016)(CRC GC19), paras 27 - 28.

'respect, protect, fulfil' set of obligations which apply to all rights in the CRC.¹⁹⁷

4.2 Obligation to protect and fulfil

As I have highlighted above, the obligation to protect encompasses positive obligations and has a symbiotic relationship with the obligation to fulfil. Thus, protection should not be viewed only in terms of protecting a person against interference with his or her rights by third parties, but it includes an obligation to ensure that an individual can enjoy his or her rights fully. In line with the ICRC's concept of protection,¹⁹⁸ the obligation to fulfil includes protection activities which 'foster an environment conducive to respect for the rights of individuals in accordance with the relevant bodies of law'.¹⁹⁹ Additionally, the OHCHR, in its guidelines and principles on human rights at borders, indicates that the obligations to respect, protect and fulfil include 'effective protection and access to justice'.²⁰⁰ This meaning of protection is, thus, complemented by the third level of states' obligations – the obligation to fulfil.²⁰¹

The obligation to fulfil requires the state to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain access to their rights, which cannot be secured by personal efforts.²⁰² The obligation covers a range of measures and positive action by states to ensure the creation of an environment in which rights can be enjoyed and states are required 'to take necessary steps, to the maximum of their available resources, to facilitate and promote the enjoyment of ... rights'.²⁰³ This includes appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of rights.²⁰⁴ In the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights the obligation to fulfil requires states to take action separately or jointly through international cooperation and

¹⁹⁷ Ibid; A Nolan 'Children's Economic and Social Rights' in T Liefaard and U Kilkelly (eds) *International Human Rights of Children* (Springer, Singapore 2019) 239 at 250.

¹⁹⁸ See section 2 above.

¹⁹⁹ Caverzasio (ICRC), n 18 at 19.

²⁰⁰ OHCHR, n 193 at iv.

²⁰¹ A Eide, n 183 at paras 67 – 69.

²⁰² Ibid, para 69.

²⁰³ CESCR, GC 24, para 23.

²⁰⁴ Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights (International Commission of Jurists, 1997), Guideline no 6.

assistance to ensure rights are fulfilled within the territory and extraterritorially²⁰⁵ and to create 'an international enabling environment'.²⁰⁶

For the CRC Committee, the obligation to fulfil requires states to take action to ensure the full realisation of children's rights.²⁰⁷ This includes the facilitation of children's rights by implementing measures which enable and assist children to enjoy their rights, providing for children's rights including monitoring and assessing the extent to which children are able to exercise their rights and promoting children's rights by ensuring appropriate education and public awareness about such rights.²⁰⁸

Next, I will examine the right to protection under the CRC and its significance in the context of a child seeking international protection.

5. Protection for Refugee Children under International Children's Rights law

The conceptualisation of protection for a child in this chapter, is based on the right to protection established in the CRC but also draws influence from IRL, IHRL and from the protection framework developed by the International Committee of the Red Cross (ICRC) and the guiding principles for responding to a humanitarian crisis.²⁰⁹

Under the CRC there is a clear obligation on a state to protect children in their jurisdiction from ill treatment or harm and there are different layers of protection which a refugee child will require, for example, protection from persecution,²¹⁰ protection from armed conflict²¹¹ or generalised violence²¹² and protection from ill-treatment within the family.

A refugee and asylum-seeking child's right to protection must be effective and the child should be able to realise his or her right to protection in the host state. It must be more than simply protection from harm – the right should identify and ensure 'appropriate protection and

²⁰⁵ Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO, FLAN international 2013), Principle 28; O de Schutter et al, n 190 at 1145 – 1146.

²⁰⁶ Ibid, Principle 29; O de Schutter et al, n 190 at 1146 – 1149.

²⁰⁷ CRC GC 19, para 27 (c).

²⁰⁸ Ibid.

²⁰⁹ M O'Flaherty (ed), *Guiding Principles for Human Rights Field Officers*, n 20, Principle 2.

²¹⁰ Especially protection from persecution of one of the five reasons set out in Article 1A(2) of the Refugee Convention: race, nationality, religion, member of a particular social group or political opinion.

²¹¹ Art 38 CRC and OPAC.

²¹² Article 19 CRC.

humanitarian assistance'.²¹³ The notion of state protection discussed in 3.2 is part of the 'appropriate protection and humanitarian assistance' obligation owed by a state to a refugee or asylum-seeking child under Article 22(1) CRC. This embraces a right to protection to exercise other rights such as access to the territory of a state of refuge, access to asylum procedures, legal representation and access to economic and social rights, such as adequate housing, education, health, and social welfare. The concept of 'special protection' for children is derived from both early children's rights law and international humanitarian law (IHL).

5.1 Special Protection of Children

Before 1924, there was little international interest in the protection of children because children were considered part of the private sphere.²¹⁴ The League of Nations' Declaration of the Rights of the Child was addressed to 'men and women of all nations' and declared that 'mankind owes to the child the best that it has to give',²¹⁵ thus bringing protection concerns about children into the public space. Throughout the twentieth century, international law has recognised the particular and unique status of children and imposed an obligation on states to provide children with 'special protection.' The special protection of children derives in part from international humanitarian law, especially the Fourth Geneva Convention of 1949²¹⁶ and the Additional Protocols of 1977.²¹⁷ There are 25 articles in the four Geneva Conventions and the Additional Protocols relating directly to children (who are defined as being under 15). The Additional Protocols confirmed that children are entitled to special protection and 'shall be provided with the care and aid they require',²¹⁸ including education, family reunion, a prohibition on being recruited into armed forces or armed groups and if necessary, removal of children to a safer area within the

²¹³ Article 22(1) CRC.

²¹⁴ E Ferris, n 1 at 55.

²¹⁵ Geneva Declaration of the Rights of the Child 1924 (adopted 26 September 1924, League of Nations), preamble.

²¹⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (12 August 1949) 75 UNTS 287 (entered into force 21 October 1950).

²¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977) 1125 UNTS 3 (entered into force 7 December 1978)(Additional Protocol I), Article 77; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609 (entered into force 7 December 1978)(Additional Protocol II), Article 4(3).

²¹⁸ Article 77(1) of Additional Protocol I 1977; Article 4(3) of Additional Protocol II 1977.

country.²¹⁹ Both the Geneva Conventions and the Additional Protocols link the protection of the child to the maintenance of family life.²²⁰

Special protection in the context of international children's rights was established in the Declaration of the Rights of the Child 1959.²²¹ Principle 2 of the Declaration linked the concept of special protection with best interests²²² and was not restricted to children affected by conflict or persecution but extended to all areas of a child's life in which he or she might need protection to secure his or her development. The best interests of the child were of paramount consideration, but only when a state was enacting laws to ensure special protection of the child. The 1959 Declaration also had a principle on humanitarian assistance for children: '[t]he child shall in all circumstances be among the first to receive protection and relief'.²²³ This was not restricted, as it was in 1924 to situations of 'distress', but extended to *all circumstances*.

The precise meaning of special protection is not clear in any of the international instruments and how this differs from simple 'protection', which is a recurring theme in the CRC.²²⁴ The CRC limits the scope of special protection in the context of children's rights to a child temporarily or permanently deprived of his or her family environment.²²⁵ This special protection under Article 20 is especially important for unaccompanied and separated children, who by reason of their situation are deprived of a family environment.²²⁶

5.2 Protection under the CRC

Protection is a dominant theme in the CRC and, as I have argued, it is closely linked with the principle of best interests and a child's well-being (Articles 3(1) and 3(2) CRC). Goodwin-Gill argued that the thrust of national and international action on behalf of children is recognition of their need for 'special protection' including legal protection. However, '[p]rotection is not just a narrow question of rights and process: rather it extends to the broad range of developmental needs, for example freedom

²¹⁹ Article 4(3) (a) – (d) of Additional Protocol II 1977.

²²⁰ For example, Article 74 of Additional Protocol I. Also see Chapter 3, section 4.5 on the right to family life.

²²¹ UN Declaration of the Rights of the Child adopted by the UN General Assembly Resolution 1386 (XIV) on 20 November 1959.

²²² Principle 2 is set out in full in Chapter 2, section 3.1.

²²³ *Ibid*, Principle 8.

²²⁴ For example, CRC preamble, Article 2(2), Article 3(2) CRC, Article 20 CRC.

²²⁵ Article 20(1) CRC.

²²⁶ CRC Committee, GC 6, para 12; CRC Committee *DD v Spain* (12 February 2019).

from hunger, rehabilitative care, access to education and participation in social and cultural life'.²²⁷ Although written two decades ago, this reflects the CRC Committee's rights-based approach which stipulates a holistic and expansive concept of protection to ensure the enjoyment of all rights under the CRC.

The duty to protect children is, in the first instance, fulfilled by parents,²²⁸ unless the parents are unable to care for and protect the child or they abuse or neglect the child, in which case the state takes over that role, in accordance with the best interests of the child principle.²²⁹ The state has an overall duty to try to keep the family together.²³⁰ However, where a child has been deprived of his or her family environment or separated from his or her family, the child is entitled to 'special' or 'appropriate' protection and assistance provided by the state.²³¹

Children have a right to protection from ill-treatment and the state must ensure they receive such protection even if it means separating the child from his or her parents' care.²³² The difficulty with the right to protection in children's rights is how to find the appropriate balance between the exercise of parental rights to protect the child (that is to what extent the state should interfere with family life), whilst also respecting the child's capacity for choice and autonomy.²³³ This delicate balancing dilemma, however, is different in the case of a child asylum-seeker who no longer has the protection of his or her home state (and/or his or her parents) and therefore requires international protection. The child's right to protection in a state other than his or her own ought to be paramount.²³⁴

A child's right to protection is not articulated in a single article, but is a thread running throughout the CRC. As I set out at the start of this chapter, the right to protection under the CRC has three main strands, weaved into different articles in the CRC, first the right to protection from

²²⁷ GS 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 at 410.

²²⁸ Articles 3(2) CRC and Article 18 CRC.

²²⁹ Article 9(1) CRC.

²³⁰ The family is 'the fundamental group of society' and the 'child...should grow up in a family environment', Preamble CRC. See also: Article 9, Article 10, Article 22(2) and Article 37(c).

²³¹ Article 20(1) and Article 22(2) CRC.

²³² J Fortin, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, Cambridge 2009) at 551.

²³³ *Ibid* at 553.

²³⁴ Of course, the question of state interference in family life does not arise, whether or not the child is travelling with his or her family, unless the state provides the child and not the parents with international protection and deliberately separates the family.

harm,²³⁵ the right to protection for well-being and development²³⁶ and the right to a protective environment conducive to enjoying rights.²³⁷ Recalling that there is no derogation clause in the CRC,²³⁸ a state cannot derogate from its obligations to protect all children in its jurisdiction.²³⁹

In Chapter 2, I explained that Article 3(2), is closely linked to the best interests principle, and requires a state 'to ensure the child such protection and care as is necessary for his or her well-being', whether this is provided by parents with state support or through state institutions, facilities and services.²⁴⁰ Freeman indicates that Article 3(2) CRC 'embrace(s) protection in the widest understanding of the concept'.²⁴¹ Freeman does not elaborate on this, but I argue that, given the emphasis on protection in the CRC, Article 3(2) directs states (and parents) to ensure that any action they take which impacts on children's lives must have their care, protection and children's well-being at the heart of it.

A child who is a refugee or who is seeking refugee protection should receive 'appropriate protection' (Article 22 CRC). At the very least this should go beyond simply protection from harm or persecution, but the CRC does not elaborate on whether this refers to state protection in the IRL sense or is part of the obligation to protect under the tripartite typology of obligations in the IHRL sense. General Comment No 6, however, responds to the protection gaps for unaccompanied or separated children and sets out the standard of protection such children require in order to access and enjoy their rights.²⁴² The CRC Committee refers to the obligations of the state (host state) to provide for the 'protection, care and treatment' of unaccompanied or separated children, and the legal obligations on the host

²³⁵ This thread of protection includes Articles 11, 17(e), 19, 32, 33, 34, 35, 36, 37 and 38 CRC.

²³⁶ Protection in this sense includes Articles 2, 3(1), 3(2), 6, 9, 10, 11, 12, 13, 14, 15, 16, 20, 24, 25, 26, 27, 28, 29, 31 and 39.

²³⁷ There is some overlap with the second strand, but this includes, Article 2, 3(1), 6, 7, 8, 11, 12, 17, 22, 23, 28 and 31.

²³⁸ Compare with Article 4 ICCPR which allows for derogations if the state declares a national emergency.

²³⁹ Four rights of the child can be restricted if necessary, to protect the rights and freedoms of others, on grounds of national security, public safety, public order and public health or morals. The four rights are: the right to leave any country (Article 10(2) CRC); freedom of expression (Article 13 CRC); freedom of thought, conscience and religion (Article 14 CRC); and freedom of association and peaceful assembly (Article 15 CRC). The restrictions on these rights are interpreted narrowly, to ensure minimum interference with the right.

²⁴⁰ Article 3(3) CRC.

²⁴¹ MDA Freeman, 'Article 3. The Best Interests of the Child', in: A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2007) at 68.

²⁴² CRC Committee, GC 6, paras 1 and 3. GC 6 does not refer to the tripartite typology, although later CRC Committee General Comments do, for example, GC 16 and GC 19.

state require the state not only to refrain from interfering with the child's rights but also to take measures to ensure the enjoyment of rights without discrimination, which form part of the protection and assistance obligations of the state.²⁴³ Protection, 'under all norms of the Convention' extends to children who are not granted refugee status (or complementary protection), 'as long as they remain *de facto* within the State's territory and/or subject to its jurisdiction'.²⁴⁴

'Appropriate protection' is elaborated on further in the two joint General Comments of the CMW and CRC. The emphasis in both General Comments is on the protection of children's rights in the context of international migration and the obligations of the states to ensure the rights of children whatever their status or that of their parents. Child protection, as a means of ensuring a child has access to his or her rights, is relevant both in relation to the care and protection of a child in a host state and when a decision is made to return the child to his or her country of origin.²⁴⁵

The protection a refugee child receives should be based on non-discrimination, the best interests and well-being of the child and robust child protection procedures.²⁴⁶ The CRC provides children with protection from harm,²⁴⁷ but significantly, the CRC also imposes obligations of protection on states (and parents) in order to empower children and to ensure access to their rights.²⁴⁸ UNHCR and UNICEF have advocated for states to develop frameworks of child protection which promote the state's positive obligation to protect and which apply the four general principles of non-discrimination, the best interests of the child, a child's right to life, survival and development and encourage children's participation allowing them to have a say in decisions about their future.²⁴⁹

In the early 2000s, UNICEF used the term 'child protection' in the context of preventing and responding to violence, exploitation and abuse

²⁴³ Ibid, para 13.

²⁴⁴ Ibid, para 78.

²⁴⁵ JGC 3 and 22, paras 32 and 33 (in the context of a best interests determination and assessment); JGC 4 and 23, paras 12, 13 and 65.

²⁴⁶ Article 2 CRC; Article 3(1) and 3(2) CRC; JGC 3 and 22, para 14.

²⁴⁷ Such as Articles 19, 32, 33, 34, 36 and 38 CRC.

²⁴⁸ Articles 8, 17, 20 and 22. The two Optional Protocols also build on the theme of protection for empowerment and states should undertake measures to enable a child to live without fear of being recruited into armed forces or exploited for child pornography, to enable full enjoyment of rights.

²⁴⁹ UNHCR, *Framework for Protection* (UNHCR, Geneva 2012); UN ECOSOC *UNICEF Child Protection Strategy*, UN Doc. E/ICEF/2008/5/Rev.1 (20 May 2008); UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (UNICEF, New York 2017).

against children, including commercial sexual exploitation, trafficking, child labour and harmful traditional practices, such as female genital mutilation/cutting and child marriage,²⁵⁰ thus focusing on the narrower protection from harm thread within the CRC. However, UNICEF's later child protection strategy focuses less on the obligation to protect from harm and more on the need to create a protective environment framework based on a rights-based approach.²⁵¹ This framework should include, state commitment to fulfilling protection rights, legislation and enforcement, development of attitudes, traditions, customs, behaviour and practices which are protective, and open discussion about the protection of children, including the engagement of media and civil society, developing children's life skills, knowledge and participation, improving the capacity of those in contact with the child to protect the child, ensuring basic and targeted services for child protection and implementing effective systems of monitoring and oversight.²⁵²

The OHCHR adopts a broad approach to the concept of protection for children in the context of international migration and defines a child protection system as comprising 'a set of laws, policies, regulations and services, in particular services related to social welfare, education, health, security, labour and justice'.²⁵³ The OHCHR's definition reveals an understanding of protection which does not confine child protection to a system of laws to protect the child from harm, but describes it as a system which allows a child to develop and access other rights such as those relating to health, education and social welfare. Protection in the context of a rights-based approach should enable a child to live, survive and develop in freedom and dignity.

According to the UN Guidelines for Alternative Care of Children, '[e]very child and young person should live in a supportive, protective and caring environment that promotes his/her full potential'.²⁵⁴ But if the family is unable to provide the care and protection the child requires, then the state is responsible for protecting the rights of the child.²⁵⁵ Where a child is

²⁵⁰ UNICEF, Child Protection Information Sheet, (UNICEF, Geneva 2006) 1.

²⁵¹ UN ECOSOC, *UNICEF Child Protection Strategy*, n 249, para 2.

²⁵² *Ibid*, para 10.

²⁵³ OHCHR, Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration (2010) UN Doc. A/HRC/15/29, 4, footnote 12.

²⁵⁴ UN General Assembly, *Guidelines for Alternative Care of children* (2010) UN Doc A/RES/64/142, para 4.

²⁵⁵ *Ibid*, para 5.

undertaking a dangerous and life-threatening journey to reach a place of safety, the states he or she encounters on the move owe the child an obligation to protect him or her from harm and exploitation and protect the right to family life, adequate housing, healthcare and education.²⁵⁶

The CRC Committee, the UN and international organisations concerned about children in vulnerable and dangerous situations, were focused on states' obligations to protect children from harm. However, more recently the CRC Committee has advocated for a rights-based approach requiring states to undertake positive steps to create a protective environment to ensure children, including refugee and asylum-seeking children, enjoy all of their rights. In 2016, UN Member States declared their commitment to 'provide refugee and migrant children with a nurturing environment for the full realisation of their rights and capabilities.'²⁵⁷ States preventing access to their borders and thus access to asylum procedures are violating fundamentally, the child's right to protection in the broadest sense and denying the child a right to develop in a nurturing environment.

6. Conclusion - The Normative Content of the Right to Protection

Protection for a refugee child under the CRC is not confined to protection from the well-founded fear of persecution or serious harm in the child's country of origin, although the first priority for a state when it encounters a child seeking asylum is to ensure the child's safety and security²⁵⁸ and protection from immediate harm. A child must be treated first and foremost as a child not as a migrant or refugee and states have obligations to respect, protect and fulfil the rights of the child regardless of their status or that of their parents.²⁵⁹ These obligations apply to all such children within the jurisdiction of the state, including where a state exercises effective control outside its borders and to children who come within a state's jurisdiction while attempting to enter its territory.²⁶⁰ International law prescribes the mode of conduct for states towards

²⁵⁶ JGC 4 and 23.

²⁵⁷ UN New York Declaration for Refugees and Migrants, UN Doc. A/Res/71/1 (Resolution adopted by UNGA on 19 September 2016), para 33; Global Compact on Refugees, n 49

²⁵⁸ CRC Committee, GC 6, paras 13 and 31; CRC Committee, *DD v Spain* (2019), para 14.3.

²⁵⁹ JGC 3 and 22, para 11.

²⁶⁰ JGC 3 and 22, para 12. I discuss jurisdiction in Chapter 5.

refugee and asylum-seeking children through both the CRC and Refugee Convention.²⁶¹

The normative framework for a refugee and asylum-seeking child's right to protection includes a right not to be harmed, abused, exploited, harassed and bullied,²⁶² a right to leave their country of origin²⁶³ and a right to seek and enjoy asylum in another state.²⁶⁴ The state's obligation to protect must extend to not returning the child to harm/ill-treatment,²⁶⁵ not turning the child back at the border²⁶⁶ and ensuring the child gets effective protection and access to asylum procedures in the host state.²⁶⁷ A child seeking international protection at the borders of the state or who encounters the state outside the state's territory, for example at the airport or on the high seas is entitled to have their claim for asylum assessed by the state authorities and to have the best interests determination conducted by the child protection authorities within child protection systems.²⁶⁸ Practically speaking, this can only be carried out by allowing the child access to the territory, which triggers a right to access asylum procedures, due process guarantees²⁶⁹ and access to economic and social rights including a right to an adequate standard of living,²⁷⁰ right to health²⁷¹ and right to education.²⁷² A right to protection for refugee and asylum-seeking children is important because there is no right to asylum in international law and such children lose the protection of their home state and often the protection of their immediate family (including community and cultural links).

As I discussed in this chapter, there are different concepts of 'protection', which need to be examined when considering how best to protect a child who is a refugee or seeking asylum. 'Protection' in the IRL sense has both a negative aspect – the absence of persecution and a positive aspect – the ability and willingness of the state to secure basic

²⁶¹ GS Goodwin-Gill, 'Who to Protect. How...and the Future?' (1997) 9 *International Journal of Refugee Law* 1 at 1-2.

²⁶² JGC 3 and 22, para 23.

²⁶³ Article 13 (2) Universal Declaration on Human Rights, 217 A (III) (10 December 1948). (UDHR); Article 12(2) ICCPR; Article 10 CRC.

²⁶⁴ Article 14 UDHR.

²⁶⁵ Article 33 of the Refugee Convention.

²⁶⁶ CRC Committee, *DD v Spain* (2019).

²⁶⁷ JGC 3 and 22, para 42. See Chapter 5.

²⁶⁸ JGC 3 and 22, para 32(j).

²⁶⁹ JGC 4 and 23, para 17(a).

²⁷⁰ JGC 4 and 23, paras 49 – 53.

²⁷¹ JGC 4 and 23, paras 54 – 58.

²⁷² JGC 4 and 23, paras 59 – 63; I discuss this in more depth in Chapter 5.

human rights of its nationals. IHRL is concerned with the state's obligation to protect a person from interference of their rights by a third party as well as the obligation to fulfil to guarantee enjoyment of rights. Child protection is focused on protecting the child from harm, violence, abuse and exploitation, but ought to be read alongside the state's obligation to fulfil which requires a state to create a protective environment conducive to the enjoyment of rights. The approach I discuss in this chapter is based on Article 3(2) CRC which obliges states to provide care and protection to ensure a child's well-being, Article 22 which obliges states to ensure 'appropriate protection' and in CRC Committee's General Comment No 6 and JGC 3 and 22 which urges holistic protection of rights. The child's right to protection thus points to a broader notion of protection than solely shielding from harm.

The state's obligation to protect extends to all children within a state's jurisdiction and *non-refoulement* is a key element of this protection, which should provide children with a protective environment in a host state to exercise their rights. I examine the principle of *non-refoulement* in the next chapter.

CHAPTER 5: *Non-Refoulement* and the Protection of Child Refugees

1. Introduction

This chapter examines the principle of *non-refoulement* - a crucial element of protection for child refugees. In international refugee law (IRL) this principle is central to the protection of a person fleeing persecution, torture or other cruel, inhuman or degrading treatment or punishment and is relevant when children face being returned to a place where their human rights are at risk. The best interests principle, in turn, plays a role in securing their protection.

Non-refoulement, however, is not confined to IRL and its evolution since 1951 has been influenced by developments in international human rights law (IHRL).¹ In general, states acknowledge the existence of a duty of *non-refoulement* under both IRL and IHRL, but there is little consensus on its scope.² This chapter provides some clarity on the scope of *non-refoulement* which extends to a refugee or asylum-seeking child, who might be facing the risk of *refoulement* at different stages of their journey. A child who reaches the territory of the destination state will have a right to protection and to have their best interests assessed and determined, as well as enjoyment of their rights under the CRC and will be able to rely on the state's protection and *non-refoulement* obligations.

States seek to interpret this obligation as narrowly as possible, adhering to the core elements of the principle, but at the same time asserting the right to control their borders and migration flows.³ However, border control can only take place within the parameters of IHRL

¹ V Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law.' In R Rubio-Marin (ed) *Human Rights and Immigration* (Oxford University Press, Oxford 2014) 19 at 28.

² CW (Kees) Wouters, *International Legal Standards for the Protection from Refoulement* (Doctoral Thesis), Leiden University (Intersentia Publishing, Antwerp 2009) at 2.

³ See, for example T Gammeltoft-Hansen, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 *Journal of Refugee Studies* 574; T Gammeltoft-Hansen and JC Hathaway *Non-Refoulement in a World of Cooperative Deterrence* (2015) 53 *Columbia Journal of Transnational Law* 235; V Moreno-Lax and M Giuffre, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edwards Elgar, forthcoming).

obligations - borders are not human rights-free zones.⁴ Although states acknowledge that 'refugee law is predicated on the duty of *non-refoulement*', they practice 'the politics of *non-entrée* [which] is based on a commitment to ensure refugees shall not be allowed to arrive'.⁵ *Non-entrée* policies have evolved from visa controls and carrier sanctions and states operating interdiction on the high seas into a complex, cooperative approach to deterrence, which includes reliance on diplomatic relations, offering of financial incentives (including aid) to transit states and countries of origin, provision of equipment, machinery or training, deployment of officials of the destination state, joint or shared border enforcement, assumption of direct migration control and establishment or assignment of international agencies and private companies to effect interception.⁶ *Non-entrée* operates both at a state's border (including at ports, airports and land borders) and in the murky waters of extraterritorial jurisdiction, where there is little effective international oversight and a lack of a clear approach in international law on the extent and scope of a state's jurisdiction and potential responsibility for transnational activities which result in breaches of human rights.⁷ Thus, refugee and asylum-seeking children, like adults, are victims of states' deterrence policies and human rights violations before they can reach a place of refuge and safety to seek an effective remedy. Hathaway argues that 'extraterritorial deterrence is ... as much a breach [of the State's obligation of *non-refoulement*] as expulsion from within a State's territory'.⁸

This chapter examines the principle of *non-refoulement* as it is conceptualised in IRL and discusses the influence of IHRL, which expands the scope and content of the principle. First, I examine jurisdiction and the extent of a state's extraterritorial obligations in relation to *non-refoulement* because it is important to understand developments in international law. Next, in order to contextualise a state's obligations towards a child in relation to its *non-refoulement* obligations, I discuss four scenarios, which highlight the risks to a child's right to *non-refoulement*. In section 4, I

⁴ OHCHR, Recommended Principles and Guidelines on Human Rights at international Borders (2014).

⁵ T Gammeltoft-Hansen and JC Hathaway n 3 at 241.

⁶ Ibid at 243.

⁷ T Altwickler, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 *European Journal of International Law* 581 at 588.

⁸ JC Hathaway, 'Refuge and asylum' in B Opeskin, R Perruchoud and J, Redpath-Cross (eds) *Foundations of International Migration Law* (Cambridge University Press, Cambridge 2012) 177 at 194-195.

examine the principle of *non-refoulement* under IRL, before examining the influence of IHRL on the principle in section 5. The development of the principle in IHRL is particularly pertinent for refugee and asylum-seeking children and it is intimately bound up with the state's obligation to protect all children within its jurisdiction. The risk of return is not only from the territory of the state but also from a place where the state exercises jurisdiction – which can be at the border, at sea or at an off-shore processing or detention centre. Following on from this, I analyse the impact of the best interests principle on a state's *non-refoulement* obligations. First, I examine jurisdiction and extraterritorial obligations before setting out four scenarios which illustrate the potential scope of the *non-refoulement* obligation for a refugee child or a child seeking asylum.

2. Jurisdiction and Extraterritorial Obligations

There is a growing trend of states seeking to move both migration control and responsibility for asylum processing away from their borders or off-shore to avoid triggering their obligations under the *non-refoulement* principle.⁹ In the process of externalising their protection obligations, states are *de facto* extending the reach of their migration control operations. A universalist approach might suggest that for every action of the state to extend jurisdiction to ensure refugees do not arrive at their border, states should be held to account for violations of human rights which occur as a result of their action to externalise border control.¹⁰ A state-centric view, however, would argue that states are entitled under international law to enter into agreements with other states to cooperate on migration control matters and where a state is acting beyond its territory the duty not to *refoule* is inapplicable. Any measure implemented or actions of the state to prevent refugees and asylum-seekers arriving on the territory may directly or indirectly impact on the right of children to seek and enjoy asylum and their right to (effective) protection. Thus, it is

⁹ For example, the 'Pacific Solution' developed by the Australian government in 2001, which eventually led to the establishment of detention and processing facilities on the islands of Nauru and Manus. A class action against the Australian Government challenging the conditions at the camps on Manus and Nauru, on the grounds of torture, crimes against humanity and the intentional infliction of harm, was commenced in December 2018: see National Justice Project, 'NJP Launches Class action for detainees on Manus Island and Nauru', available at: <https://justice.org.au/njp-launches-class-actions-for-detainees-on-manus-is-auru/> (13 December 2018).

¹⁰ ECtHR *Issa and others v Turkey*, Application No 3821/96 (16 November 2004), para 71; UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UNHCR, Geneva 26 January 2007), paras 24 and 35; V Moreno-Lax and M Giuffrè, n 3.

important to focus here (albeit briefly) on jurisdiction in the context of *non-refoulement* as it is relevant to a state's obligation to protect and a child's right to protection.

The extent to which a state owes obligations in relation to *non-refoulement* is determined by the jurisdictional reach of the principle. It is true to say that, '[t]he territorial scope of application of human rights treaties is undoubtedly one of the most current and complex topics of contemporary public international law',¹¹ and determining the jurisdictional reach of a *state's non-refoulement* obligations under both IRL and IHRL is complex and contentious.¹² In terms of human rights obligations, extraterritorial jurisdiction is partly determined by interpretation of the jurisdictional clauses in human rights treaties, but also the extent of a state's jurisdiction which has been developed in other spheres of public international law.¹³

There are two primary models of jurisdiction: the spatial model, where a state has effective control over territory¹⁴ and the personal model, where a state has authority and control over individuals.¹⁵ In the latter model, responsibility of the state is triggered by the exercise of authority and control over the person and is connected not to where the person is refouled *from* but where he or she is refouled *to*.¹⁶ Jurisdiction is not always clear cut nor can it be neatly established on the basis of either personal or territorial control as there are cases which fall into grey areas between the two or fall outside these categories altogether. Thus, other models of jurisdiction have evolved to cover these grey areas, including

¹¹ M. Milanovic, 'Extraterritorially and Human Rights: Prospects and Challenges' in Gammeltoft-Hansen and Vedsted-Hansen (eds) *Human Rights and the Dark Side of Globalisation: Transnational law enforcement and migration control* (Routledge, Abingdon 2017) at 53.

¹² Within the scope of this thesis my analysis of jurisdiction and *non-refoulement* is necessarily brief. For a comprehensive analysis of international law on Jurisdiction and *non-refoulement* see T Gammeltoft-Hansen *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, Cambridge 2011) at 44 – 157; CW Wouters, n 2; and from an EU perspective, see V Moreno-Lax, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (Oxford University Press, Oxford 2017) at 247 – 336.

¹³ See for example, A Pijnenburg 'From Italian pushbacks to Libyan pullbacks: Is *Hirsi* 2.0 in the Making in Strasbourg?' (2019) 20 *European Journal of Migration and Law* 396.

¹⁴ ECtHR, *Loizidou v Turkey*, Application no.15318/89, 23 February 1995 at para 62; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, paras 109 – 111.

¹⁵ ECtHR, *Cyprus v Turkey* Application nos 6780/74 and 6950/75, 26 May 1975 at 136; UNHRC *Lopez-Burgos v Uruguay* Communication No R.12/52 (29 July 1981), paras 12.2 – 12.3.

¹⁶ V Moreno-Lax, n 12 at 333.

jurisdiction based on the exercise of public powers.¹⁷ A model based on the distinction between the overarching positive obligations of states to secure, ensure and protect human rights and the negative obligations of states to respect human rights has also been proposed as an alternative to the traditional models of jurisdiction.¹⁸ The positive obligations would be territorially limited, because a state would require effective overall control of an area in order to comply with its obligations. The negative obligation to respect is territorially unlimited because it requires a state to refrain from interfering with a person's rights without justification.¹⁹ Furthermore, Gammeltoft-Hansen and Hathaway have identified human rights jurisdiction where extraterritorial control is direct²⁰ or indirect, for example where refugees are intercepted and detained outside the territory of the intercepting state.²¹ Moreno-Lax argues in favour of a functional approach to jurisdiction, which entails an exercise of public powers 'normally ... exercised by a sovereign government'.²² In establishing state responsibility under this approach what matters is the 'function' exercised by a state in enabling the violation.²³

The European Court of Human Rights (ECtHR) interprets its jurisdiction clause under Article 1 of the European Convention on Human Rights (ECHR) as applying where a state exercises effective control over territory or a zone occupied by it and where state officials exercise control and authority over an individual.²⁴ *Hirsi Jamaa v Italy*²⁵ confirmed that a state has human rights obligations when refugees and asylum-seekers are intercepted at sea. Obligations can arise wherever refugees are intercepted

¹⁷ ECtHR, *Al Skeini v United Kingdom* Application no 55721/07 (7 July 2011), paras 102 and 130. – 150; ECtHR, *Jaloud v Netherlands* Application no 47708/08 (20 November 2014), para 145.

¹⁸ M Milanovic, n 11 at 58-59. See also M Milanovic *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011), at 118.

¹⁹ *Ibid.*

²⁰ Such as in ECtHR *Hirsi Jamaa v Italy* Application no 27765/09 (23 February 2012).

²¹ See UNCAT, *JHA v Spain* No 323/2007, UN Doc. CAT/C/41/D/323/2007 (2008), para 8.2.

²² ECtHR, *Al-Skeini v United Kingdom*, para 149.

²³ V Moreno-Lax, n 12 at 279; V Moreno-Lax, 'Responsibility by Proxy and the Functional Approach to Jurisdiction: Closing the Accountability Gaps in Multi-actor Constellations of Extraterritorial Cooperation' (paper presented at *Accountability for Human Rights Violations in Migration Control Workshop* at the Refugee Studies Centre, Oxford, 10 November 2018); S Besson argues that the criterion for the ECHR to apply is not territorial but functional. Functional jurisdiction is not a third approach, but personal and territorial jurisdiction are instances of functional jurisdiction: see S Besson, 'The Extraterritoriality of the ECHR: Why Human Rights Depend on Jurisdiction and What Jurisdiction amounts to' (2012) 25 *Leiden Journal of International Law* 857 at 863.

²⁴ ECtHR, *Al Skeini v United Kingdom*, paras 133 – 140.

²⁵ ECtHR, *Hirsi Jamaa v Italy*.

and their journeys are controlled by state agents acting outside the territory of the state.²⁶

The approach of the ECtHR is also supported by an expansive interpretation of the jurisdiction clauses in the relevant human rights treaties. Under the ICCPR,²⁷ a person, including a child, must be present on the territory of the state *and* within its jurisdiction in order to enjoy all the rights under the Covenant,²⁸ which on a literal interpretation restricts jurisdiction for human rights obligations territorially. However, the Human Rights Committee (HRC) has interpreted this provision as meaning that a state 'must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of the [state], even if not situated within the territory of the [state]'.²⁹ Further the HRC has asserted that 'it would be unconscionable to ... interpret the responsibility under Article 2 ... as to permit a State Party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.³⁰

ICESCR³¹ has no article setting out the jurisdictional scope of the rights in the Covenant. Article 2(1) ICESCR obliges states to take steps (including international cooperation) to achieve progressively all of the rights set out in the Covenant. The absence of a jurisdiction clause allows for interpretation whereby a state has obligations under ICESCR beyond a state's territory, especially taking into consideration the 'international assistance and cooperation' phrase in Article 2(1) ICESCR.³²

The Refugee Convention does not have a jurisdiction clause, although it includes a number of rights for refugees who are physically present on the territory. However, as I have said previously, *non-refoulement* applies

²⁶ Ibid, para 81.

²⁷ International Covenant on Civil and Political Rights (adopted 19 December 1966, in force 23 March 1976) 999 UNTS 171 (ICCPR)

²⁸ Article 2(1) ICCPR.

²⁹ UNHRC General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004), para 10.

³⁰ UNHRC, *Lopez Burgos v Uruguay*, para 12.3; This is not dissimilar to the 'complicity principle' proposed by Legomsky, that no country may send any person to another country knowing that the latter will violate rights which the sending country is itself obliged to respect, see S Legomsky, 'Secondary Refugee Movements and the Return of Asylum-Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567 at 573-573 and 619 – 621.

³¹ International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1966) 993 UNTS 3 (ICESCR).

³² M Foster, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) *New Zealand Law Review*, 257 at 283.

without territorial or other qualification³³ and is not conditional on physical presence on the territory of the state.³⁴ This is 'contextually logical as well as purposively sound, a fact recognised by soft law.'³⁵ However, one notable exception to this view is that of the United States Supreme Court in *Sale v Haitian Centers Council*.³⁶ This case involved the interdiction at sea by the US coastguard of refugees fleeing from Haiti in the early 1990s. The refugees were routinely turned back to Haiti to stop them reaching the US coast without a refugee status hearing. The Supreme Court held that the correct interpretation of Article 33 of the Refugee Convention is that it only applies to refugees and asylum-seekers who reach the territory of the United States and not to refugees interdicted on the high seas.³⁷ However, Supreme Court Associate Justice Blackmun dissenting from the majority opinion, concluded that the majority incorrectly interpreted the unambiguous meaning of the words in Article 33(1), 'the language is clear, and the command is straightforward; that should be the end of the inquiry'.³⁸ Blackmun said that what mattered is where the refugees were being returned *to*, not where they were being returned *from*, because its aim is to protect refugees from persecution.³⁹ Blackmun's dissenting opinion complies with the interpretation in international law.

The US Supreme Court's argument that jurisdiction under Article 33 is strictly territorial has been rejected by the UNHCR,⁴⁰ the HRC⁴¹ and the ECtHR.⁴² The UNHCR confirms that 'the obligation under Article 33(1) ... is not subject to territorial restrictions; it applies wherever the state in question exercises jurisdiction'⁴³ or where a state exercises effective control.⁴⁴ This is based on the ordinary meaning of the words in Article 33, which refer to return to the 'frontiers' of a state where the individual may be at risk of persecution. This covers any action by the state at any stage of the refugee's journey⁴⁵ and applies wherever the state exercises

³³ Article 33 of the Refugee Convention.

³⁴ T Gammeltoft-Hansen and JC Hathaway n 3 at 258.

³⁵ Ibid, at 259. USA is the notable exception to state practice.

³⁶ *Sale, Acting Commissioner, Immigration and Naturalization Service et al., Petitioners v Haitian Centers Council, Inc. et al*, 509 US 155 (1993).

³⁷ Ibid at 187.

³⁸ Ibid, at 190.

³⁹ Ibid, at 193.

⁴⁰ UNHCR, Advisory Opinion n 10 at 12, para 26 and footnote 54.

⁴¹ UNHRC *Lopez v Uruguay*.

⁴² ECtHR *Hirsi Jamaa v Italy*.

⁴³ UNHCR, Advisory Opinion n 10, para 9. See also T Gammeltoft-Hansen n 12 at 55.

⁴⁴ UNHCR UNHCR, ExCom Conclusion No 74, General Conclusion on International Protection (XLV) UN Doc.12A A/49/12/Add.1 (7 October 1994), para g.

⁴⁵ T Gammeltoft-Hansen n 12 at 58.

jurisdiction, whether on its territory, at the border, on the high seas or on the territory of another state.⁴⁶

Under the CRC, jurisdiction is not limited by territory. Article 2(1) CRC obliges states 'to respect and ensure the rights...to each child *within their jurisdiction*'. There is no requirement for the child to be present on the territory of the receiving state in order to benefit from the obligations which the state owes.⁴⁷ Wherever they encounter child refugees or asylum-seekers, states should not adopt a narrow interpretation of *non-refoulement*.⁴⁸ The *non-refoulement* obligation of the state applies to 'each child within their jurisdiction' and who 'come under its jurisdiction while attempting to enter its territory'.⁴⁹ Based on the CRC and CMW's interpretation of the jurisdictional reach of the CRC, a child should receive the protection of the state wherever he or she encounters the state and comes within the state's jurisdiction, including where the state is exercising extraterritorial control.

The CRC Committee refers to the 'extraterritorial effects' of *non-refoulement*,⁵⁰ without elaborating on what this means.⁵¹ Foster argues that the 'extraterritorial effects' of the *non-refoulement* principle is a misnomer, because the implied and express *non-refoulement* obligation does not relate to conduct taken outside the state's territory, rather the act of deportation or expulsion takes place on the territory of the expelling state.⁵² However, since Foster wrote this, the ECtHR case of *Hirsi Jamaa v Italy*, confirmed that under the ECHR states can be responsible for the 'extraterritorial effects' of their acts outside their territory.⁵³ The justification for arguing that the state is responsible for the 'extraterritorial effects' of its actions in the removal or rejection at the border is based on both the negative obligation to respect or refrain from violating the child's rights and the positive obligation to protect by preventing others from

⁴⁶ UNHCR Advisory Opinion, n 10, para 24.

⁴⁷ G Noll, 'Seeking Asylum at Embassies: A Right to Entry Under International Law' (2005) 17 *International Journal of Refugee Law* 542 at 570.

⁴⁸ Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22), para 46.

⁴⁹ *Ibid*, para 12.

⁵⁰ CRC Committee, General Comment no. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (2005) (GC 6), para 28.

⁵¹ The *Soering* case is credited with establishing the 'extraterritorial effects' doctrine: ECtHR *Soering v United Kingdom*, Application No. 14038/88 (7 July 1989): See Foster, n 32 at 269.

⁵² *Ibid*, at 267.

⁵³ *Hirsi Jamaa v Italy*, paras 72 and 74.

violating the child's rights.⁵⁴ However, for children, it may not be sufficient for a state to simply respect rights or refrain from violating rights. A child has a right to protection which goes beyond the state preventing harm⁵⁵ and where a child is in need of international protection, states are required to be proactive, this includes action taken beyond the territory of the state, as a result of the exercise of its jurisdiction.⁵⁶ As we have seen, Article 22(1) CRC obliges states to take 'appropriate measures' to ensure children receive 'appropriate protection and humanitarian assistance' which may entail obligations in situations where child asylum-seekers encounter state authorities extraterritorially. Deterrence measures by Italy, including the threat to fine NGO boats who rescue refugees and asylum seekers in the Mediterranean and enter Italian waters as well as refusing permission to disembark (thus ensuring the refugees and asylum seekers never come within Italy's jurisdiction), violate the clear obligation under Article 22 (1) CRC to provide appropriate protection and humanitarian assistance. In a similar vein, the UK's *non-entrée* policies, including refusing safe passage to unaccompanied children who are at the border in makeshift camps in Calais and have family members in the UK, violate the UK's obligations under the CRC.⁵⁷

The extent to which states employ deterrence and *non-entrée* policies may be in violation of their human rights obligations extraterritorially and in this context jurisdiction functions as a threshold criterion.⁵⁸ The drafters of the Refugee Convention could not have foreseen the extent to which states would seek to operate migration control on the high seas or set up off-shore processing centres or outsource border management to other states and private entities in order to prevent asylum-seekers arriving at their borders.⁵⁹ The trend today is to decide the fate of asylum-seekers and

⁵⁴ M Foster, n 32 at 288 – 289.

⁵⁵ See Chapter 4.

⁵⁶ ECtHR, *Hirsi Jamaa v Italy*, para 74.

⁵⁷ The UK adopts a very narrow interpretation of its obligations under 'Dublin III' Regulation, which obliges member states to reunite unaccompanied children with family members in other member states, see *Secretary of State for the Home Department (SSH) v ZAT and others* [2016] EWCA Civ 810 and has granted limited 'Calais Leave' to a small number of children transferred to the UK between 17 October 2016 and 13 July 2017, see UK Home Office, *Calais Leave Version 2.0* (27 June 2019).

⁵⁸ ECtHR, *Catan and others v Republic of Moldova and Russia*, Application No 43370/04, 8252/05, 18454/06 (19 October 2012), para 103; T Altwicker, n 7 at 588.

⁵⁹ T Gammeltoft-Hansen, n 12 at 63.

refugees before they arrive on the shores or at the borders of the state in an attempt to avoid the application of human rights obligations.⁶⁰

3. Four Scenarios

In order to make sense of the different circumstances a refugee or asylum-seeking child encounters on his or her journey and to examine a state's obligations towards children in the context of *non-refoulement*, I discuss four scenarios, based on common *non-entrée* policies implemented by states. These will contextualise the application of the *non-refoulement* principle to children seeking international protection. These four scenarios loosely correlate with the four *ratione loci* of the *non-refoulement* principle enshrined in Article 33 of the Refugee Convention,⁶¹ which operates 'within the territory', 'at the frontier', 'within a state's jurisdiction' and 'wherever a state acts'.⁶²

First, the child has an established right to protection from being returned (*refouled*) to their country of origin or to a state where there is a risk of return to harm or persecution ('chain *refoulement*'). The host state owes this obligation whenever the refugee or asylum-seeking child reaches its territory. This includes situations where the child is trafficked or smuggled into the state or is at risk of being removed or returned as a result of his or her parents' migration status.

Second, children will encounter the state at the border of the state whenever they arrive at a border fence or wall, when they present themselves to the state's border guards or are held in a detention centre or in a refugee camp on the border. The CRC Committee and the ECtHR have held that push backs operated by a state's border guards amount to an exercise of the state's jurisdiction and thus a state is under an obligation to assess the risk of irreparable damage, persecution and grave human rights violations in the country to which the refugees or asylum-seekers are being returned.⁶³ Article 33 of the Refugee Convention is not territorially limited and thus a child should not be returned to a state (including the border of

⁶⁰ Ibid. For example, the Australian policy of detaining boat refugees in Manus and Nauru and the EU-Turkey deal sending asylum-seekers back to camps in Turkey to be processed for asylum.

⁶¹ Article 33 of the Refugee Convention states: 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'; see below section 3.2.

⁶² T Gammeltoft-Hansen, n 12 at 93 – 94.

⁶³ CRC Committee *DD v Spain*, (12 February 2019); ECtHR, *ND and NT v Spain* Application nos. 8675/15 and 8697/15 (3 October 2017).

a state) where there are substantial grounds for believing that he or she may be at risk of irreparable harm.⁶⁴

Third, a child may encounter the destination state on the journey, either on the high seas⁶⁵ or whilst on the move through another state. States are increasingly finding creative ways of avoiding responsibility for human rights protection by pushing or pulling back to third countries⁶⁶ or deterring children and their families from reaching their borders. The *non-entrée* policies of (mostly European states⁶⁷) reflect the model of cooperative deterrence as described by Gammeltoft-Hansen and Hathaway.⁶⁸

Finally, a child may be transferred to an off-shore processing centre⁶⁹ or a detention centre which is operated by or funded by the destination state.⁷⁰ Arguably this falls within the human rights model of jurisdiction, which indicates that even indirect control can lead to an obligation to ensure the child is not *refouled*.⁷¹

4. *Non-Refoulement* in International Refugee Law

The *non-refoulement* principle has a specific meaning in the 1951 Refugee Convention,⁷² but its meaning has expanded under IHRL and there is no single overarching principle of *non-refoulement*.⁷³ Two models of the *non-refoulement* principle are discussed in this chapter; one is an explicit

⁶⁴ CRC Committee GC no 6; see section 6.1 below.

⁶⁵ ECtHR, *Hirsi Jamaa v Italy*.

⁶⁶ See ECtHR *ND and NT v Spain*; the pending case of ECtHR *SS and Others v Italy* Application No 21660/18; CRC Committee *DD v Spain*.

⁶⁷ Although most of the CEAS measures have been implemented by EU member states, the obligations under the directives and regulations do not operate until the asylum-seeker is on the territory of an EU state.

⁶⁸ T Gammeltoft-Hansen and Hathaway, n 3 at 248 – 257.

⁶⁹ An off-shore processing centre is a place outside the territory of the destination state and is usually within the jurisdiction of a third state. It is where the applications of the asylum-seekers are supposed to be processed and then the asylum seeker is either recognised as a refugee and resettled or returned to their country of origin. For example, the centres in Manus and Nauru in Papua New Guinea, funded by the Australian Government to prevent boat refugees arriving on the Australian coast. However, many of the detainees on Manus (men only and officially closed) and Nauru (families including children) have been there for years, with no processing of their claims by the Australian authorities. There has been significant NGO campaigning and resistance from the Papua New Guinea government which has prompted Australia to act; see, for example, Refugee Council of Australia, *Offshore Processing Statistics* (September 2019), available at: <https://www.refugeecouncil.org.au/operation-sovereign-borders-offshore-detention-statistics/>.

⁷⁰ See for example, UNCAT, *JHA v Spain*.

⁷¹ High Court of Australia, *Plaintiff S195/2016 v Minister for Immigration and Border Protection (CTH) & Ors* [2017] HCA 31; see section 6 below on jurisdiction.

⁷² See 3.2 below.

⁷³ F Messineo, 'Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?' in SS Juss (ed) *The Ashgate Research Companion to Migration Law, Theory and Policy* (Ashgate, London 2013) 129 at 131.

duty on states to prevent the return of refugees to territories where they are likely to be persecuted for one of the five Refugee Convention grounds.⁷⁴ The other exists in IHRL as a broadening of the Refugee Convention and emerged as an explicit duty in specific treaties to prevent return where individuals risk torture⁷⁵ or enforced disappearance.⁷⁶ IHRL recognises an implicit obligation prohibiting the *refoulement* of any person to territories where they are at risk of ill-treatment or punishment,⁷⁷ other grave violations of fundamental human rights,⁷⁸ or 'irreparable harm'.⁷⁹ Furthermore, there is a 'humanitarian stream' of *non-refoulement* in international humanitarian law, which prevents forcible return of protected persons to countries where they might be persecuted for their political and religious views or transfer to countries which are unwilling or unable to provide protection under the Fourth Geneva Convention.⁸⁰ Whilst states accept the existence of implied *non-refoulement* obligations arising out of IHRL treaties,⁸¹ the triggering of a *non-refoulement* duty based on a risk of violation of socio-economic rights is more contentious.⁸² There is a body of jurisprudence, particularly from the ECtHR, which recognises that a person should not be returned to a state where there is a risk of socio-economic deprivation.⁸³ However, some courts regard this development, particularly on health-related grounds, to be an 'extension of an extension'⁸⁴ or an 'exceptional extension of the Treaty obligations'.⁸⁵ Although regional courts

⁷⁴ Article 33(1) Refugee Convention. See section 2.2 below.

⁷⁵ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85 (adopted 10 December 1984, came into force 26 June 1987)(CAT).

⁷⁶ Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3 (adopted 2 October 2008, came into force on 23 December 2010)(CED).

⁷⁷ This phrase is a short form of 'other cruel, inhuman or degrading treatment or punishment' and either inhuman treatment or 'ill-treatment' will be used throughout the chapter, but is inclusive of the other forms of treatment or punishment prohibited under IHRL.

⁷⁸ Article 7 ICCPR, Article 3 ECHR and Article 37(a) CRC.

⁷⁹ UNHRC GC 31, para 12; CRC GC 6, para 27. See discussion at section 5.3.1 below.

⁸⁰ Article 45 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) 75 UNTS 287; see also UNHCR, *Guidelines on International Protection No 12: Clams for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions* HCR/GIP/16/12 (2 December 2016).

⁸¹ M Foster, n 32 at 266.

⁸² *Ibid*, at 260.

⁸³ ECtHR, *MSS v Belgium and Greece* Application No 30696/09 (21 January 2011), violation of Article 3 ECHR; See M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge 2007) at 187-188; M Foster n 32 at 278 – 285.

⁸⁴ UKCA AJ (*Liberia*) v Secretary of State for the Home Department [2006] EWCA Civ 1736, para 12.

⁸⁵ UKCA N v Secretary of State for the Home Department [2004] 1 WLR 1182 (EWCA), para 36.

may consider inadequate protection of social and economic rights to be a reason for not returning a person, Foster's limited review of state practice indicates that the *non-refoulement* principle has not been extended beyond the narrow grounds discussed above.⁸⁶

The term *refoulement*, according to Goodwin-Gill and McAdam, is a 'term of art' meaning to 'drive back or repel, as of an enemy who fails to breach one's defences', but in the context of immigration control it covers summary return to the border of a state, of people who have entered the state illegally or the summary refusal to admit onto the state's territory individuals without valid papers.⁸⁷ It should be distinguished from formal legal or administrative processes of deportation, expulsion or extradition,⁸⁸ although the basic principle of *non-refoulement* remains applicable in these situations.

Before turning to examine the expansion of the *non-refoulement* principle under IHRL, I analyse the *non-refoulement* provision under IRL, which prohibits the *refoulement* of refugees to states where they are at risk of persecution.

4.1 *Non-refoulement* under the Refugee Convention 1951

Non-refoulement is recognised as a pivotal concept at the heart of the 1951 Refugee Convention: '[t]he principle of *non-refoulement* is not the foundation of the [Refugee] Convention, but its cornerstone: the protection ... refugees are owed would be illusory if it did not include protection against forcible return.'⁸⁹ The principle of *non-refoulement* is recognised explicitly in Article 33(1) of the Refugee Convention:

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

States cannot enter a reservation to Article 33(1)⁹⁰ and the only exception to the principle is that set out in Article 33(2), which provides that a

⁸⁶ M Foster n 32 at 284 – 285.

⁸⁷ GS Goodwin-Gill and J McAdam, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford 2007) at 201.

⁸⁸ Ibid. See also Article 32 of the Refugee Convention on the expulsion of refugees lawfully on the territory of a state party.

⁸⁹ J Durieux, *Three Asylum Paradigms*, (2013) 20 *Journal of Minority and Group Rights* 147 at 167.

⁹⁰ Article 42 of the Refugee Convention.

refugee may not benefit from Article 33(1) if there are reasonable grounds for regarding him or her as a danger to the security of the country or if convicted of a serious crime and thus a danger to the community of that country.

Although Article 33(1) does not use the word 'persecution', most commentators accept that the wording of Article 33(1) was intended to recall Article 1A(2) and the difference in the wording is immaterial to the scope of *non-refoulement*.⁹¹ The *non-refoulement* principle as conceptualised in Article 33(1) of the Refugee Convention is intended to benefit refugees who fulfil the criteria in Article 1A(2) of the Refugee Convention, although the protection of Article 33(1) (in theory) is not predicated on formal recognition of refugee status, thus it can apply to people seeking asylum in addition to recognised refugees. If it were necessary to establish refugee status before benefiting from the destination state's *non-refoulement* obligation, there would be no effective protection for the person fleeing.⁹² For a state to avoid its *non-refoulement* obligations by refusing to determine a person's status would undermine the principle of good faith in international law⁹³ and the concept of protection offered by the Refugee Convention. Thus, this provision applies to all asylum-seekers, however they arrive in the state and in situations where asylum procedures are not effective or in cases of mass influx.⁹⁴

The duty of *non-refoulement* under Article 33(1) does not equate to a duty to receive refugees, nor a right to be granted asylum. It applies where there is a real risk that return will expose the refugee to being persecuted for a Refugee Convention ground.⁹⁵ However, Article 33(1) may amount to a *de facto* duty to admit refugees to a state's territory, as admission to the territory is the only means to process a claim for asylum in order to avoid the prohibition on *refoulement*.⁹⁶ It has been argued that a fair refugee status determination procedure is an 'essential component of the ... prohibition on *refoulement*'.⁹⁷ The UNHCR ExCom confirms that the procedure must be 'adequate to ensure in practice that persons in need of

⁹¹ CW Wouters, n 2 at 57; Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005) at 304-307.

⁹² GS Goodwin-Gill and J McAdam, n 87 at 232.

⁹³ Ibid at 205; Vienna Convention on the Law of Treaties 1969 (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Article 26.

⁹⁴ GS Goodwin-Gill and J McAdam, n 87 at 205.

⁹⁵ JC Hathaway n 8 at 193.

⁹⁶ Ibid. See *ND and NT v Spain*, paras 104 and 107; *DD v Spain*, paras 14.3 – 14.7.

⁹⁷ S Legomsky, n 30 at 654.

international protection are identified and that refugees are not subject to *refoulement*'.⁹⁸ This *de facto* duty to admit or right of entry will cease if the risk of persecution no longer exists.⁹⁹ The duty of *non-refoulement*, notwithstanding its limitations, does constrain a state's ability to decide who can enter and who can leave its territory.

During the drafting of the Refugee Convention, there was concern that this provision would require states to grant entry to refugees in cases of mass influx and some states insisted that the principle should only apply to those who have already entered the territory.¹⁰⁰ Although this was discussed in the context of a mass migration scenario, unfortunately, this restrictive view of the *non-refoulement* obligation was (and continues to be) relied upon by states to argue that the obligation only applies to refugees who are already on the territory of the state,¹⁰¹ even though Article 33(1) has no territorial limitation. Early commentators agreed that this was the correct approach. For example, Robinson argued that 'if a refugee has succeeded in eluding the frontier guards, he is safe; if he has not, it is his hard luck'.¹⁰² But this view has been challenged by Weis who argued that if *non-refoulement* does not include non-rejection at the border, the duty only applies to those who due to 'fortuitous circumstance' have successfully entered the territory.¹⁰³ Goodwin-Gill and McAdam assert that '[a]s a matter of fact, anyone presenting themselves at the frontier post, port or airport will already be within state territory and jurisdiction'.¹⁰⁴ Some state practice and (primarily) ECtHR case law, have supported an interpretation¹⁰⁵ of Article 33(1), which encompasses both

⁹⁸ UNHCR ExCom General Conclusion on International Protection No 71 (XLIV) UN Doc 12 A A/48/12/Add.1 (8 October 1993), para h.

⁹⁹ JC Hathaway n 8 at 193.

¹⁰⁰ See UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting*, (23 November 1951) UN Doc. A/CONF.2/SR.16.

¹⁰¹ *Sale v Haitian Centers Council Inc*, n 36; GS Goodwin-Gill and J McAdam n 87 at 206.

¹⁰² P Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation - A Commentary* (New York, Institute for Jewish Affairs 1953) at 163.

¹⁰³ P Weis, 'Territorial Asylum' (1966) 6 *Indian Journal of International Law* 173 at 183.

¹⁰⁴ GS Goodwin-Gill and J McAdam, n 87 at 207.

¹⁰⁵ *Ibid*, at 208; Declaration on Territorial Asylum, UNGA Resolution 2312(XXII), 14 Dec. 1967: No refugee 'shall be subjected to measures such as rejection at the frontier'; See also ExCom Conclusions Nos. 6 and 85; On the applicability of human rights obligations within 'international zones' in border posts in cases concerning refugees and migrants: see ECtHR, *Amuur v. France*, Application No. 19776/92 (25 June 1996); ECtHR *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03 (12 October 2006); ECtHR, *Gebremedhin v. France*, Application No. 25389/05 (26 April 2007); ECtHR, *Riad and Idiab v. Belgium*, Application Nos. 29787/03 and 29810/03, 24 Jan. 2008; ECtHR, *Muskhadzhiyeva v. Belgium*, Appl. 41442/07, 19 Jan. 2010; *Z.A. v. Russia*, Appl. 61411/15, 28 Mar. 2017.

non-return and non-rejection at the border, including 'push-backs' and instances of summary rejection at the border.¹⁰⁶

A more inclusive view of the principle in Article 33(1) of the Refugee Convention focuses not on where the individual is being returned *from* but on where he is being returned *to*.¹⁰⁷ The obligation is not restricted to the territory of the returning state and must apply to return at any stage of the journey, which is covered by the words 'in any manner whatsoever'.¹⁰⁸ Thus, the principle covers situations of return to 'safe third countries',¹⁰⁹ where there is a danger of chain *refoulement*, in cases where boats with refugees and asylum-seekers are intercepted at sea¹¹⁰ and where people are forced to return to the country they escaped from¹¹¹ or they are forced to disembark at off-shore processing and detention centres.¹¹² There is a risk of *refoulement* as a consequence of the deterrence measures designed to prevent people travelling to countries of asylum and thus if states engage in such practices, they are likely to be in violation of the principle.¹¹³ The principle under Article 33 enjoys universal application *wherever* a state may act and is not restricted to people lawfully present or resident in the state.¹¹⁴

Gammeltoft-Hansen contends that there has been 'a dynamic development in the application of the *non-refoulement* principle as enshrined in Article 33(1) of the Refugee Convention [and] state practice has extended the normative reach of the Refugee Convention'.¹¹⁵ Nevertheless, Article 33(1) of the Refugee Convention exposes a gap in refugee protection. The flexibility inherent in Article 33(1) allows states to circumvent their obligations either on the basis that the individual does not

¹⁰⁶ ECtHR *Hirsi v. Italy*, Application No. 27765/09 (23 February 2012) (push-backs); ECtHR, *Sharifi v. Italy and Greece*, Application No. 16643/09 (21 Oct. 2014), para. 219; ECtHR, *N.D. and N.T. v. Spain*, Application Nos. 8675/15 and 8697/15 (3 October 2017) (summary rejections at the Melilla fence).

¹⁰⁷ UNHCR, Advisory Opinion n 10, para 26; see section 2 above.

¹⁰⁸ Article 33 of the Refugee Convention; T Gammeltoft-Hansen, n 12 at 46.

¹⁰⁹ S Legomsky n 30.

¹¹⁰ ECtHR, *Hirsi Jamaa v Italy*; Wouters, n 2 at 55.

¹¹¹ ECtHR, *ND and NT v Spain*; CRC Committee, *DD v Spain*.

¹¹² Offshore processing and detention are not breaches of IRL or Article 33(1) Refugee Convention *per se*, provided appropriate human rights safeguards are in place: see OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014), Guidelines 5 – 8. Whether safeguards can be effectively implemented in an offshore processing and detention situation remains to be seen, see for example, Australian Senate Inquiry and Report of Serious allegations of abuse, self-harm and neglect of asylum-seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre (21 April 2017).

¹¹³ See T Gammeltoft-Hansen and JC Hathaway, n 3 at 235; V Moreno-Lax and M Giuffre, n 3, forthcoming.

¹¹⁴ T Gammeltoft-Hansen, n 12 at 46; V Moreno-Lax, n 12 at 250 - 251.

¹¹⁵ *Ibid.*

satisfy the criteria which invokes the *non-refoulement* obligation on one of the five Convention grounds or the state is able to argue that the individual is caught by the exception in Article 33(2). Hathaway argues that, 'the insufficiency of the *non-refoulement* guarantee set down by [Article] 33 of the Refugee Convention is effectively remedied by the ability to invoke other standards of international law'.¹¹⁶ In other words, a state cannot argue that the limitations under Article 33 of the Refugee Convention apply to restrict its legal obligations under IHRL.¹¹⁷

Non-refoulement under the Refugee Convention has its limitations in terms of the protection it can offer to people fleeing for non-persecutory reasons. As I discuss below, *non-refoulement* under IHRL is absolute no matter how 'undesirable' or 'undeserving' the person resisting return,¹¹⁸ whereas *non-refoulement* under the Refugee Convention is conditional on satisfying one of the five Convention grounds, not being excluded from protection under Article 1F of the Refugee Convention¹¹⁹ and not being a national security or public order threat.¹²⁰ There have been developments in IHRL, however, which arguably eclipse the IRL concept of *non-refoulement* and provide a better protection basis for a refugee or asylum-seeking child. The next section examines the contribution of IHRL to the development of the *non-refoulement* principle.

5. *Non-Refoulement* in International Human Rights Law

5.1 *Non-refoulement* – Human Rights Treaties

Non-refoulement is recognised beyond IRL and the expansion of the concept has been influenced by developments in IHRL. The scope of the principle under IHRL encompasses both refugees and non-refugees and includes people seeking recognition of refugee status, people whose claim for asylum has failed and individuals excluded from protection under Article 1F of the Refugee Convention. The obligation is referred to explicitly in Article 3 of CAT, in respect of torture and in Article 16 of CED, if there is a

¹¹⁶ JC Hathaway, n 91 at 369 - 370.

¹¹⁷ ECtHR *Chahal v United Kingdom* (15 November 1996) 23 EHRR 413.

¹¹⁸ J McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007) at 22.

¹¹⁹ A person is excluded from refugee status under the Convention, if he or she has committed a crime against peace, a war crime or crime against humanity, has committed a serious non-political crime or has been guilty of acts against the purposes and principles of the United Nations. Note, however, that exclusion under Article 1F is part of the determination process itself and should therefore be distinguished in its role from Article 33(2) of the Refugee Convention.

¹²⁰ Article 33(2) of the Refugee Convention.

'danger of being subjected to enforced disappearance'. In both treaties, the threshold is 'substantial grounds for believing' that the torture or enforced disappearance is a risk if the individual is returned.¹²¹ The CAT Committee assert that for the purposes of determining whether there are grounds for believing that a person would be at risk, the authorities need to take into account 'all relevant considerations including, where applicable, the existence in the State of a consistent pattern of gross, flagrant or mass violations of human rights'.¹²²

Non-refoulement is also implicit in Articles 6 and 7 ICCPR¹²³ and Articles 6 and 37 CRC,¹²⁴ in relation to the right to life¹²⁵ and the prohibition on torture, cruel, inhuman or degrading treatment or punishment.¹²⁶ The International Convention on the Protection of the Rights of all Migrant Workers and their Families (ICMW) does not contain a specific provision on *non-refoulement*, despite having provisions on slavery and forced or compulsory labour.¹²⁷ Nevertheless, Article 22 ICMW provides protection against collective expulsion and procedural safeguards in individual cases of expulsion. The CMW Committee regards *non-refoulement* as an applicable right under the ICMW and interprets it to include the risk of torture and cruel, inhuman or degrading treatment or punishment.¹²⁸ This includes inhuman and degrading conditions of detention for migrants or lack of necessary medical treatment in the country of return and risks to the right to life.¹²⁹ This also applies to a risk of chain *refoulement*.¹³⁰ Moreover, any expulsion or return of a migrant to their country of origin must not arbitrarily interfere with the migrant's right to family and private life.¹³¹

The principle is also incorporated into regional instruments, such as Article II(3) of the Convention Governing the Specific Aspects of Refugee

¹²¹ Article 3(1) CAT and Article 16 (1) CED.

¹²² Committee against Torture, General Comment No 4 on the implementation of article 3 of the Convention in the context of article 22, UN Doc. CAT/C/GC/4 (4 September 2018), para 27.

¹²³ UNHRC, GC 31, para 12.

¹²⁴ CRC Committee GC 6, para 27.

¹²⁵ The right to life under Article 6 CRC includes the right to survival and development and thus is broader than Article 6 ICCPR.

¹²⁶ Article 37 CRC is much broader than Article 7 ICCPR. See section 5.3.3.

¹²⁷ Article 11 CMW.

¹²⁸ CMW General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families, UN Doc. CMW/C/GC/2 (28 August 2013), para 50.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*; ECtHR, *MSS v Belgium and Greece* [GC] Application No 30696/09 (21 January 2011).

¹³¹ *Ibid.*

Problems in Africa,¹³² in Article 22(8) of the American Convention on Human Rights¹³³ and in Article 19 of the EU Charter of Fundamental Rights.¹³⁴ *Non-refoulement* is not explicitly reproduced in the Council of Europe's system of human rights, but has been implied by the ECtHR into Article 3 ECHR.¹³⁵ In *Soering*, the ECtHR affirmed for the first time the *non-refoulement* potential of Article 3 ECHR, '[t]he absolute prohibition of torture and of inhuman and degrading treatment or punishment ... enshrines one of the most fundamental values of the democratic societies making up the Council of Europe'.¹³⁶

Since *Soering*, the Court has produced 'unprecedented output in cases concerning *non-refoulement*, even though it is not a specific principle of the ECHR'.¹³⁷ The case law of the ECtHR demonstrates that its main concern in cases concerning the expulsion of asylum-seekers is 'whether effective guarantees exist that protect the applicant against arbitrary *refoulement*, be it direct or indirect, to the country from which he or she has fled'.¹³⁸ The ECtHR has also expanded the protection of *non-refoulement* to cover *refoulement* actions by states at sea.¹³⁹

The Inter-American Court of Human Rights has also contributed to the development of the *non-refoulement* principle in IHRL.¹⁴⁰ In its Advisory Opinion on the rights of children in the context of international migration, it observes that the principle of *non-refoulement*

may also be invoked by those who wish to assert their right to seek and receive asylum and who are either on the border or have crossed it without being admitted officially or legally into the territory of the country ... This necessarily means that such

¹³² Organisation of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45. In July 2004, the African Union Summit of Heads of State confirmed the continuing relevance of the OAU Convention.

¹³³ American Convention on Human Rights OAS Official Records, OEA/Ser.K/XVI/1.1.

¹³⁴ Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities* (2000/C 364/01)(18 December 2000).

¹³⁵ ECtHR *Soering v. United Kingdom*, Application No. 14038/88 (7 July 1989).

¹³⁶ *Ibid*, para 88.

¹³⁷ Judge Bianku, Dialogue between Judges 2017 *Non-Refoulement as a Principle of International Law and the role of the Judiciary in its Implementation* at 17.

¹³⁸ ECtHR, *JK and Others v. Sweden* [GC], Application no. 59166/12 (23 August 2016), para 78.

¹³⁹ ECtHR *Hirsi Jamaa v Italy*.

¹⁴⁰ IACtHR, *Pacheco Tineo Family v Bolivia*, Judgment, series C No 272 (November 25 2013), para 151; Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-21/14 (August 19 2014) *Rights and Guarantees of Children in the Context of Migration and/or in need of International Protection*, at 79 – 95.

persons may not be rejected at the border or expelled without an adequate and individualized analysis of their requests.¹⁴¹

Although the principle of *non-refoulement* is considered to be at the heart of the refugee protection regime,¹⁴² the discourse of human rights has overtaken it 'via a process of appropriation'¹⁴³ and the duty of *non-refoulement* has emerged as an overlapping ground of protection common to both IHRL and IRL.¹⁴⁴

The principle has been extended to such an extent that international law prohibits, *as a minimum*, the removal of any individual to a country where there is a risk that he or she may face torture, cruel, inhuman or degrading treatment or punishment, persecution or threats to his or her life.¹⁴⁵ Both the Human Rights Committee (HRC) and the CRC Committee have recognised that a person should not be returned 'where there are *substantial grounds for believing* that there is a real risk of irreparable harm'.¹⁴⁶ The UNHCR confirms that:

[s]tates have a duty to establish, prior to implementing any removal measure, that the person whom it intends to remove from their territory or jurisdiction would not be exposed to a danger of serious human rights violations... If such a risk exists, the State is precluded from forcibly removing the individual concerned.¹⁴⁷

Thus, the principle of *non-refoulement* provides a safety net for those who may not satisfy the definition of 'refugee' under the Refugee Convention, but who cannot return to that country because of the risk of torture or death or 'irreparable harm' or serious human rights violation.

The overall influence of IHRL on the principle of *non-refoulement* has broadened the scope of protection under IRL in three aspects.¹⁴⁸ First, the human rights version of *non-refoulement* is not subordinated to or confined to the five grounds of persecution under the Refugee Convention. Second,

¹⁴¹ Ibid, at 82 – 83, para 210.

¹⁴² V Chetail, n 1 at 28.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ E Lauterpacht and D Bethlehem, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Turk and F Nicolson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003); UNHCR, Advisory Opinion n 10.

¹⁴⁶ UNHRC GC 31, para 12; see eg UNHRC *Raziyeh v Denmark* (10 April 2017), UN Doc, CCPR/C/119/D/2512/2014 at para 8.3; CRC Committee, GC 6, para 27. I discuss irreparable harm below in section 5.3.1.

¹⁴⁷ UNHCR, Advisory Opinion n 10, para 22.

¹⁴⁸ V Chetail, n 1 at 36 – 37.

the Refugee Convention definition of refugee applies to persons outside their country of nationality or habitual residence and a person can only be protected by the *non-refoulement* principle outside their country, but no such geographical limitation is imposed by human rights law. Finally, the prohibition on *non-refoulement*, in the context of a return to the risk of torture, is absolute under IHRL and allows for no exceptions/derogations, since it derives from the prohibition against torture. Thus, it applies to asylum-seekers and refugees excluded from *non-refoulement* protection under Article 33(2) of the Refugee Convention.

Chetail argues that the different approaches to *non-refoulement* underlines the rationales behind the two legal regimes – IRL only grants status and protection to those who meet at least one of the Refugee Convention grounds, whereas IHRL is universal and inclusive.¹⁴⁹ Hathaway, however, seeks to temper any notion that the beneficiaries of this broader approach to *non-refoulement* are at an advantage over refugees under the Refugee Convention. The Refugee Convention provides precise legal entitlements to members of the protected class, whereas ‘the new protections against *refoulement* are bare-bones entitlements’.¹⁵⁰ However, McAdam considers that this ‘class’ of beneficiary receives the same benefits because *non-refoulement* provides a source of protection and extends the grounds upon which a person could be granted status as a Convention Refugee.¹⁵¹ In any event, both ‘classes’ of persons will trigger the *non-refoulement* duty of the state and benefit from the state’s overarching obligations to respect, protect and fulfil their rights under IHRL. The development of the *non-refoulement* principle in IHRL reflects an insecure compromise between a state’s right to control access to its territory and the protection of refugees whose lives are at risk.¹⁵² As one commentator has observed ‘[t]he refugee brings to the fore the very tension between the state prerogative to exclude and the human rights imperative to include’¹⁵³ and this is evident in the context of the broadening scope of the duty of *non-refoulement* under IHRL. To complete the picture of development of *non-refoulement* in international law, in the next section, I

¹⁴⁹ Ibid at 37.

¹⁵⁰ JC Hathaway, ‘Leveraging Asylum’ (2010) 45 *Texas International Law Journal* 503 at 504.

¹⁵¹ J. McAdam, n 118 at 197 – 198.

¹⁵² V. Chetail, n 1 at 33.

¹⁵³ E Haddad, ‘Refugee Protection: A Clash of Values’ (2003) 7 *International Journal of Human Rights* 1.

will briefly discuss the existence of a duty of *non-refoulement* in customary international law.

5.2 *Non-Refoulement* – Customary International Law

There is a strong basis for arguing that the principle of *non-refoulement* constitutes a norm of customary international law.¹⁵⁴ The UNHCR considers that the principle has crystallised into a norm of customary international law.¹⁵⁵ This view is shared by senior domestic Courts,¹⁵⁶ ECtHR Judges¹⁵⁷ and academics.¹⁵⁸ This means that it is not only a treaty-based obligation, applicable to state parties, but it also binds all states, even those who have not signed a relevant treaty.¹⁵⁹ The UNHCR notes that states have accepted the principle as binding, especially in cases where states have provided justifications or explanations in cases of actual or implied *refoulement*.¹⁶⁰ The principle has been described as 'an integral part of customary international law' and no state has returned a refugee on the basis that *refoulement* is permissible under international law.¹⁶¹

In addition to the obligations under IRL and IHRL, states have indicated their adherence to the principle in declarations and resolutions (even if they do not always comply with it), such as the Declaration on Territorial Asylum made in 1967,¹⁶² which was adopted unanimously by the General Assembly, the Declaration of States Parties to the Refugee Convention in 2001,¹⁶³ the New York Declaration for Refugees and Migrants

¹⁵⁴ E Lauterpacht and D Bethlehem, n 145 at 163. But see the contrary view of JC Hathaway n 150

¹⁵⁵ UNHCR Note on international protection UN Doc. A/AC.96/951, (13 September 2001) at para 16; UNHCR, Advisory Opinion n 10 at para 15.

¹⁵⁶ *R (European Roma Rights Centre) v. Immigration Officer at Prague Airport* [2004] UKHL 55, para 26 (Lord Bingham).

¹⁵⁷ Judge Bruno Nascimbene, Intervention, *Non-Refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation: Dialogue Between Judges 2017* (ECtHR 27 January 2017) 49; ECtHR *MSS v Belgium and Greece*, Application No30696/09 (21 January 2011), para 56.

¹⁵⁸ See for example, GS Goodwin-Gill and J McAdam, n 87 at 248 and 345; JC Hathaway argues that there is no duty of *non-refoulement* that binds all states as a matter of customary international law: see JC Hathaway, n 150 at 506 and 510.

¹⁵⁹ JC Hathaway, n 150 at 507.

¹⁶⁰ *Ibid.*

¹⁶¹ San Remo Declaration on the Principle of *Non-Refoulement* (September 2001) and 'Explanatory Note on the Principle of Non-Refoulement of Refugees as Customary International Law'.

¹⁶² UN Declaration on Territorial Asylum, UN General Assembly Resolution 2312 (XXII) (adopted 14 December 1967).

¹⁶³ Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09 (16 Jan 2002), para 4.

(2016)¹⁶⁴ and the Global Compact on Refugees (2018).¹⁶⁵ As mentioned above, the customary nature of the principle means that it is binding on states, even if the states are not parties to the Refugee Convention or any of the human rights treaties which explicitly or implicitly recognise the principle. The core element of the customary rule is the 'prohibition of *return in any manner whatsoever* of refugees to countries where they may face persecution'.¹⁶⁶ Goodwin-Gill argues that it goes further than that and regulates state action wherever it may take place, whether in the territory of the state, at the border or outside its territorial jurisdiction.¹⁶⁷ But given the state practice and policies of push-backs, pull-backs and the erection of fences and walls at borders (especially in Europe),¹⁶⁸ it is questionable whether the jurisdictional reach of *non-refoulement* amounts to a customary rule of international law.

The issue of jurisdiction and the extent to which a state may be liable for a violation of the *non-refoulement* principle is a contentious one between states who adopt a narrow concept of jurisdiction, viewing it as territorially limited in relation to *non-refoulement*, and human rights bodies (especially the ECtHR) who in recent years have developed a more expansive and universalist approach to jurisdiction to counter some of the deterrence and *non-entrée* policies adopted by states to shift their protection responsibilities and human rights obligations.¹⁶⁹

In the next section, I examine the relationship between children's rights and the state's obligation of *non-refoulement*.

5.3 *Non-Refoulement* and Child Refugee and Asylum-Seekers

It is arguable that the obligation of *non-refoulement* in the context of children is the broadest expression of the principle in IHRL and demonstrates 'the immense protective power of the norm, and its capacity

¹⁶⁴ UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/Res/71/1 (Resolution adopted by UNGA on 19 September 2016).

¹⁶⁵ UN General Assembly, Report of the UN High Commissioner for Refugees: Global Compact on Refugees, UN Doc. A/73/12 (Part II) (13 September 2018, affirmed by UNGA on 17 December 2018).

¹⁶⁶ GS Goodwin-Gill and J McAdam, n 87 at 248.

¹⁶⁷ Ibid.

¹⁶⁸ See, for example, European Center for Constitutional and Human Rights (ECCHR), *Dossier on Migration* (April 2019).

¹⁶⁹ T Gammeltoft-Hansen, n 12 at 149.

to bind States' actions'.¹⁷⁰ The CRC Committee in General Comment No 6 on unaccompanied asylum and refugee children confirmed that states must respect *non-refoulement* obligations deriving from IHRL, IHL and IRL.¹⁷¹ Both the CMW and CRC Committees emphasised that return is not territorially limited: '[s]tates shall not reject a child *at a border* or return him or her to a country where there are substantial grounds for believing that he or she is at real risk of irreparable harm.'¹⁷² States may argue that their obligations are limited to children who are on the territory of the state and thus limit the duty of *non-refoulement*.¹⁷³ However, as I discussed above, the gradual expansion of the state's jurisdiction to stop people arriving through implementation of *non-entrée* policies and more recently, through cooperative deterrence,¹⁷⁴ including pull back and push back operations has been challenged before human rights bodies and courts to clarify the boundaries of a state's extraterritorial human rights obligations.¹⁷⁵ The duty of *non-refoulement* for children is non-negotiable and no exceptions and derogations are permitted.¹⁷⁶

The interpretation of the principle by the CRC Committee confirms that the applicable IHRL threshold of substantial grounds for believing there is a risk of irreparable harm¹⁷⁷ applies whether the child is on the territory, at the border, on the high seas or in an off-shore processing or detention centre, and thus applies in each of the four scenarios outlined in section 3. However, if the child is not on the territory of the state, where does this assessment of risk take place and what evidence needs to be produced to show that there are substantial grounds for believing there is a real risk? This can only be achieved by giving the child access to the territory of the state as well as a refugee determination process, with procedural guarantees. If the child does not meet the criteria for refugee status, then the state must assess its *non-refoulement* obligation towards

¹⁷⁰ A Farmer, A Commentary on the Committee of the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights' (2011) 80 *Fordham Law Review Res Gestae* 39.

¹⁷¹ CRC Committee, GC 6, para 26.

¹⁷² JGC 3 and 22, para 46 (my emphasis); Cf CRC Committee, GC 6, para 27, which only mentions return to another country; the EU Qualification Directive, article 15 has a 'serious harm' threshold, which covers death penalty and execution, torture, inhuman or degrading treatment or punishment and a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

¹⁷³ As the USA did in the *Sale* case n 36.

¹⁷⁴ T Gammeltoft-Hansen and JC Hathaway, n 3.

¹⁷⁵ See ECtHR *ND and NT v Spain*; ECtHR *SS and Others v Italy* Application No 21660/18 (pending); CRC Committee *DD v Spain* (12 February 2019).

¹⁷⁶ A Farmer, n 170 at 44.

¹⁷⁷ CRC Committee GC 6, para 27.

the child. An assessment of the risk of irreparable harm a child may face if returned cannot be done effectively at a border camp, on the high seas or in a detention centre because there will be a lack of trained personnel, legal representation and access to courts. Thus a state has a duty to admit children who come within its jurisdiction in this way, in order to carry out a proper due process procedure¹⁷⁸ on its territory because Article 33 of the Refugee Convention provides a *de facto* duty to admit the refugee, at least until the refugee's claim is examined, otherwise the state risks violating their duty of *non-refoulement*.¹⁷⁹

For a child refugee, a state must admit the child to determine refugee status and to provide access to justice and due process guarantees, including a right to access the territory for a best interests assessment.¹⁸⁰ As a consequence of the nature and scope of the best interests assessment along with the complex identification, registration and determination process,¹⁸¹ such assessment and determination can only be carried out effectively and practically on the territory of the state which can provide effective protection for the child.

States owe refugee and asylum-seeking children a positive obligation to protect,¹⁸² and this obligation can arise wherever the child encounters the destination state in the scenarios discussed in section 3. Both the duty to protect and the best interests of the child dictate that the child has a right not only to *non-refoulement*, but also to a right to seek and enjoy asylum without the fear of being returned to persecution, torture and ill treatment or irreparable harm. Joint General Comment no 3 and 22 reiterates that the principle of *non-refoulement* has been interpreted by treaty monitoring bodies and international and national courts to be 'an implicit guarantee flowing from the obligations to respect, protect and fulfil human rights'.¹⁸³ Thus, *non-refoulement* in the context of a refugee or asylum-seeking child is centred on the state's obligation to protect the

¹⁷⁸ See OHCHR, *General Principles on Human Rights at International Borders* (2014) at 8.

¹⁷⁹ T Gammeltoft-Hansen and JC Hathaway n 3 at 238; see also JC Hathaway, n 8 at 193.

¹⁸⁰ Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4 and CRC/C/GC/23 (2017) (JGC 4 and 23), para 14 and 17; see also CRC GC 6, para 20.

¹⁸¹ CRC Committee, GC 6, para 40.

¹⁸² See Chapters 2 and 5.

¹⁸³ JGC 3 and 22, para 45.

child's human rights and to prevent third parties from interfering with those rights.

The 'real risk of irreparable harm' threshold to determine whether or not a child should be returned to their country of origin which has been adopted by the CRC Committee¹⁸⁴ requires closer scrutiny. Therefore, the next section examines the interpretation of 'irreparable harm' by the UN Human Rights Committee (HRC), CRC Committee and the ECtHR and how it applies to a child.

5.3.1 Irreparable Harm

Neither the HRC nor the CRC Committee provides a definition of 'irreparable harm' but the CRC Committee has said that at the very least, the phrase includes harm which would violate Article 6 CRC (life, survival and development) or Article 37 CRC (freedom from torture and cruel, inhuman or degrading treatment, right to liberty and prohibition of unlawful or arbitrary detention).¹⁸⁵ The Joint General Comments confirm that 'irreparable harm' includes 'persecution, torture, gross violation of human rights and other irreparable harm'.¹⁸⁶ The HRC has considered what is meant by 'real risk' and has held that the risk must be a necessary and foreseeable consequence of the forced return¹⁸⁷ and the risk must be personal.¹⁸⁸ The threshold is high and considerable weight should be attached to the assessment conducted by the state, which carries the burden of evaluating the facts and evidence to determine whether the risk exists,¹⁸⁹ unless it is found that the evaluation was arbitrary or amounted to a denial of justice.¹⁹⁰

The HRC and the CRC are not clear about the origin of the phrase 'irreparable harm' in their General Comments.¹⁹¹ Irreparable harm was referred to in *Soering v United Kingdom*.¹⁹² The ECtHR held that the

¹⁸⁴ CRC Committee, GC 6, para 27. The CRC Committee, however, also adopt a second test, which states that '[r]eturn to the country of origin is not an option if it would lead to a "reasonable risk" that such return would result in the violation of fundamental human rights of the child', but do not elaborate on what is meant by 'reasonable risk' and whether this is a higher or lower threshold than 'real risk of irreparable harm'. GC no 6, para 82 and 84.

¹⁸⁵ CRC Committee, GC 6, para 27.

¹⁸⁶ JGC 3 and 22, para 45.

¹⁸⁷ UNHRC *ARJ v Australia* 692/1996, (28 July 1997), para 6.8 and 6.14; UNHRC *GT v Australia* 706/1996, (4 December 1997), para 8.1; UNHRC *X v Sweden* 1833/2008 (1 November 2011), para 5.18.

¹⁸⁸ UNHRC *Raziyeh v Denmark* 2512/2014 (10 April 2017), at para 8.3.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*; UNHRC *Errol Simms v Jamaica* 541/1993 (3 April 1995), inadmissibility hearing, para 6.2; UNHRC 2007/2010 *X v Denmark* (12 May 2014), para 9.3.

¹⁹¹ HRC GC 31 and CRC Committee GC 6; M Foster, n 32 at 273.

¹⁹² *Soering v United Kingdom*, para 90.

'object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective' and 'consistent with the general spirit of the Convention.'¹⁹³ Following *Soering*, the ECtHR held that the *non-refoulement* obligation only applies in cases where the risk of 'irreparable harm' relates to the violations of absolute and non-derogable rights, such as Article 3 ECHR.¹⁹⁴ '[I]t cannot be required that an expelling Contracting State only return[s] ...where the conditions are in full and effective accord with each of the safeguards...set out in the [ECHR]'.¹⁹⁵ However, the *non-refoulement* doctrine can apply to rights that are not absolute and non-derogable, where they encapsulate an 'internally accepted standard and violation will lead to serious and irreparable harm'.¹⁹⁶

Noll considers that the difficulty with adopting the 'irreparable harm' benchmark as a means of restricting the scope of *non-refoulement* is that it is 'ambiguous and difficult to pin down' and it 'opens up a new arena for indeterminacy, turning on the question of exactly what is reparable and what is not'.¹⁹⁷ Unfortunately the CRC Committee does not provide clarity when it suggests that irreparable harm includes but is 'by no means limited to ... Articles 6 and 37 CRC'.¹⁹⁸ The CRC only provides one stark example of irreparable harm in General Comment No 6: where children will be at risk of underage recruitment and participation in hostilities.¹⁹⁹ The CRC had an opportunity to clarify the meaning of 'irreparable harm' in *IAM (KYM) v Denmark*,²⁰⁰ but this was not addressed.²⁰¹ In *DD v Spain*,²⁰² the Committee said that the state has an obligation to conduct an initial evaluation procedure to evaluate the risk of irreparable harm to the child, including serious violations of their rights in the country to which they will be transferred or returned.²⁰³ The HRC have tended to focus on whether

¹⁹³ *Ibid*, para 87.

¹⁹⁴ See, for example: ECtHR *Z and T v The United Kingdom*, Application No 27034/05 (28 February 2006), paras 4 and 6.

¹⁹⁵ *Ibid*, para 6.

¹⁹⁶ *Ibid*; M Foster, n 32 at 275 - 276.

¹⁹⁷ G Noll, n 47 at 466.

¹⁹⁸ CRC Committee, GC 6, para 27.

¹⁹⁹ *Ibid*, para 28; Article 38 CRC and Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, Articles 3 and 4. See discussion on Article 38 below.

²⁰⁰ CRC Committee, *IAM (KYM) v Denmark* (25 January 2018).

²⁰¹ See below in section 5.3.5 for further discussion on CRC Committee *IAM (KYM) v Denmark*.

²⁰² CRC Committee, *DD v Spain*.

²⁰³ *Ibid*, para 14.4.

the risk of harm amounts to inhuman or degrading treatment or a violation of the right to life.²⁰⁴ The question of whether irreparable harm covers a situation where a child might be returned to a situation of deprivation and lack of economic and social rights has been contemplated by the CRC Committee.²⁰⁵ Taking its lead from the HRC, ECtHR and CRC, the CMW Committee's *non-refoulement* approach focuses on the risk to the right to life as well as the risk of torture and cruel, inhuman and degrading treatment or punishment.²⁰⁶

For the remainder of this section, I examine Articles 6 (right to life, survival and development), Article 37 (freedom from torture, inhuman and degrading ill-treatment or punishment) and Article 38 (state obligations in relation to the recruitment of children into the armed forces and participation in hostilities) which are the three CRC provisions the CRC Committee has specifically linked to *non-refoulement*. If there is a risk that the rights protected in these Articles will be violated by returning a child, then the child is at a 'real risk of irreparable harm' and should not be returned to their country of origin or habitual residence. I then consider other rights which may lead to a 'real risk of irreparable harm' and thus will trigger the host state's *non-refoulement* obligations.

5.3.2 Article 6 CRC

Article 6(1) CRC is set out in similar terms to Article 6 ICCPR²⁰⁷ and therefore, the HRC's interpretation of 'irreparable harm' in General Comment No 31 is relevant.²⁰⁸ A child shall not be returned if there are risks associated with violence and exploitation, trafficking and involvement in organised crime²⁰⁹ as well as threats to his or her life, including where there is a real risk that he or she could be sentenced to death,²¹⁰ which is prohibited under Article 37(a) CRC. The CRC Committee's interpretation of the implied *non-refoulement* duty²¹¹ has a broader scope than Article 6 ICPPR because Article 6 CRC includes the right to survival and development.²¹² In joint General Comment 3 and 22, the Committees

²⁰⁴ M Foster, n 32 at 273.

²⁰⁵ CRC Committee, GC 6, para 27; see below under 'other rights'.

²⁰⁶ CMW Committee General Comment no 2 on the Rights of Migrant Workers in an irregular Situation and Members of their Families (20 August 2013), para 50.

²⁰⁷ Article 6 ICCPR guarantees the 'inherent right to life'.

²⁰⁸ UNHRC, GC 31, para 12.

²⁰⁹ CRC Committee, GC 6, paras 23 and 24.

²¹⁰ UNHRC, GC 31, para 12.

²¹¹ CRC Committee, GC no 6, para 27.

²¹² Article 6(2) CRC; JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017) at 193.

stipulate that any return measure should 'be sustainable from the perspective of the child's right to life, survival and development',²¹³ which suggests that Article 6(2) should be a part of the irreparable risk assessment and may trigger a state's *non-refoulement* obligations.

There is a strong basis for arguing that *non-refoulement* also embraces the notion that deprivation of social and economic rights constitutes a 'real risk of irreparable harm', because such deprivation may cause irreparable harm to the child's survival or development under Article 6(2) CRC. This is derived from the drafters of the CRC whose interpretation of the right to life 'should be positive and take into account economic, social and cultural conditions'²¹⁴ and the Committee's assertion that such rights must be taken into consideration when contemplating the return of a child.²¹⁵ Nevertheless the threshold remains that there must be *substantial grounds for believing* that a child is at risk of irreparable harm, so not every violation of Article 6(2) CRC will automatically engage a state's *non-refoulement* obligations.²¹⁶

The Committee on Economic and Social Rights (CESCR) has not considered *non-refoulement* in the context of economic, social or cultural rights and as Foster observes, there is a lack of academic writing indicating support for the possibility of such an approach.²¹⁷ However, Foster argues that *non-refoulement* should include the risk of deprivation of socio-economic rights under general IHRL.²¹⁸ She finds support for her argument in the development of a socio-economic approach to the right to life and the prohibition on cruel, inhuman or degrading treatment or punishment, which has evolved through litigation before the HRC, the UK courts²¹⁹ and in cases before the ECtHR.²²⁰

Foster's argument for broadening *the non-refoulement* principle to cover social and economic rights is equally applicable to the situation of child refugees, arguably more so. The CRC in General Comment no 6 stated that the 'real risk of irreparable harm' grounds was 'by no means

²¹³ JGC 3 and 22, para 32(k).

²¹⁴ UN ECSOC, Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, (1988), UN Doc No. E/CN.4/1988/28, para 21.

²¹⁵ CRC Committee GC 6, paras 27 and 84 – see also JGC 3 and 22, para 33.

²¹⁶ JM Pobjoy, n 212 at 193.

²¹⁷ M Foster, n 32 at 279.

²¹⁸ Ibid.

²¹⁹ For example, *R (Adam, Limbuela and Tesema) v Secretary of State for the Home Department* [2005] UKHL 66.

²²⁰ For example, ECtHR *MSS v Belgium and Greece*; ECtHR, *Rahimi v Greece*; ECtHR, *Khan v France*; M Foster, n 32 at 285, 302 – 307.

limited to' Articles 6 and 37 CRC'.²²¹ In the same paragraph, the Committee indicated that 'any assessment of risk must be conducted in an age and gender-sensitive manner and should take into account the particularly serious consequences of insufficient food provision or lack of health services'.²²² Furthermore Article 6(2) CRC guarantees the child a right to survival and development, which requires that all rights, including economic and social rights be respected, protected and fulfilled.²²³

Farmer argues that this assertion by the CRC Committee has established a much lower threshold for triggering a state's duty under *non-refoulement* where socio-economic rights are concerned.²²⁴ However, I am not convinced the CRC Committee's assertion leads to a *lowering* of the threshold as there remains a requirement to show 'substantial grounds for believing that there is a real risk of irreparable harm to the child',²²⁵ thus the threshold remains the same. Instead, this approach by the CRC Committee suggests that the *non-refoulement* obligation has a broader scope than the traditional conceptualisation of *non-refoulement* in IHRL. Indeed, as Farmer observes:

[t]hroughout General Comment No. 6, the Committee articulates a broad approach to *non-refoulement* and related concepts, emphasizing that the protection of children's fundamental human rights—including economic and social rights—cannot be suspended.²²⁶

The obligation of the state under Article 6 includes responding to children living in squalid conditions in tents at a border, where basic services such as education, health and adequate living standards are lacking, children boarding unseaworthy boats to reach safety or risking their lives to climb fences and barbed wire,²²⁷ as well as the dangers associated with trafficking and violence in makeshift or *ad hoc* camps.²²⁸ State obligations

²²¹ CRC Committee, GC 6, para 27.

²²² Ibid.

²²³ JGC 3 and 22, paras 40 – 44 (subject to Article 4 CRC).

²²⁴ A Farmer, n 170 at 42.

²²⁵ CRC Committee, GC 6, para 27; JGC 3 and 22, para 45.

²²⁶ A Farmer, n 170 at 43 (my emphasis).

²²⁷ CRC Committee *DD v Spain*; ECtHR, *NT and ND v Spain*

²²⁸ See, for example UNICEF *Neither Safe nor Sound* (2014); ECtHR *ShD v Greece* (2019).

under Article 6 CRC override any responsibility to fulfil harsh return policies under bilateral agreements²²⁹ or interdiction at sea policies.²³⁰

5.3.3 Article 37 CRC

Article 37 protects a child from torture, inhuman and degrading ill treatment or punishment and in this sense, it is similar to the provision in Article 7 ICCPR. Thus, the interpretation by the HRC will be influential in the context of children who are threatened with removal or deportation.²³¹ The CRC Committee has emphasised the importance of taking into account the individual circumstances of a child and assessing risk 'in an age and gender sensitive manner'.²³²

However, Article 37 CRC goes beyond its equivalent section in ICCPR, because it also includes the right to liberty and freedom from unlawful or arbitrary detention and prohibits the death penalty, sentences of life without parole, and inappropriate detention practices without a proper legal procedure.²³³ This demonstrates the broader remit of Article 37 CRC, as it confers on states a greater duty of *non-refoulement* to children than the duty owed to adults under Article 7 ICCPR. A returning state, therefore, is under an obligation, as part of its evaluation of the risk, to consider whether returning the child would lead to a violation of Article 37 in its broadest sense. The *non-refoulement* obligations apply whether the harm is perpetrated by non-state actors or if the actions were intended or were the indirect consequences of state action.²³⁴ The ECtHR case of *MSS v Belgium and Greece*²³⁵ demonstrates the extent of the enquiry a state must undertake to ensure that the asylum-seeker will have access to basic services including health care and adequate living standards and that states should not rely on the 'diplomatic assurances' of the receiving state nor assume that the receiving state maintains the same standards of reception conditions as the sending state.²³⁶ The obligation in relation to children is

²²⁹ For example, the EU-Turkey deal of 18 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 18 August 2018); Italy-Libya Treaty on Friendship, Partnership and Cooperation (30 August 2008); Italy-Libya Memorandum of Understanding (February 2017).

²³⁰ For example, the policy of the United States from the early 1980s to return Haitian refugees to Haiti without a refugee status determination hearing: Presidential Proclamation No. 4865, 3 CFR 50-51 (1981-1983 Comp.); President Bush: Executive Order No. 12807 (May 23 1992).

²³¹ See eg UNHRC, GC 20, para 9.

²³² CRC Committee GC 6, para 27.

²³³ Article 37 CRC; see also discussion of Article 37 in Chapter 3.

²³⁴ JGC 3 and 22, para 46.

²³⁵ ECtHR *MSS v Belgium and Greece*.

²³⁶ ECtHR *MSS v Belgium and Greece*, paras 353 – 354.

even greater, given the need to consider a child's best interests, whether the child is returning to a family environment or state care and to evaluate whether the country to which the child is returning has facilities which meet the requirements of Article 3(3) CRC to ensure that institutions, services and facilities conform with the standards established by 'competent authorities'. In joint General Comment no 3 and 22, the state's obligations extends to putting together an individual plan for sustainable reintegration, adopting 'a rights-based approach, [which includes] immediate protection measures and long-term solutions, in particular effective access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence'.²³⁷ In addition, a decision to return must be based on evidentiary considerations and follows a procedure with appropriate due process guarantees and a best interests assessment and determination, which ensures 'that the child, upon return, will be safe and provided with proper care and enjoyment of rights'.²³⁸

5.3.4 Article 38 CRC and Articles 3 and 4 OPAC

The CRC Committee specifically highlights the dangers of underage recruitment and participation in hostilities as a clear example of a 'risk of irreparable harm'.²³⁹ The primary risk of irreparable harm identified is the right to life, but also covers other dangers a child may face not only as a combatant, but also where the child might be forced to provide sexual services and become indirectly involved in hostilities through carrying out military duties.²⁴⁰

Article 38 CRC and the Optional Protocol on the involvement of children in Armed Conflict (OPAC),²⁴¹ cover the rights of children in the context of underage recruitment and participation in hostilities. Article 38 CRC does not prohibit states from recruiting children into the States Parties' armed forces, nor does it set a minimum age for participation in hostilities. States are encouraged to 'take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a

²³⁷ JGC 3 and 22, para 32(k).

²³⁸ *Ibid*, para 33.

²³⁹ CRC Committee GC 6, para 28.

²⁴⁰ *Ibid*.

²⁴¹ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, UN Doc. A/RES/54/263 (adopted 25 May 2000, entered into force 12 February 2002) (OPAC).

direct part in hostilities'.²⁴² States 'shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces' and states shall be guided by the principle that priority should be given to those who are the oldest.²⁴³ OPAC adds flesh to the bones of Article 38, reminding states that persons under eighteen years of age are entitled to special protection,²⁴⁴ as well as raising the minimum age for direct participation in hostilities to eighteen.²⁴⁵ Children under eighteen years cannot be compulsorily recruited into a state's armed forces.²⁴⁶ There is an obligation to raise the minimum age for voluntary recruitment, although it is at the discretion of the state, it must be higher than fifteen years.²⁴⁷ OPAC also sets out safeguards to ensure that the recruitment of persons under eighteen is genuinely voluntary and not forced or coerced.²⁴⁸

The Committee asserts that Article 38 alongside Articles 3 and 4 of OPAC 'entail extraterritorial effects'.²⁴⁹ It is incumbent upon states to 'refrain from returning a child *in any manner whatsoever* to the borders of a State where there is a real risk of underage recruitment ... or where there is a real risk of direct or indirect participation in hostilities'.²⁵⁰ Given that OPAC has set out specific safeguards to ensure that recruitment of children over the age of 15 is truly voluntary, it must follow that a state, in deciding whether to return a child, must check such safeguards are in place in the country of return as part of the risk assessment. Any failure to do so could arguably be a violation of the *non-refoulement* principle.

5.3.5 Other rights

The CRC Committee have emphasised that the risk of irreparable harm includes Articles 6 and 37 CRC, but it is not limited to these articles and thus other rights can and will engage a state's *non-refoulement* duty.²⁵¹ Further risks include the unsatisfactory conditions for migrants on return including lack of medical facilities and situations should be avoided where expulsions would constitute an arbitrary interference with the right

²⁴² Article 38(2) CRC.

²⁴³ Article 38(3) CRC.

²⁴⁴ Article 3(1) OPAC.

²⁴⁵ Article 1 OPAC.

²⁴⁶ Article 2 OPAC.

²⁴⁷ Article 3(1) OPAC.

²⁴⁸ Article 3(2) and (3) OPAC.

²⁴⁹ CRC Committee, GC 6, para 28.

²⁵⁰ *Ibid.*

²⁵¹ CRC Committee, GC 6, para 27.

to family and private life.²⁵² The joint General Comments remind states of their duties to protect children and that this extends to ensuring that the child, upon return 'will be safe and provided with proper care and enjoyment of rights'.²⁵³ If a plan for a child's sustainable integration cannot be secured the child should not be returned.²⁵⁴

In the case of *IAM (KYM) v Denmark*,²⁵⁵ the author alleged a breach of Article 19 CRC, which obliges the state to protect the child from all forms of physical and mental violence, because her child was at risk of being subjected to female genital mutilation (FGM). Although the CRC Committee did not discuss the meaning of 'irreparable harm', in particular whether *any* violation of Article 19 CRC amounts to irreparable harm, the case confirms that the risk of being subjected to FGM is a 'real risk of irreparable harm' and the child and her mother should not be returned to a place where FGM is practised widely, despite the government prohibiting its practice.²⁵⁶ The CRC Committee did not provide guidance on how a state should assess the 'substantial grounds for believing' threshold, but instead applied a 'principle of precaution' approach for evaluating the risk of the child being subjected to 'an irreversible harmful practice' on return.²⁵⁷ It is unclear whether both approaches need to be applied or if they are mutually exclusive. Thus, if there is 'reasonable doubt' that the receiving state cannot protect the child from harmful practices such as FGM, the state should refrain from returning the child.²⁵⁸ The CRC Committee also reiterated that as part of the state's duty to protect the child, the mother or primary caregiver should also be given (international) protection.²⁵⁹

Pobjoy argues that because the *non-refoulement* obligations under the CRC are distinct from and wider than the general obligations under CAT and the ICCPR, they warrant separate consideration in claims involving children.²⁶⁰ This is because children experience harm differently to adults. Pobjoy notes that there has been a tendency to overlook the CRC's approach to *non-refoulement* and ignore the additional risks which children

²⁵² Ibid.

²⁵³ JGC 3 and 22, para 32.

²⁵⁴ Ibid para 33.

²⁵⁵ CRC Committee, *IAM (KYM) v Denmark*.

²⁵⁶ Ibid, at para 11.8(c).

²⁵⁷ Ibid; see discussion on principle of precaution in section 6.4 below.

²⁵⁸ Ibid.

²⁵⁹ Ibid, para 11.4; Joint General Recommendation No 31 Committee on the Elimination of Discrimination Against Women and No 18 Committee on the Rights of the Child on harmful practices (2014), para 55.

²⁶⁰ JM Pobjoy, n 212 at 192.

face.²⁶¹ In particular, despite developments in regional and national complementary protection regimes, most of the jurisprudence refers only to the explicit obligation under Article 3 of CAT and the implied obligations under Articles 6 and 7 of ICCPR and to assume that the provisions in the ICCPR are broad enough to cover the obligations under the CRC.²⁶² Part of the reason for this is the general tendency to conflate the various *non-refoulement* obligations (which runs the risk of undermining international protection)²⁶³ and also the fact that the CRC Committee followed the HRC and adopted the same wording for the threshold of risk in General Comment No 6²⁶⁴ and again in joint General Comment no 3 and 22.²⁶⁵

There is evidence of a more prominent role played by best interests both in relation to *non-refoulement* and as a mechanism for ensuring a child receives 'appropriate protection', as required by Article 22 CRC. In the next section, I examine how best interests adds a layer to the child's right to protection within the scope of *non-refoulement*.

6. Best Interests, Protection and *Non-Refoulement*

The best interests principle has an important role in the protection of children facing removal or return to their country of origin. As I have previously discussed, it has become a universally acknowledged principle which is applied in IRL.²⁶⁶ Article 3(1) CRC and Article 3(2) CRC are not territorially limited and thus apply wherever the state exercises jurisdiction. Both sections of Article 3 are applicable in each of the four scenarios discussed in section 3 above. However, when a state is exercising migration control extraterritorially and employing policies of *non-entrée*, who is responsible for ensuring that a child's best interests are assessed and for guaranteeing the care and protection necessary for the child's well-being? The obligation under Article 3(1) is to consider the child's best interests as a primary consideration in *all* actions concerning children but

²⁶¹ Ibid at 190.

²⁶² Ibid at 190 – 191.

²⁶³ F Messineo, n 73 at 132.

²⁶⁴ CRC Committee, GC 6, para 27.

²⁶⁵ JGC 3 and 22, para 45.

²⁶⁶ CRC Committee GC 6, para 31; JGC 3 and 22, paras 27 – 33; UNHCR, *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva 1994) (reprinted in 2001); UNHCR *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva May 2008); New York Declaration for Refugees and Migrants; Global Compact on Refugees; in legal instruments both nationally (eg s 55 of the Borders, Citizenship and Immigration Act 2009) s 55 BCIA)) and regionally (Preamble, paragraph 18 of the EU Qualification Directive and Art 24 of the European Charter of Fundamental Rights); EASO, *Practical guide on the best interests of the child in asylum procedures* (European Asylum Support Office, 2018).

this is not addressed to state parties specifically. It applies to public or private social welfare institutions, courts of law, administrative or legislative bodies. Thus, it has a broad remit and any state official or anyone acting on behalf of the state or any other body or international organisation carrying out status determinations (for example European Asylum Support Office (EASO) or UNHCR) are bound to consider the child's best interests. The right to protection in Article 3(2) is addressed to all state parties who are required to take *all* appropriate legislative and *administrative measures*, which challenges any measures by states whose purpose is to stop refugee children from reaching a place of protection. Article 22 adds a further layer to this, requiring states to take 'appropriate measures' to ensure the child receives 'appropriate protection and humanitarian assistance'. Thus, wherever a child encounters a state, the state is required to meet the child's protection needs and best interests *and* owes the child a *non-refoulement* obligation. This is the combined effect of Articles 3(1), 3(2) and 22(1).

If the approach of the CRC Committee and CMW is followed, it could never be in a child's best interests to return a child or reject a child at the border where there are substantial grounds for believing that he or she is at real risk of irreparable harm.²⁶⁷ A question, which is not addressed in joint General Comment no 3 and 22, is whether it is enough to prove that return or rejection at the border is not in the child's best interests, in cases where he or she is not at *real risk of irreparable harm*. The CRC asserts that the best interests element of the risk assessment, in deciding whether there is a 'reasonable risk of irreparable harm', must evaluate whether 'such return would result in the violation of [the] fundamental rights of the child'.²⁶⁸ The risk evaluation must take into account the safety, security and other considerations including socio-economic conditions, availability of care arrangements, views of the child, the child's level of integration into the host country, the child's rights to preserve his or her identity including nationality, name and family relations (Article 8) and the desirability of continuity in the child's upbringing and to the child's ethnic, religious, cultural and linguistic background (Article 20).²⁶⁹ All of these factors are also relevant to a best interests assessment.

²⁶⁷ Ibid, para 46.

²⁶⁸ CRC Committee, GC 6, para 84.

²⁶⁹ Ibid.

Pobjoy has argued that the best interests principle should be regarded as an independent or complementary source of protection for children in this context.²⁷⁰ The CRC and Article 3 in particular, provide a 'critical, legal and moral benchmark for the treatment of children'.²⁷¹ Pobjoy's central argument is that the principle may preclude the removal of a child to his or her country of origin, even though the child is not eligible for refugee protection under the Refugee Convention or is not at risk of irreparable harm, if returned.²⁷² Pobjoy observes that application of Article 3(1) in the context of international protection claims has generally been limited to procedural guarantees and the treatment of children during and after the status determination procedure.²⁷³ But the principle is equally relevant to the substantive determination of a child's claim and has particular significance in relation to protection from *refoulement*, although Pobjoy asserts that the principle does not alter or displace the need to prove refugee status.²⁷⁴ The question will be whether the removal of the child is in the child's best interests and if removal is not in the child's best interests there should be a presumption against removing the child.²⁷⁵ Pobjoy's argument, influenced by Goodwin-Gill's assertion that the CRC calls for a 'total alignment of protection', is not solely based on a refugee status determination process under the Refugee Convention, but rather on a 'complete welfare approach' for child refugees.²⁷⁶ The CRC Committee pursue a more rights-based approach²⁷⁷ and deliberately distances itself from a 'protection' or welfare approach.²⁷⁸ Ultimately the focus of the state's obligation of *non-refoulement* is ensuring the child's right to protection and seeking a sustainable solution in the best interests of the child.

²⁷⁰ In other words, independent of the protection offered by the Refugee Convention or independent of a state's *non-refoulement* obligations, see JM Pobjoy, 'The Best Interests Principle as an Independent Source of International Protection' (2015) 64 *International and Comparative Law Quarterly* 327 at 328.

²⁷¹ Ibid at 362; See also GS Goodwin-Gill, 'Introduction to the Expert Roundtable on The United Nations Convention of the Rights of the Child and its application to child refugee status determination and asylum processes' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 226.

²⁷² JM Pobjoy, n 212 at 199.

²⁷³ Ibid 197.

²⁷⁴ Ibid at 198.

²⁷⁵ Ibid. See also the discussion on *non-refoulement* in Chapter 5.

²⁷⁶ GS Goodwin-Gill, 'Who to Protect. How...and the Future?' (1997) 9 *International Journal of Refugee Law* 1 at 7.

²⁷⁷ See, for example CRC Committee, General Comment no. 13, 'The right of the child to freedom from all forms of violence', UN Doc. CRC/C/GC/13 (2011).

²⁷⁸ Ibid, paras 3(b) and 59.

What follows is an analysis of a state's return decisions and migration control actions which potentially engage *non-refoulement* obligations and where Articles 3(1) and (2) and Article 22(1) should be operationalised.

6.1 Return decisions

The decision to return a child, who is on the territory of a state but is not recognised as a refugee, must ensure best interests are a primary consideration when any decision is made

pursuant to a procedure with appropriate due process safeguards, including a robust, *individual* assessment and determination of best interests... [and] that the child, upon return, will be safe and provided with proper care and enjoyment of rights.²⁷⁹

States not only have an obligation to ensure that there is no real risk of irreparable or serious harm or persecution upon return,²⁸⁰ but also there is a positive obligation to ensure the child receives *appropriate* protection (Article 22(1)) and that the child receives such protection and care as is necessary for his or her well-being (Article 3(2)). This places a heavier burden on states when considering whether to return a child and may prevent the child from being returned if it is not in his or her best interests to be returned. The CRC Committee states this very clearly:

[r]eturn to the country of origin is not an option if it would lead to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child, and in particular if the principle of *non-refoulement* applies.... Return can only be arranged *if such return is in the best interests of the child*.²⁸¹

A child should not be returned to his or her family, even if that is considered to be in the child's best interests, if the child's interests are outweighed by the risk of harm or by inadequate socio-economic protection waiting for the child upon his or her return.²⁸² The child's family should be reunited with him or her in the state where the child's protection needs have been assessed fully, especially if the child has been granted refugee

²⁷⁹ JGC 3 and 22, para 33 (my emphasis).

²⁸⁰ See above in para 3.2.1.

²⁸¹ CRC Committee GC 6, para 84 (my emphasis).

²⁸² S Ruxton, Separated Children Seeking Asylum in Europe: A Programme for Action, (Save the Children and UNHCR 2000) at 60-61.

status as this 'constitutes a legally binding obstacle to return to the country of origin and, consequently, to family reunification therein'.²⁸³

In view of the broad recognition of the best interests principle in children's rights, states should justify any of their decisions about returning children to their countries of origin on the grounds of best interests, but, given the contentious nature of asylum and immigration, this is often accorded a narrow interpretation in order to justify return. This weaponising of best interests as a means to justify returning a child 'home' to their country of origin has been adopted, for example by the UK government who argue that a generous admission policy for child asylum-seekers alongside liberal family reunification measures would encourage parents and families to use their children as anchors to secure entry into the UK. However, the UK's House of Lords EU Committee in 2016, found no evidence that EU member states which adopt a more generous family reunification approach experienced a 'spike' in the numbers of so-called anchor children being sent ahead of families. In fact, there was evidence to suggest that unaccompanied children were reluctant to seek family reunification for fear of putting their families in danger.²⁸⁴

A narrow interpretation of the child's best interests in return decisions, however, misses the requirement for a meticulous best interests determination set out in General Comment no 6, taking account of the 'safety, security and other conditions, including socio-economic conditions, awaiting the child upon return'.²⁸⁵

Although 'real risk of irreparable harm' is the benchmark for whether or not a child should be returned, it is clear that the CRC Committee considers a best interests *determination* as an essential part of this risk assessment. This is reiterated in joint General Comment no 3 and 22.²⁸⁶ States must ensure that any decision to return a child is based on 'evidentiary considerations' on a case by cases basis.²⁸⁷ For most states the best interests principle only applies to children on their territory.²⁸⁸ If

²⁸³ CRC Committee GC 6, para 82 and 83; see Chapter 3, section 4.5.

²⁸⁴ UKHL EU Committee Report, 'Children in Crisis: Unaccompanied Migrant Children in the EU', 2nd Report of Session 2016-17, paras 56 – 62.

²⁸⁵ Ibid, para 84.

²⁸⁶ JGC 3 and 22, para 32(k).

²⁸⁷ Ibid, para 33.

²⁸⁸ See for example, in the UK, the duty to safeguard the welfare of children only applies to those children in the UK (s 55 BCIA); UNICEF calls for the care and protection of a child to cross borders and this includes cooperation between states in the child's best interests: see UNICEF, *A Child is a Child: Protecting children on the Move from Violence, Abuse and Exploitation* (UNICEF, New York 2017) at 51.

states do not accept that they have an extra-territorial obligation, they will not recognise a best interests obligation in relation to their actions taken outside the state, so if a child is pushed back to a transit country (for example, to Libya by Italy) or to their country of origin (for example, to Syria by Turkey) without stepping foot on the territory of the destination state, an obligation to assess or determine the child's best interests does not kick in. Furthermore, it is difficult to envisage how a child can challenge the lack of assessment or determination of their best interests if they are not on the territory of the state. What mechanisms or procedures can such children access to challenge a summary return/push back to a state where there is a risk of irreparable harm?

In terms of the care and accommodation which an unaccompanied child may be returned to, it is the obligation of the returning state under Article 3(3) CRC to assess whether the institutions, services and facilities responsible for the care and protection of the child conform with the standards established by 'competent authorities', particularly in the areas of safety and health.²⁸⁹ In a return situation, it is not clear whether the standards of the competent authorities refers to the competent authorities of the country of origin or the returning country. The CRC committee sets the standard high and indicates that return home after a thorough best interests assessment is likely to be exceptional.²⁹⁰ If the assessment is that a child should return home, an individual plan should be prepared and should include effective reintegration with access to education, health, psychosocial support, family life, social inclusion, access to justice and protection from all forms of violence. Such return and reintegration should be *sustainable* from the perspective of the child's right to life, survival and development.²⁹¹ If this is not fulfilled, a state could be in breach of its *non-refoulement* obligation. Thus a proposal of Norway and Denmark to set up children's reception centres in Kabul in order to return Afghan teenagers, for instance,²⁹² will need to comply with the high standards set by the CRC and the CRC Committee and both states will need to be involved in monitoring the centres to ensure their duties towards these children are

²⁸⁹ Article 3(3).

²⁹⁰ CRC Committee GC 6, para 86.

²⁹¹ JGC 3 and 22, para 32(k).

²⁹² See Reuters, *Denmark, Norway eye Kabul centre for minors denied asylum* (20 June 2018), available at: <https://uk.reuters.com/article/uk-europe-migrants-nordics-afghanistan/denmark-norway-eye-kabul-centre-for-minors-denied-asylum-idUKKBN1JG2PO>.

fulfilled.²⁹³ A recent and disturbing report from Save the Children²⁹⁴ who interviewed 57 children returned to Afghanistan by EU member states and Norway revealed that three-quarters of these children did not feel safe during the returns process. On arrival most received little or no support and only three had reintegration plans. Although most of them had attended school in Europe, only ten of the returnees interviewed went to school in Afghanistan and most experienced violence, discrimination and insecurity on a daily basis and most expected to attempt to re-migrate within the year. One of the conclusions of the report was that, 'the processes and support necessary to ensure sustainable returns for children are not in place'.²⁹⁵

States such as the UK avoid a costly and lengthy assessment procedure and the risk of violating their duty of *non-refoulement*, by granting unaccompanied children who fail to secure refugee status a temporary form of protection until they are 17½.²⁹⁶ However, as soon as the child reaches 18, he or she will be returned²⁹⁷ without any form of best interests assessment or without any of the due process guarantees and robust procedures recommended by the CRC and CMW committees in joint General Comment no 3 and 22.²⁹⁸

A best interests determination or assessment must be carried out, guided by the child protection authorities of the returning state.²⁹⁹ This is essential for the child's right to protection and to ensure the state's obligation of *non-refoulement*. In a best interests framework, it is inconceivable that a child would be returned at the border without first ascertaining whether the child meets the refugee determination criteria and determining his or her protection needs.³⁰⁰ Thus, as part of the child's right to protection, in particular 'appropriate protection' under Article 22

²⁹³ JGC 3 and 22, para 32(k). Such a proposal is not likely to meet such stringent requirements, given that the UNHCR has designated Kabul as a place 'not safe' for return: UNHCR Eligibility Guidelines for Afghanistan 30 August 2018, see <https://www.ecre.org/afghan-capital-not-safe-for-return-according-to-unhcrs-newest-guidelines>.

²⁹⁴ Save the Children, *From Europe to Afghanistan: Experiences of Child Returnees* (Save the Children and Samuel Hall, Sweden 2018).

²⁹⁵ *Ibid*, at 8 and 50.

²⁹⁶ This is known as Unaccompanied Asylum-seeking Child leave (UASC) – UK Immigration Rules, para 352ZE.

²⁹⁷ See for example, *The Independent*, 'Hundreds of children seeking refuge in the UK deported to 'unsafe' countries at age 18', 12 April 2019; available at: <https://www.independent.co.uk/news/uk/home-news/asylum-seekers-children-uk-iraq-afghanistan-somalia-home-office-a8853866.html>; See also Save the Children (2018), n 294.

²⁹⁸ JGC 3 and 22 paras 32 and 33.

²⁹⁹ JGC 3 and 22, para 32 (j).

³⁰⁰ JM Pobjoy n 212 at 54.

CRC, there is necessarily an implied right to admit a child in order to assess his or her best interests and protection needs.

6.2 Migration Control Actions

A child's best interests must also be a primary consideration in any decision made about border control and any measures or action taken to prevent border crossing or to stop people arriving, which affect children in general or individually, directly or indirectly.³⁰¹ For example, states must consider the impact on the best interests of children affected by a decision to close a border or to prevent safe passage or to enter a bilateral agreement which includes any push back or pull back action on the high seas or elsewhere. Such actions are unlikely to be in the best interests of the child or compliant with the child's right to protection under Articles 3(2) and 22 CRC.

As I have highlighted earlier in this chapter, the action and intention of states primarily in the Global North is to cooperate to deter refugees, asylum-seekers and migrants from reaching their borders.³⁰² Rather than stop the child and his or her family from coming, such decisions, actions and agreements are likely to force children and/or their parents to take action which may not be in their best interests, such as climbing a border fence, boarding an unseaworthy boat, jumping on the back of a lorry or attempting to escape from detention or 'reception' centres³⁰³ or off-shore processing centres in order to reach a place safety where their rights can be secured. There should be no human rights-free exclusion zones at the border or before a refugee or asylum-seeker reaches the border.³⁰⁴ Furthermore, the actions of the states to deter or contain refugees and asylum-seekers away from their borders do not ensure the child's care and protection necessary for the child's well-being under Article 3(2) CRC nor are they measures of 'appropriate protection' under Article 22 CRC. In the Joint General Comments, the CRC and CMW committees challenge head-on the most recent state responses to the refugee crisis and the attempts by state parties to narrow the obligations they owe to refugees and migrants

³⁰¹ JGC 3 and 22, para 46.

³⁰² T Gammeltoft-Hansen, and JC Hathaway, n 3; V Moreno-Lax and M Giuffre, n 3 (forthcoming).

³⁰³ For example, the refugees who attempted to cross the Greek-Macedonian border after it was closed on 6 March 2016 and were forcibly returned to the Idomeni camp: see ECCHR, *Dossier on Migration* (April 2019) at 5.

³⁰⁴ OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014) at 1.

by exercising greater migration control regardless of its impact on the protection needs and rights of children on the move.³⁰⁵

7. The Principle of Precaution and *Non-Refoulement*

In *IAM (KYM) v Denmark*, the CRC Committee emphasised the protective nature of the *non-refoulement* principle. In particular, the Committee stressed that the principle extends beyond Articles 6 and 37(b) and that the evaluation of risk when assessing whether to return a child should be based on the 'principle of precaution'³⁰⁶ and 'where reasonable doubts exist that the receiving State cannot protect the child against such practices, State parties should refrain from returning the child'.³⁰⁷ In this section, I examine what the principle of precaution is and what it adds to a child's right to protection who is at risk of being *refouled*.

The CRC Committee first introduced the principle in 2013:

[a]pplying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time, however, the precautionary principle also requires assessing the possibility of future risk and harm and *other consequences of the decision for the child's safety*.³⁰⁸

The principle was introduced in the context of the elements which need to be considered in assessing a child's best interests, particularly in relation to 'care, protection and safety of the child'.³⁰⁹ A child's safety includes the right of the child to protection against all forms of physical or mental violence, injury or abuse (Article 19) and protection against sexual, economic and other exploitation, drugs, labour, arbitrary detention and armed conflict (Articles 32 – 39).³¹⁰ It is implicit in the wording used by the CRC Committee that a state must also consider the consequences of the child being returned by another state or 'safe third country' to their country of origin (in other words, a state must assess the risk of chain *refoulement*). The CRC Committee has also applied it in the context of FGM and *non-refoulement* in *IAM v Denmark*.³¹¹

³⁰⁵ JGC 3 and 22, para 12.

³⁰⁶ CRC Committee, *IAM (KYM) v Denmark*, para 11.8(c).

³⁰⁷ *Ibid.*

³⁰⁸ CRC Committee, GC 14, para 74 (my emphasis)

³⁰⁹ CRC Committee, GC 14, para 71. The CRC Committee refers to Article 3(2) which does not cover 'safety' explicitly.

³¹⁰ CRC Committee, GC 14, para 73.

³¹¹ CRC Committee, *IAM (KYM) v Denmark*, para 11.8(c).

The principle of precaution originates in environmental issues pertaining to children's health. It is based on the state's obligation to protect rights, in particular to prevent others from interfering with the enjoyment of their rights.³¹² The literature focuses on how the precautionary principle is applied in that context.³¹³ Jaroiniska and Gee note that there are various definitions for the 'precautionary principle',³¹⁴ but the Rio Conference of 1992 provides the most widely accepted definition: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent [harm]'.³¹⁵ This wording uses the double negative to define the precautionary principle, identifying reasons that 'cannot' be used to justify 'not' taking actions. This points towards the prevention element of the obligation to protect. A state must exercise precaution if there is any indication that the child might be harmed (and not necessarily in an irreparable way) upon return.

The CRC Committee has not stipulated in what circumstances the principle becomes operable and what is its scope and content. If the CRC Committee intends to extend the application of the precautionary principle to a *non-refoulement* context, it could be applied in a case where a state decides that it is in a child's best interests to return to their country of origin for family, language or cultural reasons. However, by applying the precautionary principle, the returning state decides that on balance there is reasonable doubt that the receiving state is able or willing to protect the child and secure his or her safety in the future and thus the child should not be returned. A state's positive obligation to protect children provides the precautionary principle with a sound normative basis in the context of children seeking international protection.

The limited use of this principle so far, indicates that it is operable where a child is at the risk of return, and is therefore on the territory of the returning state. However, there is perhaps scope for the principle to be applied in relation to a state's extraterritorial human rights obligations in order to protect children outside their country of origin whose safety is at

³¹² See discussion of this element of the obligation to protect in chapter 4.

³¹³ D Jaroiniska and D Gee, 'Children's Environmental Health and the Precautionary Principle' (2007) 210 *International Journal of Hygiene and Environmental Health* 541 – 546.

³¹⁴ For example, the Treaty on the European Union states: 'Community policy on the environment ... shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at the source and the polluter should pay', Article 130r.

³¹⁵ United Nations Environment Programme (UNEP) 1992.

risk. It bolsters the *non-refoulement* obligation of the state as it requires a state to consider a broad range of future risks a child might be exposed to if he or she is returned to his or her country of origin or is returned to an environment which is not conducive to the enjoyment of his or her human rights. Equally, the principle could be applied in migration control decisions, for example to a decision on whether to admit children (accompanied or unaccompanied) to the territory of a state, in situations involving the disembarkation of refugees/migrants on boats on international waters or whether to transfer the children to an off-shore processing centre.

8. Conclusion

Non-refoulement continues to be regarded as a central pillar in IRL and has been developed and enhanced by the influence of IHRL. In this chapter, I explored the impact of deterrence and *non-entrée* policies on the rights and best interests of children seeking international protection in such contexts. There is no effective oversight of a state's actions or inactions which breach their duty of *non-refoulement* and thus refugees are not guaranteed effective protection.

The duty of *non-refoulement* has emerged as an overlapping ground of protection common to both IHRL (and CRC) and IRL.³¹⁶ Article 33 of the Refugee Convention imposes an obligation on states to ensure that a refugee is not returned to a place in which he or she may risk being persecuted. However, in IRL, the principle is based on the five Refugee Convention grounds and allows states to circumvent their obligations on national security or public order grounds.³¹⁷ The conceptualisation of *non-refoulement* in IHRL is broader because there are no exceptions and it is absolute where the return is to a risk of torture. *Non-refoulement* under IHRL centres on the question of whether there are substantial grounds for believing that there is a real risk of irreparable harm. Both the HRC and CRC Committee consider that potential violations of the right to life and the prohibitions on torture and cruel and inhuman treatment engage a state's obligation on *non-refoulement*.

This chapter has considered the question of whether protection and a best interests determination are essential components of a *non-*

³¹⁶ V Chetail, n 1 at 28.

³¹⁷ Article 33(2) Refugee Convention.

refoulement obligation and if it depends on whether the child is on the territory of the state. The state's *non-refoulement* obligation includes investigating whether there are 'substantial grounds for believing' that a refugee child would be at 'real risk of irreparable harm' and to undertake a thorough evaluation of risk to assess and determine a child's best interests. In addition, the CRC Committee has more recently developed the principle of precaution in the context of potentially returning a child to risk of harm or danger.

The CRC Committee's interpretation of the *non-refoulement* principle is developing through General Comments, Concluding Observations and the Views of the Committee. There is heavy emphasis on 'carefully balancing' best interests against the state's sovereign interest in controlling migration flows with the objective of ensuring the full enjoyment of the child's rights. Whilst my analysis acknowledges the protective potential of the best interests principle from a child's perspective, in practice it is almost impossible for a child to challenge a state which violates *non-refoulement* especially if he or she is no longer on the territory of the state or if he or she cannot reach the territory of that state to access legal procedures or legal representation to exercise his or her rights in a meaningful way. Children along with their families are victims of states who are willing to engage in cooperative deterrence measures and extra-territorial border controls to stop people arriving at their borders and avoid their human rights obligations, but at the same time seek a narrow interpretation of their obligation not to *refoule* a child.

In the next chapter, I build upon the arguments developed in Chapters 4 and 5 and I examine the operationalisation of the best interests principle in IRL and the child's right to protection.

CHAPTER 6: Best Interests and the Refugee Child's Right to Protection

1. Introduction

The main goal of IRL is to manage the priorities of states, usually within an immigration and asylum framework.¹ This sits in stark contrast to a child rights-based approach which aims to determine the best course of action for a child, in his or her best interests, in the broader context of the rights of the child under the CRC.² The CRC Committee stipulates that determination of the best interests of the child should be 'aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child'.³ However, due to the open-ended and indeterminate nature of the best interests principle, there is a risk that it is vulnerable to a variety of interpretations and applications,⁴ and an assessment of the best interests of a refugee or asylum-seeking child may be justified in terms of state interests and/or outweighed by the imperative of immigration control. The protection framework provided by the CRC ought to recalibrate the scales through a rights-based approach, which ensures that in the balancing of interests, more weight is accorded to a child's best interests and right to protection than to the interests of the state.

This chapter draws together the key arguments in my thesis on the operationalisation of the best interests principle and the child's right to protection in the context of a child's asylum claim. I highlight the problematic and delicate balancing exercise undertaken in the context of assessing a child's best interests against the state interest in immigration control. I ask whether the application of a rights-based understanding of

¹ C Harvey, 'Is Humanity Enough?' Refugee, asylum-seekers and the rights regime', in S.S. Juss, and C. Harvey, (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham 2013) 68, 72.

² See Chapter 1, section 6.

³ CRC Committee, General Comment No 14, The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), UN Doc. CRC/C/GC/14 (2013) (GC 14), para 4.

⁴ P Jeronimo Vink and N Finch, *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 the Office of the United Nations High Commissioner for Human Rights: Regional Office for Europe 2012) at 10; Chapter 2, section 6.

the best interests principle recalibrates the scales in favour of a child's right to protection in asylum and immigration decisions.

In section 2, I review the best interests principle in refugee law by examining what the international standards of the best interests principle are in the context of a child seeking international protection. This part analyses the 'soft law' developments and guidance on best interests published by UNHCR and the CRC Committee. The 'soft law' of the UNHCR, CRC and CMW Committees sets the appropriate protection standard, which ought to be adopted by states when children in their jurisdiction seek international protection. In section 3, I discuss the role of the best interests principle and the state's 'appropriate protection' obligation in plugging some of the protection gaps in IRL. Finally, in section 4, I examine the extent to which the best interests balancing exercise fulfils a child's right to 'appropriate protection' under Article 22 CRC. Ultimately, this chapter concludes that despite its faults, the best interests principle has a larger role to play in ensuring that the focus should be on the realisation of a refugee child's right to protection under the CRC.

2. Best Interests in International Refugee Law

The best interests principle is not a part of the Refugee Convention, nor was it contemplated by the drafters of the Refugee Convention as a guiding principle for decisions concerning children. Thus, our understanding of the interaction between best interests and IRL stems from the children's rights framework.⁵ As Chapter 2 demonstrated, the best interests principle expresses one of the fundamental values of the CRC, which ought to be accorded a high priority and larger weight must be attached to what serves the child best.⁶ The principle must be respected at all stages of the migration process.⁷ States recognise the best interests principle as part of the child's claim for international protection.⁸ This is reflected in the

⁵ Although, the UNHCR, as I discuss in section 2.1.1 below, has adopted the best interests of the child as a guiding principle; see also Pobjoy 'The Best Interests Principle as an Independent Source of International Protection' (2015) 64 *International and Comparative Law Quarterly* 327; Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017), chapter 6.

⁶ GC 14 para 39.

⁷ Joint General Comment No 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22), para 29.

⁸ In the Netherlands: M Kalverboer, D Beltman, C van Os and E Zijlstra, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 *International Journal of Children's Rights* 114; in Sweden: M Eastmond and H Ascher, 'In the Best Interest of the Child? The Politics of Vulnerability and

jurisprudence of some senior domestic courts, where decision-makers must be 'alert, alive and sensitive' to the best interests of children and accord 'substantial weight' to them,⁹ the best interests of the child should be considered first,¹⁰ they must 'rank higher than any other' consideration¹¹ and '[w]hat is determined to be in a child's best interests should customarily dictate the outcome...and it will require considerations of substantial moment to permit a different result'.¹²

The principle is highly relevant to the adjudication of asylum claims which involve a child – whether directly or indirectly.¹³ The principle must be a primary consideration in any decision involving the entry and stay of a refugee child, in any procedural or substantive decision about the asylum application¹⁴ and when identifying a durable solution, including return to a country of origin. The best interests of a *refugee* child will share commonalities with the best interests of other children, but as a best interests assessment and determination procedure should be individualised for the particular circumstances of the child, inevitably differences will emerge when defining the respective best interests of refugee and non-refugee children. Despite the lofty ambitions for the best interests of the child, the findings of a number of studies observe that best interests are generally balanced against the state interests in immigration control and that migration policy arguments often outweigh the best interests of the child.¹⁵

Negotiations for Asylum in Sweden' (2011) 37 *Journal of Ethnic and Migration Studies* 1185; A Lundberg, 'The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights (2011) 3 *Journal of Human Rights Practice* 49; in Ireland: S Mullaly, 'Separated Children in Ireland: Responding to Terrible Wrongs' (2011) 23 *International Journal of Refugee Law* 632; In the UK and Canada: Meyler, F and Morrish, D 'Best Interests of the Unaccompanied Refugee Child: United Kingdom and Canadian Approaches in Legislation and Case Law' (2017)(unpublished paper presented to the 11th Conference of the International Association of Refugee Law Judges).

⁹ Supreme Court of Canada, *Baker v Canada* (MCI) [1999] 2 SCR 817, para 75.

¹⁰ UKSC *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at para 26 and 33, *per* Lady Hale.

¹¹ *Ibid*, para 46, *per* Lord Kerr.

¹² *Ibid*.

¹³ J McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 *The International Journal of Children's Rights* 251 at 255.

¹⁴ *ZH (Tanzania) v SSHD*, para 24; however, Canadian Courts only recognise the best interests as having a procedural role in asylum claims, see Morrish in F Meyler and D Morrish, n 8.

¹⁵ See, for example, Kalverboer et al n 8 at 128, Eastmond and Ascher, n 8 at 1188; S Mullaly, n 8 at 634, 647 – 649; J Bhabha, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers' (2001) 3 *European Journal of Migration and Law* 283 at 293 – 294.

The indeterminacy of the best interests principle on the one hand gives a decision-maker some flexibility, but on the other, there is danger in this indeterminacy because the weight of refugee law favours a state's control of its borders.¹⁶ However, it has been argued that its indeterminacy may give the principle a flexibility which the specificity of the refugee definition in Article 1A(2) of the Refugee Convention prevents.¹⁷ In asylum claims, it is a state's border and immigration officials who assess the best interests of the child and not the child's parents or specialists in the care and protection of children. A decision-maker, who determines what is best for a refugee child's future, will be influenced by policy concerns on immigration as well as financial and political pressures, which may mean they are unable or unwilling to do what is right in a child's best interests¹⁸ and which will impact on the state's obligation to protect the child.

A child's rights-based approach to a best interests assessment means that children ought to participate in the assessment and have a say on their protection needs in accordance with Article 12 CRC.¹⁹ However, there are a number of factors, unique to children seeking international protection, which may militate against the desirability of having a child participate in asylum proceedings. First, it may not be in the child's best interests to participate in asylum proceedings because their participation is used to gather evidence and to undermine the child's claim for asylum rather than to genuinely and actively seek the views of the child.²⁰ Second, if the process for enabling children to participate is inadequate and as a consequence the 'due weight' requirement is distorted, this is likely to lead to poor outcomes for refugee and asylum-seeking children.²¹ Third the participatory right and application of the 'due weight' criteria can be used to test a child's credibility²² and be distorted and manipulated by decision-makers, whose agenda is to protect state borders and the public purse.²³ Additionally, there is an inherent tension between what the young person thinks is in their best interests and the requirements of the state, which

¹⁶ Ibid.

¹⁷ J McAdam, n 13, 256.

¹⁸ R Humphris and N Sigona, 'Outsourcing the "best interests" of unaccompanied asylum-seeking children in the era of austerity' (2019) 45 *Journal of Ethnic and Migration Studies*, 312 at 320.

¹⁹ Article 12 CRC; CRC GC 14, paras 43-45.

²⁰ H Stalford, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258 at 265 and 269.

²¹ Ibid, at 268.

²² Ibid, at 270 - 271.

²³ Ibid, at 275 - 276.

can result in the young person not complying with the state's conception of their best interests, especially where that might mean a return to their country of origin.²⁴ These tensions are not addressed in the UNHCR's or the CRC Committee's guidance on how states should approach best interests, even though both acknowledge the right of the child to be heard with their views given due weight according to age and maturity.²⁵

In addition to the CRC Committee singling out the best interests principle as a guiding principle of the CRC,²⁶ it has been promoted as a key guiding principle for decisions concerning children by the UNHCR.²⁷ The next section reviews the 'soft-law' developments, which build up a picture of the international standards required of the principle in asylum cases.

2.1 Best Interests of the Refugee Child – 'Soft Law' Developments

The best interests principle has become a central pillar of IRL as both the UNHCR and the CRC Committee seek to align international refugee law with children's rights. This section will show that from a tentative acknowledgement of the relevance of the best interests principle in IRL in the mid-1980s, the UNHCR and the CRC Committee have developed an approach which seeks to embed the best interests principle at every stage of the asylum process from a rights-based perspective. Is it possible to identify international standards for applying best interests to claims by children for asylum and determining refugee status? If so, what are these standards? To answer these questions, I draw out the international standards from the 'soft-law' discussed below.

²⁴ J Allsop and E Chase, 'Best interests, durable solutions and belonging: policy discourses shaping the futures of unaccompanied migrant and refugee minors coming of age in Europe' (2019) 45 *Journal of Ethnic and Migration Studies*, 293 at 297.

²⁵ CRC Committee GC 6, para 25; UNHCR *Guidelines on International Protection: Child Asylum Claims under Articles 1A(2) and 1F of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* UN Doc. HCR/GIP/09/08 (22 December 2008) at para 70; CRC GC 12, paras 70 – 74; CRC Committee, GC 14, para 44; see also H Stalford, n 20.

²⁶ See CRC Committee, General Comment no. 5, General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (27 November 2003). But note the criticism of the Committee's decision to single out four general principles: K Hanson and L Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 285.

²⁷ See, for example, UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva May 2008).

2.1.1 UNHCR and Refugee Children

As I discussed in Chapter 3, States Parties to the Refugee Convention adjudicate on refugee status and there is no international body overseeing or monitoring the measures states implement to fulfil their obligations under the Refugee Convention.²⁸ Thus, most of the interpretation of the Convention and its application is carried out by states at a domestic level which provides

an extraordinary example of international law in action, with treaty-based norms enforced domestically in ways that lead to real rights for some of the most seriously disfranchised persons in the world.²⁹

The UNHCR plays a limited role in terms of guidance and norm setting.³⁰ As part of its mandate, the UNHCR publishes policies and guidance on the interpretation of the Refugee Convention and other developments in international refugee law, available to all states³¹ and States Parties participate in the UNHCR Executive Committee's (ExCom) meetings, contribute to and adopt the Conclusions. Additionally, the UNHCR intervenes in cases before domestic courts³² and supranational courts, such as the European Court of Human Rights (ECtHR)³³ and the Court of Justice of the European Union (CJEU),³⁴ to assist with the interpretation of IRL in a particular context. Interventions are 'an important tool through which protection standards can be developed and a consistent application of refugee law fostered'.³⁵

Coinciding with its involvement in the Working Group which drafted the CRC, the UNHCR set up its own Working Group on Refugee Children in 1986 and published a *Note on Refugee Children* in 1987.³⁶ The UNHCR identified two principles to guide action on behalf of refugee children: the

²⁸ TA Alienikoff, 'State Centered Refugee Law: From Resettlement to Containment (1992) 14 *Michigan Journal of International Law* 120 at 124.

²⁹ See, JC Hathaway, AM North and JM Pobjoy, 'Supervising the Refugee Convention: Introduction' (2013) 26 *Journal of Refugee Studies* 323.

³⁰ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, UN Doc. A/RES/428(V).

³¹ *Ibid*, Article 8.

³² UKCA, *Secretary of State for the Home Department v ZAT* [2016] EWCA Civ 810.

³³ ECtHR, *HA and others v Greece* Application No 19951/16, 28 February 2019; *Hirsa Jamaa and others v Italy*, App No 27765/09, 23 February 2012.

³⁴ CJEU, *N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland*, C-411/10 and C-493/10 (1 February 2011).

³⁵ UNHCR RefWorld Court interventions/Amicus Curie, available at: <https://www.refworld.org/type/AMICUS.html>

³⁶ UNHCR, *Note on Refugee Children* UN Doc. EC/SCP/46 (9 July 1987).

principle of the best interests of the child and the principle of family unity.³⁷ In the *Guidelines on Refugee Children* (1988), published soon after the *Note*, the UNHCR stated that these two principles are 'fundamental and universally recognised'.³⁸

The *Note* (1987) and the *Guidelines* (1988) were published before the CRC was adopted, therefore, citing the best interests of the child as a guiding principle in relation to refugee children would have been an innovative approach which acknowledged the significance of the best interests principle in the context of children's rights and international protection:

[a]ll action, whether by UNHCR or governmental or non-governmental agencies, and whether directed towards protection, emergency relief, intermediate assistance or durable solutions, should be governed by the best interests of the child.³⁹

The *Note* also provides some content to the best interests principle, requiring that the 'child's welfare precedes all other considerations, that individuality be respected and that physical, psychological and social developmental needs be met'.⁴⁰ The UNHCR considers that the best interests of the child precedes *all* other considerations and that 'what is best for the refugee child comes before any political, social or other consideration'.⁴¹ The *Note* does not indicate that a child's best interests should be weighed or balanced against other interests or that a child's interests are one of several considerations to be taken into account.

The UNHCR ExCom adopted the *Conclusion on Refugee Children* in October 1987,⁴² which confirmed that the two principles of best interests of the child and family unity must guide 'all action taken on behalf of refugee children' and added the 'widely-recognized principle that children must be among the first to receive protection and assistance'.⁴³ In 1993 the UNHCR published its *Policy on Refugee Children* which was its first opportunity to clarify its approach to refugee children following the

³⁷ Ibid, para 11.

³⁸ UNHCR, *Guidelines on Refugee Children* (August 1988) POP/CHI/167 D, para 2.

³⁹ UNHCR, n 45, para 11

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² UNHCR ExCom *Conclusion on Refugee Children* UN Doc A/42/12/Add.1 (12 October 1987).

⁴³ Ibid, paras c and d, which alludes to Principle 2 of the 1959 Declaration, rather than the best interests principle agreed in the draft convention.

adoption of the CRC.⁴⁴ The policy aligned the UNHCR's approach with the normative framework of the CRC of 'appropriate protection and assistance'.⁴⁵ The UNHCR identified three factors which contributed to the 'special needs of refugee children: their dependence, their vulnerability and their developmental needs'.⁴⁶

Although the CRC was the 'normative frame of reference for UNHCR's action',⁴⁷ the *Policy* did not engage with children's rights or recognise children as rights-holders specifically⁴⁸ or provide guidance on how the rights of the child might be realised. The primary concern of the UNHCR in the *Policy* was with children's welfare and fulfilling children's *needs*.⁴⁹ The best interests principle is listed as one of seven 'central principles' to guide the UNHCR's goals of protection, healthy development of children and achieving durable solutions.⁵⁰ The UNHCR indicated that protecting the best interests of children was a pre-requisite for 'ensuring certain elements of their well-being',⁵¹ thus signposting the importance of Article 3(2)CRC to the best interests principle. The UNHCR did not provide any policy guidance on how states should identify, assess or determine the best interests of the child.

*Refugee Children: Guidelines on Protection and Care*⁵² updated the 1988 *Guidelines* and confirmed the alignment of both IRL and CRC and its work to protect and assist refugee children.⁵³ In the *Guidelines*, the UNHCR focused on the best interests 'rule', non-discrimination and the right to participate,⁵⁴ acknowledging that these rights so 'fundamental that they can be thought of as underlying the entire CRC'.⁵⁵ This 'triangle' of rights was to demonstrate that the three rights 'reinforce each other to reach the objective of the survival and development of children',⁵⁶ reflecting the four

⁴⁴ UNHCR *Policy on Refugee Children* UN Doc. EC/SCP/82 (6 August 1993). In the policy: 'the term "refugee child" when used in this policy may be understood to mean any child of concern to the High Commissioner, including those children who are refugees, returnees, asylum-seekers and displaced persons of concern to UNHCR' (para 3).

⁴⁵ *Ibid*, para 17. The wording is from Article 22 CRC.

⁴⁶ *Ibid*, para 10.

⁴⁷ *Ibid*, para 17.

⁴⁸ Although their rights were referred to in the *Policy*. paras 16 – 18.

⁴⁹ UNHCR *Policy on Refugee Children* (6 August 1993), paras 21 – 24.

⁵⁰ *Ibid*, paras 25 and 26.

⁵¹ *Ibid*, para 31.

⁵² UNHCR *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva 1994) (reprinted in 2001).

⁵³ *Ibid*, 14.

⁵⁴ It is possible to trace the thread of this concept back to the 1993 policy, but these guidelines were also informed by what was happening in the field.

⁵⁵ UNHCR *Refugee Children* (1994) at 20.

⁵⁶ *Ibid*.

general principles highlighted by the CRC Committee.⁵⁷ The best interests 'rule' has two main applications: government policy-making and individual decisions about children.⁵⁸ On policy decisions, the UNHCR asserted that in any conflict between children's and adults' interests, states must carefully separate out the interests at stake and 'must make the "best interests" of children "a primary consideration"'.⁵⁹ This was the first time, the UNHCR acknowledged that a child's best interests might be balanced against the interests of others. However, according to these guidelines, the best interests 'rule' will only be applied if there is a conflict of interests in relation to budget allocation or the making of laws or the administration of government. In relation to individual children and decisions about them, best interests must be, at a minimum, 'a primary consideration'.⁶⁰ In the context of a child who is unaccompanied, a long term plan requires a decision about what is in the child's best interests and many factors such as language and culture and family unity would need to be considered.⁶¹

In its *Guidelines on Policy and Procedures in dealing with Unaccompanied Children*, the UNHCR's focus was on children travelling alone,⁶² with the 'basic guiding principle' of the best interests of the child.⁶³ There was an acknowledgement that if the unaccompanied child does not qualify for asylum, 'an assessment of the solution that is in the best interests of the child should follow as soon as practicable after the negative result of his/her application is confirmed'.⁶⁴ A child should only be returned to their country of origin if that is in their best interests and if there are suitable arrangements for the child's 'appropriate care and protection'.⁶⁵ The UNHCR acknowledged that a child could be protected outside of the Refugee Convention, on the basis of their best interests and the principle of *non-refoulement*. This guidance established an assumption that reunification with the child's parents 'will generally be in the best interests

⁵⁷ CRC Committee, General guidelines regarding the form and content of initial reports to be submitted by State Parties under Article 44, paragraph 1 (a) of the Convention, adopted by the Committee on its 22nd meeting (first session) (15 October 1991), UN Doc. CRC/C/5, 4.

⁵⁸ UNHCR *Refugee Children* (1994) at 21.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 22.

⁶¹ *Ibid.*

⁶² UNHCR *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (UNHCR, Geneva Feb 1997).

⁶³ *Ibid* at 1.

⁶⁴ *Ibid*, para 9.2.

⁶⁵ *Ibid*, para 9.4.

of the child',⁶⁶ which affirmed the UNHCR's approach that family reunification and a child's best interests are aligned and compatible.

In 2001, the UNHCR launched its '*Global Consultations on International Protection in Refugee Law*'⁶⁷ and examined the protection needs of refugee children⁶⁸ including the separation of the child from his or her family, sexual exploitation, abuse and violence, military recruitment, education, detention, registration and documentation. The best interests principle was regarded as 'fundamental to any action on refugee children',⁶⁹ but there was little discussion about how the best interests principle should be operationalised in each area of concern highlighted in the document.

UNHCR ExCom adopted the *Conclusion on Children at Risk* in 2007,⁷⁰ which highlighted the vulnerability of children in situations of forced displacement, the protection risks they face and emphasised that the protection of children is primarily the responsibility of the states.⁷¹ The focus of this *Conclusion* was to identify components which may form part of a comprehensive child protection system, with the 'aim of strengthening the protection of children at risk',⁷² including children who are refugees, asylum-seekers, internally displaced, returnees or stateless.⁷³ The best interests principle was highlighted as a key feature of any child protection system alongside a 'rights-based approach', which recognises children as active subjects of rights.⁷⁴ The best interests of the refugee child should be determined within a state's child protection system, which should facilitate adequate child participation without discrimination.⁷⁵

The UNHCR *Guidelines on the Best Interests Principle 2008*⁷⁶ was the first time the UNHCR provided a toolkit and detailed guidance for its field

⁶⁶ Ibid, para 9.8.

⁶⁷ During 2001 and 2002, the UNHCR commissioned papers on the key issues affecting refugees including the scope of the *non-refoulement* principle and interpretation of the refugee definition. These issues were discussed at series of expert roundtable meetings as part of the UNHCR's Global Consultations on International Protection.

⁶⁸ UNHCR, 'Global Consultations on International Protection: Refugee Children' UN Doc. EC/GC/02/9 (25 April 2002) (4th Meeting).

⁶⁹ Ibid, para 3.

⁷⁰ UNHCR ExCom *Conclusion on Children at Risk* No 107 (LVIII) (5 October 2007).

⁷¹ Ibid, para c

⁷¹ Ibid, preamble.

⁷² Ibid, para a.

⁷³ Ibid, para c.

⁷⁴ Ibid, para b.

⁷⁵ Ibid, para g.

⁷⁶ UNHCR, *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva, May 2008)

staff. The *Guidelines* identified three situations⁷⁷ in which UNHCR staff must undertake a 'best interests determination' (BID). In essence, a BID process 'should build on the existence of any arrangements for child protection and care within host communities, provided they are in conformity with international standards.'⁷⁸ Building upon the approach in the *ExCom Conclusions*, the *Guidelines* indicate that the best interests of a refugee child should be determined by what is in his or her best interests, 'as part of a comprehensive child protection system aimed at strengthening the protection of children at risk'.⁷⁹ A BID must take full account of the child's rights and a child's best interests will not be decided by one single overriding consideration.⁸⁰ For the UNHCR, the primary concern of a BID is to determine 'which of all the available options is best suited to securing the attainment of the child's rights, and thus is in his or her best interests'.⁸¹ These *Guidelines* reflected a closer alignment of the approach of both the UNHCR and CRC Committee.

In 2009, the UNHCR published guidelines on international protection, focusing on children's asylum claims.⁸² The primary purpose of these guidelines was to provide substantive, procedural and legal interpretative guidance for state decision-makers. The UNHCR focused on the difficulties and challenges children face when making an application for refugee status and the need to ensure that children are recognised as active subjects of rights and the fact that they may experience child-specific forms and manifestations of persecution. Nevertheless, the UNHCR is clear that adopting a 'child-sensitive interpretation' of the 1951 Convention does not mean a child asylum-seeker is automatically entitled to refugee status.⁸³ In these guidelines, the best interests principle plays a role in refugee status

⁷⁷ The three situations are: (i) the identification of the most appropriate durable solution for unaccompanied and separated refugee children, (ii) temporary care decisions for unaccompanied and separated children in certain exceptional circumstances, and (iii) decisions which may involve the separation of a child from parents against their will, see UNHCR *Guidelines on Determining the Best Interests of the Child* (UNHCR, Geneva, May 2008) at 9.

⁷⁸ UNHCR *Guidelines on Determining Best Interests* (2008) at 67. It is not clear who is responsible for assessing if a state's child protection system conforms with international standards.

⁷⁹ *Ibid* at 17.

⁸⁰ *Ibid* at 67.

⁸¹ *Ibid*.

⁸² UNHCR, *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* HCR/GIP/09/08 (UNHCR, 22 December 2009).

⁸³ *Ibid*, para 4.

determination alongside the other three general principles of the CRC.⁸⁴ The emphasis is on utilising best interests to ensure interpretation of the refugee definition in the Refugee Convention from the child's perspective. For example, the fear of persecution or harm suffered by the child, may not reach the 'well-founded fear' element of the definition, but this should be assessed taking account of how the child's rights and interests will be affected by the harm.⁸⁵ These guidelines suggest that children should enjoy specific procedural and evidentiary safeguards to ensure fairness in the refugee determination process.⁸⁶

The purpose of the UNHCR's *Framework for Protection*⁸⁷ was to establish six goals, 'that encapsulate UNHCR's commitment to protect and realize the rights of children of concern to the Office and offers practical guidance on how to achieve them'.⁸⁸ The *Framework* is based on a recognition of children as rights holders, the child's right and capacity to participate in their own protection, to focus on the prevention of abuse, violence, neglect and exploitation and to foster partnerships between international and non-governmental organisations to strengthen child protection systems and mechanisms.⁸⁹ The *Framework* takes a broad rights-based approach, focusing on ensuring protection for all children rather than focusing on specific categories of children.⁹⁰ There is only a brief reference to best interests as one of ten principles underpinning the *Framework* and in the context of durable solutions, which I discuss in section 3.5 below.

In 2016, the High Commissioner devoted his 'Dialogue on Protection Challenges' to *Children on the Move*.⁹¹ This focuses on rights which have particular salience for children on the move and the concerns about children's access to those rights. The Dialogue does not discuss whether the best interests principle has a role in developing solutions to the gaps between principles and practice identified by the High Commissioner.⁹² However, the updated *Guidelines on Assessing and Determining the Best*

⁸⁴ Ibid, para 5; i.e.: non-discrimination, right to life, survival and development and the right to be heard and have their views taken into account.

⁸⁵ Ibid, para 10.

⁸⁶ Ibid, para 65.

⁸⁷ UNHCR, *Framework for Protection* (UNHCR Geneva 2012).

⁸⁸ Ibid at 7-8.

⁸⁹ Ibid at 12.

⁹⁰ Ibid at 9.

⁹¹ UNHCR, High Commissioner's Dialogue on Protection Challenges: *Children on the Move* Background Paper (28 November 2016).

⁹² Ibid.

Interests of the Child (2018)⁹³ does seek to plug the gaps between principles and practice. However, the UNHCR's updated *Best Interests Guidelines* (2018) are designed to be a tool for child protection case management for UNHCR field officers. Thus, the focus of the Guidelines is on child protection, rather than a rights-based approach to children seeking international protection, with its stated aim, to 'achieve improved protection outcomes for all children of concern'.⁹⁴

2.1.2 CRC and Refugee Children⁹⁵

The CRC Committee did not set out its approach to refugee children until 2005 when it addressed the treatment of unaccompanied and separated children outside their country of origin.⁹⁶ The rights of children in the context of international migration was the topic of the CRC Committee's Day of General Discussion in 2012,⁹⁷ after which the CRC Committee collaborated with the Committee for Migrant Workers (CMW) to publish two joint General Comments on the human rights of children in the context of international migration.⁹⁸ The CRC Committee is also developing its approach to refugee and asylum-seeking children under the third Optional Protocol on a Communications Procedure.⁹⁹ The Committee has published Views in three cases which relate to the rights of children in the context of international migration, *IAM (KYM) v Denmark* (2018),¹⁰⁰ *YB and NS v Belgium* (2018)¹⁰¹ and *DD v Spain* (2019).¹⁰²

In General Comment No 6, the Committee focused on the treatment of unaccompanied and separated children.¹⁰³ The General Comment acknowledged the role of the UNHCR and the Committee encouraged states to utilise the guidance published by the UNHCR¹⁰⁴ and to accept and

⁹³ UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018).

⁹⁴ *Ibid*, at 16.

⁹⁵ I covered this in more detail in Chapter 3.

⁹⁶ CRC Committee, General Comment no. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (1 September 2005).

⁹⁷ CRC Committee, Report of the Day of General Discussion, *The Rights of all Children in the Context of International Migration* (2012) (DGD 2012).

⁹⁸ See below.

⁹⁹ Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, UN Doc. A/RES/66/138 (adopted 19 December 2011, entered into force 14 April 2014).

¹⁰⁰ CRC Committee, *IAM (KYM) v Denmark* (25 January 2018). I discussed this case in the context of *non-refoulement* in Chapter 5.

¹⁰¹ CRC Committee, *YB and NS v Belgium* (27 September 2018). I discuss this case below in section 3.4.

¹⁰² CRC Committee, *DD v Spain* (12 February 2019). I discuss this case in Chapter 5.

¹⁰³ CRC Committee, GC 6.

¹⁰⁴ *Ibid*, paras 15 and 74.

facilitate the UNHCR's assistance.¹⁰⁵ The relevance of the best interests principle to children seeking asylum, is that it:

must be respected during *all* stages of the displacement cycle...
a best interests determination must be documented in
preparation [for] any decision *fundamentally impacting* on the
unaccompanied or separated child's life.¹⁰⁶

The General Comment provides some guidance on a best interests determination for unaccompanied and separated children, including an assessment of the child's identity, his or her nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.¹⁰⁷

General Comment No 14 on the child's right to have his or her best interests taken as a primary consideration addresses all actions or decisions which concerns children both in the public or private sphere, so includes any action pertaining to refugee and asylum-seeking children. The General Comment acknowledges that the principle is part of a balancing determination, but a child's interests have a high priority and cannot be judged on the same level as other considerations.¹⁰⁸ The primacy of the child's best interests requires a 'consciousness ... and willingness to give priority to those interests ... especially when an action has an undeniable impact on the children concerned'.¹⁰⁹ General Comment no 14 is the first fully comprehensive guidance on implementing a best interests assessment and determination procedure.¹¹⁰ The Committee highlighted that for children who are in a situations of vulnerability such as refugee and asylum-seeking children, the purpose of determining the best interests of a child is not only relevant to ensure full enjoyment of all rights, 'but also with regard to other human rights norms to these specific situations'.¹¹¹ Thus emphasising the alignment between IRL and the CRC.

The joint General Comments cover general principles¹¹² and state obligations on the human rights of children in the context of international

¹⁰⁵ Ibid, paras 16, 43, 45, 49 and 64.

¹⁰⁶ Ibid, para 19 (emphasis added).

¹⁰⁷ Ibid, para 20; paras 19 – 22 set out the applicability of the best interests principle in the search for short-term and long-term solutions; I discuss the relevant paragraphs, with reference to specific stages of the asylum process, in section 3 below.

¹⁰⁸ CRC Committee, GC 14, paras 37 and 39.

¹⁰⁹ Ibid, para 40.

¹¹⁰ I discussed this General Comment in Chapter 2.

¹¹¹ CRC Committee, GC 14, para 75, such as IRL norms.

¹¹² JGC 3 and 22.

migration.¹¹³ The purpose of the General Comments is to provide 'authoritative guidance on legislative, policy and other appropriate measures', to ensure full compliance with states' obligations and to ensure the rights of children are fully protected in the context of international migration.¹¹⁴ The general principles and state obligations do not only apply to refugee children or children seeking asylum, but to children in any situation of voluntary or involuntary migration and provide a comprehensive overview of general measures of implementation and states' legal obligations. States are reminded of their obligations to respect, protect and fulfil the rights of all children within their jurisdiction.¹¹⁵

A child in the context of migration has a right to have his or her interests considered as a primary consideration which means the child's interests have a high priority.¹¹⁶ The 'high priority' to be accorded to best interests is underlined by the Committees' concern that what an adult considers to be in the best interests of a child may interfere with a child's rights.¹¹⁷ The Committees indicate that in order to implement the best interests principle in migration related decisions or procedures, states must 'conduct, systematically, best interests assessments and determination procedures',¹¹⁸ which build upon the CRC Committee's comprehensive approach to assessment and determination of a child's best interests in General Comment No 14.¹¹⁹

It is the obligation of states to ensure that the best interests of children are taken into consideration at every stage of the asylum process and in relation to any migration policies, immigration laws, planning, implementation and decision-making.¹²⁰ Best interests are relevant to decisions regarding migration enforcement and restrictions on access to 'social rights', both before and after a decision is made about residency and this applies whether the child or the parent is the main applicant.¹²¹ Best

¹¹³ Joint general comment No 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4 and CRC/C/GC/23 (2017) (JGC 4 and 23).

¹¹⁴ JGC 3 and 22, para 7.

¹¹⁵ Ibid, para 11.

¹¹⁶ Ibid, para 28.

¹¹⁷ See, for example, CRC Committee, GC 14, para 4.

¹¹⁸ JGC 3 and 22, para 31.

¹¹⁹ CRC Committee, GC 14, paras 46 – 84.

¹²⁰ JGC 3 and 22, para 29.

¹²¹ Ibid.

interests must be 'ensured explicitly' in decisions concerning entry, residence or return of a child, placement or care of a child and the detention or expulsion of a parent.¹²²

The 'soft-law' development of the best interests principle and the interpretation by both the UNHCR and the CRC Committee confirm that best interests is a key principle running throughout the child's claim for asylum, during the decision-making process and thereafter when deciding how to accommodate a refugee child, how best to protect a child, while he or she remains in the host state, when considering durable solutions for a child and where a decision is made to return or deport the child. The next section will extract the international standards on best interests in the context of a child seeking asylum.

2.2 Best Interests and IRL – International standards

The UNHCR has adopted the best interests principle as an interpretative principle to ensure that children's claims for asylum are considered from a child rights perspective and has moved from focusing on a status-based approach (Refugee Convention) to a rights-based child protection approach, aligning its guidance with the normative framework of the CRC. The CRC Committee has developed best interests into a comprehensive assessment and determination procedure which every state must apply when considering any action concerning children, including refugee and asylum-seeking children.¹²³ The CRC Committee has developed an approach to the best interests standard which should guarantee access to asylum and to the territory of a state, ensure entitlement to a full best interests assessment or determination which is fully resourced with properly trained staff, ensure the appointment of a guardian to act in the child's best interests and secure procedural guarantees including access to courts/access to justice and a right to legal representation.¹²⁴ In addition, best interests is not effective without a child's right to be heard, without a right to non-discrimination, without guarantees of confidentiality and data firewalls to ensure that the staff assessing children are free from potential conflicts of interest and not least,

¹²² JGC 4 and 23, para 30.

¹²³ CRC Committee, GC 14.

¹²⁴ JGC 3 and 22, para 32; JGC 4 and 23, para 17.

the child requires access to basic services to fulfil the child's rights to life, survival and development.¹²⁵

The approach to the best interests principle adopted by the CRC (and increasingly by the UNHCR) is a rights-based approach focused on the potential of the best interests principle to draw on the full catalogue of rights in the CRC to achieve the best outcome for the child which is the key international standard. This goes to the heart of the best interests principle and aligns with the child's right to protection, which I discussed in Chapter 4:

As to the meaning of "best interests" it is apt to recall that the concept is inherently a rights-based one: relevant rights of the child imbue the concept with meaning, rendering it *contra legem* to promote a course of action as being in the best interests of the child if it runs counter to a relevant right of the child.¹²⁶

Thus, a course of action by the state which undermines a child's right to protection cannot be framed as being in the best interests of the child. For example, the state *non-entrée* policies and actions to prevent refugee and asylum-seeking children from arriving at the border, which I described in Chapter 5, undermine the child's best interests and violate a number of rights under the CRC, including the child's right to protection.

The next section of the chapter examines, at the different stages of an asylum claim, how operationalisation of the best interests principle should support a child's right to 'appropriate protection' under Articles 3(1), 3(2) and 22 CRC and a brief reflection on the extent to which this is achieved in state practice and reflected in case law which interprets the best interests principle in the context of refugee and asylum-seeking children.

3. Best Interests and 'Appropriate Protection' in the Asylum Process

3.1 Access to the territory of the host state

A child has a right to seek and enjoy asylum under Article 14 UDHR, but, as I discussed in Chapter 3, there is no right to asylum, enforceable

¹²⁵ CRC Committee, GC 6; JGC 3 and 22.

¹²⁶ C Smyth, *European Asylum Law and the Rights of the Child* (Routledge, Oxford 2014) at 239.

against a state in international law.¹²⁷ The UNHCR and the CRC Committee do not advocate that children should have a right to asylum or that it would be in their best interests to have a right to asylum. However, the CRC Committee indicates that children ought to be given admission to the territory of the host state so that their claim for asylum can be examined¹²⁸ and to enable the state to assess the child's best interests.¹²⁹ In joint General Comment No 4 and 23, both Committees confirm that, 'children should be guaranteed the right [of] [a]ccess to the territory'.¹³⁰ This is required not only to assess a child's best interests and claim for asylum, but also to evaluate their protection needs and rights.¹³¹ Access should be granted regardless of the documentation they do or do not have.¹³² This state obligation, alongside the obligation to ensure 'appropriate protection' is activated because a state exercises jurisdiction over all children subject to its authority or effective control, whether in or outside its territory.¹³³ Thus, a state has an obligation to consider a child's best interests wherever it encounters the child and the international standard advocated by the CRC Committee is that in order to fulfil this obligation the state must grant the child access to its territory.¹³⁴ This contrasts with, for example, the European Court of Human Rights (ECtHR) which adopts a state-centric approach in relation to non-nationals accessing the territory of the state. The ECtHR supports the right of the state to decide who may enter and who may stay on its territory.¹³⁵ However, the ECtHR has also held that under Article 8 ECHR, the state owes a positive duty to admit persons onto its territory for the purpose of family reunification and where that person is a child, the best interests of the child are a primary consideration in the proportionality balancing exercise under Article 8(2) ECHR.¹³⁶

States are reluctant to grant a right of access to the territory because once the child is on the territory, whether or not the child is recognised as

¹²⁷ Chapter 3, section 2.1.

¹²⁸ CRC Committee, GC 6, para 20.

¹²⁹ *Ibid*, para 12.

¹³⁰ JGC 4 and 23, para 17.

¹³¹ *Ibid*, para 17(a).

¹³² *Ibid*.

¹³³ Article 2(1) CRC; International Commission of Jurists (ICJ), ECRE, AIRE Centre, Dutch Council for Refugees, *Third Party Intervention in DD v Spain, 4/2016 to the UN Committee on the Rights of the Child* (31st May 2018); see also Chapter 5.

¹³⁴ I deal with jurisdiction in more detail in Chapter 5.

¹³⁵ For example, ECtHR, *Abdulaziz, Cabales and Balkandali v the United Kingdom* Application nos. 9214/80, 9473/81 and 9474/81, GC (28 May 1985).

¹³⁶ ECtHR *Sen v The Netherlands* (2001) Application No. 31465/96, [2003] 36 EHRR 7; ECtHR *Tuquabo-Tekle v The Netherlands*, (2005) Application No 60665/00, [2006] 1 FLR 798; ECtHR *Mayeka and Mitunga v Belgium*, Application No. 13178/03, (12 October 2006).

a refugee, the child has rights under the CRC, including the right to appropriate protection and the obligation of *non-refoulement* applies.¹³⁷ Although a right of access to the territory of the state should form part of the obligation of the state to protect and assess the best interests of a child, there are very few examples of state practice indicating that this occurs. For instance, within the EU, Member States rely on the operation of the Dublin III Regulation¹³⁸ to control the number of asylum-seekers reaching their borders and to prevent onward movement of asylum-seekers in the Schengen area. This Regulation controls migration flows by requiring refugees and asylum-seekers to claim asylum in the first safe country they reach. If they continue their journey through Europe and apply for asylum in another state, the destination state can return them to the first EU state they arrived in. There is a qualification for unaccompanied children who can make an application in the state where they are present¹³⁹ or ask to be transferred to another Member State to be reunited with a family member, if it is in their best interests.¹⁴⁰ Under EU law, the Dublin III Regulation requires states to ensure that the best interests of the child are a primary consideration in relation to any procedure under the Regulation, which includes 'take charge' applications¹⁴¹ and 'take back' requests, that is returns to first country of asylum.¹⁴² However, not all states apply the best interests principle to the 'take charge' process. For example, the UK's welfare and safeguarding (best interests) duty under s55 of the Borders, Citizenship and Immigration Act 2009 (s55 BCIA), only applies to children who are already in the UK and thus does not cover children in other EU states seeking family reunification in the UK.¹⁴³ The narrow scope of the

¹³⁷ See discussion on *non-refoulement* in Chapter 5.

¹³⁸ EU Regulation No 604/2013 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; OJ L 180 (26 June 2013)(Dublin III).

¹³⁹ Article 8 Dublin Regulation III.

¹⁴⁰ *Ibid.*

¹⁴¹ Article 21 Dublin Regulation III. This is where an EU Member State considers another Member State is responsible for the asylum application, for example on family reunification grounds, and asks that Member State to 'take charge' of the application.

¹⁴² Under Recital 13 of the Regulation, 'the best interests of the child should be a primary consideration of Member States when applying this Regulation' and under Article 6 (1) of the Regulation: 'the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation'.

¹⁴³ Although refugee children from conflict zones in the Middle East can be resettled in the UK under the Vulnerable Children's Resettlement Scheme and a late amendment to the Immigration Act 2016, by Lord Alf Dubs (s 67 of the IA 2016, known as the 'Dubs amendment') has allowed up to 480 children mainly from Calais and Greece to be resettled in the UK. The Home Office, in deciding if a child is eligible, applies the best interests principle to such children.

UK's best interests obligations has been acknowledged by UK courts,¹⁴⁴ even though it is in violation of the UK's obligations under the CRC.

It has been argued that the emergent 'entry human right principle' in EU law and in ECHR jurisprudence broadens the basis for admission to the territory on the basis of a child's best interests and protection needs which limits the state's discretion in migration control.¹⁴⁵ In domestic jurisprudence, *ZAT and others v Secretary of State for the Home Department*,¹⁴⁶ which concerned unaccompanied children living in the Calais 'jungle' seeking reunification with family in the UK, the Upper Tribunal held that children seeking family reunification in another Member state require special protection, especially where there are factors which might amount to a violation of Article 3 ECHR (inhuman or degrading treatment) in the state they are currently in.¹⁴⁷ Such children should be granted admission to the territory to assess their application.¹⁴⁸

But the UK Court of Appeal in the same case¹⁴⁹ held that the Dublin III process to determine which state is responsible for the asylum application takes precedence over a right of the child to family life under Article 8 ECHR. An application for entry by a child, without first invoking Dublin III procedures in the relevant Member State, 'can only be justified in an especially compelling case'.¹⁵⁰ The Court focussed on the 'orderly process'¹⁵¹ which should be followed under the Dublin III procedure. In this case there was no acknowledgement of the requirement to carry out a best interests assessment and determination procedure. The Court of Appeal rejected the submission that Article 8 ECHR and the proportionality assessment (and thus best interests) are relevant where Dublin III is the

¹⁴⁴ UKUT, *R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin III Regulation – investigative duty)* IJR [2016] UKUT 00231 (IAC) at para 24.

¹⁴⁵ See P Biondi, 'The Best Interests of the Child and the Right to Family Unity under EU Law' (2018), School of Advanced Study, University of London at 33 and caselaw referred to in fn 147 (ECtHR *MSS* case and CJEU *Cimade*); The ECtHR case of *Tarakhel v Switzerland*, Application No. 29217/12 (4 November 2014) is an example of a family reunion case outside the Dublin rules. P Biondi, 'The *ZAT* case and the far-reaching consequences for the Dublin Regulation', European Database of Asylum Law' *European Database of Asylum Law Journal* (9 February 2017); available at: <https://www.asylumlawdatabase.eu/en/journal/zat-case-and-far-reaching-consequences-dublin-regulation> [last accessed 31 May 2019].

¹⁴⁶ *ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v Secretary of State for the Home Department* (2015) UKUT 6.

¹⁴⁷ *Ibid.* See also P Biondi, n 145 at 33.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Secretary of State for the Home Department (SSHD) v ZAT and others* [2016] EWCA Civ 810, para 8. This case is also cited as *ZT (Syria) and others v SSHD* [2016] EWCA Civ 810; [2016] 1 WLR 4894.

¹⁵⁰ *Ibid.*, paras 95 and 100.

¹⁵¹ *Ibid.*, para 87.

correct procedure to follow. Article 8 ECHR can only have a role in exceptional circumstances, for example where it is shown that the French legal system has systemic deficiencies in it, 'which rendered it incapable of providing an effective remedy to the Respondent children'.¹⁵²

Although the Dublin process is aimed at ensuring fairness and sharing responsibility for asylum applications between Member States of the EU, the *ZAT* case demonstrates how the UK government can use the Dublin process to prevent access to their national asylum systems.¹⁵³ Another example of a state which blocks access to its territory and national asylum systems is Australia's blanket policy of denying asylum-seekers who arrive by boat access to asylum. Australia continues to operate a policy of intercepting refugees and asylum-seekers arriving by boat and detaining them in camps on Nauru and Manus Island even though the Papua New Guinea's (PNG) Supreme Court has held that Australia's detention of asylum-seekers violates PNG law.¹⁵⁴ Australia's policy is consistent with other state practice on *non-entrée* and deterrence which ensures that refugee and asylum-seeking children do not reach their borders and trigger obligations (especially *non-refoulement*) under IRL and CRC.¹⁵⁵

3.2 Reception conditions

The Refugee Convention provides that a refugee should not be criminalised on account of his or her illegal entry or presence in a country.¹⁵⁶ This includes not being prosecuted for illegal entry and not being detained on account of his or her illegal entry or stay. Nevertheless, many states detain irregular migrants for (administrative) breaches of immigration law and for illegal entry to the territory of a state. In Chapter 3, I discussed the child's right to liberty (Article 37(b) CRC) in the context of 'appropriate measures' and 'appropriate protection' under Article 22(1)

¹⁵² *Ibid*, para 88.

¹⁵³ See also *Citizens UK v SSHD* [2018] EWCA Civ 1812 and *AM (a child) v SSHD* [2018] EWCA Civ 1815 in which the Secretary of State's expedited system for examining cases of unaccompanied asylum-seekers in Calais was held to be procedurally unfair.

¹⁵⁴ See A Maguire, 'High Court Challenge to Offshore Immigration Detention Power Fails', *The Conversation* (17 August 2017). Australia's off-shoring policy has been challenged on other fronts, for example *Kammasee v Commonwealth of Australia and others* [2017] VSC 537 (6 September 2017), although this case was settled before it was heard in court with no admission of liability by the Australian government or the security firm contracted by the government to run the camp.

¹⁵⁵ See Chapter 5, section 6.

¹⁵⁶ Article 31(1) of the Refugee Convention. States such as the UK have laws criminalising people who enter without the proper paperwork and in policy documents and in law, it is described as 'illegal' entry.

CRC. In summary, both the UNHCR and CRC have applied the *ultima ratio*¹⁵⁷ rule under Article 37(b) CRC to both administrative detention (including for immigration purposes) and to detention for the commission of criminal offences. At the CRC Committee's Day of General Discussion in 2012¹⁵⁸ a number of participants contended that detention of children on the sole basis of their or their parents' immigration status is a violation of their rights, is never in their best interests and is not justifiable.¹⁵⁹ The Committee's position currently is that a child should *never* be detained for immigration reasons.¹⁶⁰ A child's right to liberty will be violated if he or she is detained on account of his or her parents' immigration status, which also contravenes the best interests of the child¹⁶¹ and the child's right to development.¹⁶² States should pursue solutions which fulfil the child's best interests and his or her right to liberty and family life, such as staying in non-custodial community based centres, while their immigration status is being determined or before they are removed from the state.¹⁶³ Consistent with the principle of family unity,¹⁶⁴ a child's best interests will usually determine that the family should be kept together and thus the entire family should be placed in a non-custodial setting.¹⁶⁵ In addition states should not justify a child's detention on the grounds of non-separation from their parents under Article 9 CRC or that it is in the child's best interests to stay with their family.¹⁶⁶

Unfortunately, state practice does not reflect the CRC Committee's interpretation of Article 37(b) and states such as the UK routinely detain children for immigration purposes, either when they arrive at the border without paperwork or if their case is age-disputed or when they are being returned to a first country of asylum or deported back to the country of origin. Under EU law for instance, a child can be detained with their families, applying the *ultima ratio* principle and after it has been

¹⁵⁷ Detention should be a last resort and children should be detained for the shortest time possible.

¹⁵⁸ CRC Committee, DGD Report 2012.

¹⁵⁹ DGD Report 2012, paras 10 and 32; See also DGD's General Recommendations in the Report, para 78.

¹⁶⁰ *Ibid*, para 10; JGC 4 and 23, para 5.

¹⁶¹ *Ibid*, para 78; JGC 4 and 23, para 5.

¹⁶² *Ibid*, at para 10.

¹⁶³ *Ibid*, at para 11.

¹⁶⁴ See Chapter 3, section 4.5 and section 3.4 below.

¹⁶⁵ JGC 4 and 23, para 11.

¹⁶⁶ *Ibid*.

established that less coercive measures are not effective.¹⁶⁷ Member States should place children in accommodation suitable for them.¹⁶⁸ The Reception Conditions Directive is in the process of being reformed and in June 2018, the European Parliament and the Council agreed a partial provisional agreement on the proposed amendments to the Directive.¹⁶⁹ The proposed amendments ensure that all children (not just unaccompanied children) will not be detained in a prison and can only be detained for 'family unity purposes' or to protect them, for example if there is a risk that they might go missing.¹⁷⁰ The EU also sanctions detention of children under the Returns Directive, applying the *ultima ratio* principle.¹⁷¹ Thus there seems little prospect that EU Member States will end immigration detention of children in the immediate future.

Reception conditions are not only concerned with the detention of refugees and asylum-seekers, but also the right of the child to life, survival and development¹⁷² and an adequate standard of living, health and education.¹⁷³ Unaccompanied or separated children are also entitled to special care, assistance and alternative care arrangements under Article 20 CRC and in accordance with the Guidelines on Alternative Care adopted by the UN General Assembly in 2010.¹⁷⁴ The ECtHR has considered reception conditions for refugees and asylum-seekers in the context of Article 3 ECHR.¹⁷⁵ In two claims involving unaccompanied minors living in squalid conditions,¹⁷⁶ the ECtHR held that the conditions the two applicants endured in Greece and France reached the threshold of severity and amounted to inhuman and degrading treatment in violation of Article 3

¹⁶⁷ EU Council Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (26 June 2013) (Reception Conditions Directive), Article 11.

¹⁶⁸ *Ibid.*

¹⁶⁹ See European Parliament Press Release, 'Reception conditions for asylum-seekers agreed between MEPs and Council, 14 June 2018, available at:

<http://www.europarl.europa.eu/news/en/press-room/20180614IPR05803/reception-conditions-for-asylum-seekers-agreed-between-meps-and-council>.

¹⁷⁰ *Ibid.*

¹⁷¹ EU Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (16 December 2008) ('the Returns Directive'), Article 17(1).

¹⁷² Article 6 CRC; JGC 3 and 22, paras 40, 43 and 44.

¹⁷³ Articles 27, 28, 29 and 30 CRC; Articles 17 and 18 of the Reception Conditions Directive (2013) requires that asylum-seekers be accorded a dignified standard of living.

¹⁷⁴ UN General Assembly, *Guidelines for the Alternative Care of Children*, UN Doc. A/RES/64/142 (24 February 2010); JGC 4 and 23, para 11; CRC Committee, *DD v Spain* (12 February 2019).

¹⁷⁵ See for example, ECtHR *MSS v Belgium and Greece* Application No 30696/09 (21 January 2011).

¹⁷⁶ ECtHR *Rahimi v Greece* Application No 8687/08 (5 April 2011); ECtHR *Khan v France* Application No 12267/16 (28 February 2019).

ECHR. Although the Court did not discuss the best interests of the child (because there is no proportionality balancing exercise under Article 3 ECHR), it used similar language to Article 3(2) CRC and held that the state has a positive obligation to care and protect a child under Article 3 ECHR.¹⁷⁷

The European Committee of Social Rights has considered the rights of both accompanied and unaccompanied 'foreign' children to protection and their access to economic and social rights under the European Social Charter.¹⁷⁸ In *EUROCEF v France*, the Committee held that the system for the reception of unaccompanied 'foreign minors' entering France which included detaining unaccompanied children in waiting areas at airports with adults, or accommodating such children in hotels and depriving them of the assistance of a guardian (and the use of bone testing to determine age) were against their best interests and violated their right to protection under Article 17 of the Charter.¹⁷⁹

3.3 Access to asylum procedures and determination of refugee status

The 'well-founded fear' of persecution is an element of the refugee definition which a child will need to satisfy in order to claim asylum successfully. Neither the UNHCR nor the CRC Committee consider that the best interests of a child means that the child should not have to satisfy the strict criteria of the refugee definition under Article 1A(2) of the Refugee Convention. It is a high hurdle for an adult, and more so for a child.¹⁸⁰ In this context, the best interests of the child principle has a crucial role.¹⁸¹ The UNHCR states that the 'principle of the best interests of the child requires that the harm be assessed from the child's perspective',¹⁸² which will require an analysis of how the 'harm' (both actual and potential) may impact the child's rights or interests.¹⁸³ Although the UNHCR recognises and acknowledges that best interests principle plays a significant role in a

¹⁷⁷ *Khan v France*, para 91 and 92; see also *HA and others v Greece* Application No 19951/16 (28 February 2019).

¹⁷⁸ For example, ESCR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France* Complaint No 114/2015, Decision on Merits (24 January 2018).

¹⁷⁹ *EUROCEF v France*, paras 94, 100 – 101 and 113.

¹⁸⁰ UNHCR, *Child Asylum Claims* (2009).

¹⁸¹ The CRC and CMW Committees confirm that best interests has both a procedural and substantive role in the context of asylum and immigration decisions concerning children: JGC 3 and 22, paras 28 – 30.

¹⁸² UNHCR *Child Asylum Claims* (2009), para 10.

¹⁸³ *Ibid*, para 10.

child's asylum claim,¹⁸⁴ there is little analysis in the UNHCR's *Guidelines on Child Asylum Claims* as to how this may operate in practice. For example, there is little reference to best interests when 'well-founded fear' and persecution are analysed in detail.¹⁸⁵ Joint General Comment No. 3 and 22 confirms that states 'shall ensure that the best interests of the child are taken fully into consideration...including in granting or refusing applications on entry to or residence in a country'.¹⁸⁶

In relation to the process – the UNHCR recognises that children should enjoy specific procedural and evidentiary safeguards and have their claims processed on a priority basis.¹⁸⁷ The UNHCR guidelines for child asylum claims set out the minimum standards for the treatment of children during the asylum process,¹⁸⁸ such as appointing a guardian and a 'properly trained' legal representative.¹⁸⁹ There is no guidance on whether a child should, in his or her best interests, face an asylum procedure or if they should be interviewed as part of the process.¹⁹⁰ Furthermore, it is questionable whether it is in a child's best interests to have their claim assessed in an adversarial system (such as the UK, Sweden, Canada and Australia) where there is a climate of distrust or culture of disbelief.¹⁹¹

Joint General Comment no 4 and 23 acknowledges that access to justice is a fundamental right and 'a prerequisite for the protection and promotion of all other human rights'.¹⁹² Children in particular should have access to child-sensitive procedures to obtain an effective remedy¹⁹³ and to be guaranteed that all decisions are taken in their best interests.¹⁹⁴ The Committees indicate that a number of rights should be guaranteed during best interests assessment and best interests determination procedures.¹⁹⁵ These rights include, access to the territory and referral to the authorities in charge of protecting their rights, notification of the proceedings and of any decisions made, having the proceedings conducted by specially trained

¹⁸⁴ *Ibid*, para 5.

¹⁸⁵ *Ibid*, paras 11 – 52.

¹⁸⁶ JGC 3 and 22, para 29.

¹⁸⁷ UNHCR, *Child Asylum Claims* (2009), paras 65 and 66.

¹⁸⁸ *Ibid*, paras 65 – 77.

¹⁸⁹ *Ibid*, para 69.

¹⁹⁰ H Stalford, n 20.

¹⁹¹ Eastmond and Ascher, n 8 at 1187; House of Lords and House of Commons Joint Committee on Human Rights, 'Human rights of Unaccompanied Migrant Children and Young People in the UK' (2013 - 2014) at 4, 28 and 30.

¹⁹² JGC 4 and 23, para 14.

¹⁹³ *Ibid*.

¹⁹⁴ *Ibid*, para 15.

¹⁹⁵ *Ibid*, para 17.

officials and judges, a right to be heard, communication with consular officials, representation by an attorney and access to legal aid, priority of application, right to appeal any decision, and, if unaccompanied, the right to a guardian, who serves as a key procedural safeguard to ensure respect for their best interests and the right to be fully informed throughout.¹⁹⁶

In the UK, there has been some indication that the senior courts are willing to refer to other CRC rights, especially Article 12, to ensure that children have a right to be heard¹⁹⁷ and to ensure an effective right of access to vulnerable individuals whose ability to effectively participate in proceedings might be limited.¹⁹⁸

3.4 Family reunification

As I have discussed in Chapter 3, in the context of refugee and asylum seeking children, a state has a positive obligation to implement measures to ensure the family stays together, even though only one family member may have a valid refugee claim.¹⁹⁹ Joint General Comment No. 4 and 23 indicates that deporting a family member or refusing a family member a right to enter the territory of the state may amount to arbitrary or unlawful interference with family life.²⁰⁰ As I discussed in Chapter 3, for refugees and asylum-seekers, there is an 'emerging consensus' that a right to family reunification should be realised in the country of asylum because the refugee cannot safely return to their country of origin to enjoy family life there.²⁰¹ A person cannot realise the right to family life if he or she is not with the rest of the family.

States should deal with applications to enter or leave the state by a child or his or her parents 'in a positive, humane and expeditious manner'²⁰² and to protect and assist the child to trace the parents or other family members in order to assist reunification.²⁰³ Belgium's failure to consider the child's *de facto* family ties for the purposes of a family reunion

¹⁹⁶ Ibid, para 17 (a) – (j).

¹⁹⁷ UKSC *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, para 37. Baroness Hale confirmed that the best interests principle applies both to the decision about the child and care for the child while he or she is waiting for the decision.

¹⁹⁸ UKCA *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123, paras 1 and 2.

¹⁹⁹ Article 9(1) CRC; JM Pobjoy, n 5 at 45.

²⁰⁰ JGC 4 and 23, para 28.

²⁰¹ K Jastram and K Newland, 'Family Unity and Refugee Protection' in E Feller, V Turk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003, reprinted 2005) 555 at 556-7.

²⁰² Article 10(1) CRC; CRC Committee, *YB and NS v Belgium* (27 September 2018).

²⁰³ Article 22(2) CRC.

application was held by the CRC Committee to be in breach of Article 10 and in particular the obligation to deal with family reunification in a positive, humane and expeditious manner'.²⁰⁴ If a state grants protection to a child or to a child's parents, the state must be proactive in ensuring reunification is in accordance with the child's best interests and develop effective and accessible family reunification procedures which allow children and/or their parents to migrate in a safe and regular manner.²⁰⁵

Family reunification is important to assist integration in the host state and restrictive family reunification policies are likely to result in more children taking dangerous journeys to reunite with family members.²⁰⁶ Although it is generally regarded as a solution which would fulfil the best interests of a child, there are situations when reuniting a child with his or her family would not be in the child's best interests. For example, because of risks associated with where the child's parents live, which include risks that the child may be trafficked, smuggled, coerced into involvement in armed conflict, forced into marriage or subjected to a harmful practice because his or her parents cannot protect him or her. The child may also be at risk of violence, abuse or neglect from his or her own parents and family reunification with the child's parents should not be pursued in such cases.²⁰⁷

In most cases, an opportunity to reunite with his or her family in a safe country offers a refugee child one of the safest routes to protection and the lack of access to family reunion procedures forces children to make a choice between staying in a dangerous situation or making a perilous journey to join their families.²⁰⁸ It can never be in a child's best interests to undertake such a journey alone in the hope of being reunited with their family.

However, states are not invested in protecting the child by providing safe routes or allowing a child to reunite with their families in safe countries. The best interests principle may be used as a mechanism to block routes to family reunification. For example, in the UK, while adults who are recognised as refugees or who have humanitarian protection are

²⁰⁴ CRC Committee *YB and NS v Belgium*, para 8.12.

²⁰⁵ JGC 4 and 23, paras 27 and 32-38.

²⁰⁶ UNHCR, High Commissioner's Dialogue on Protection Challenges, Summary of Thematic Session 3: Securing Solutions for children on the move (8-9 December 2016).

²⁰⁷ P Jeronimo Vink and N Finch, n 4 at 42.

²⁰⁸ Joint Agency Briefing Note, *Together Again: Reuniting Families in Safety-What the UK Can Do* (Oxfam, Refugee Council, Amnesty International and British Red Cross, February 2017) at 2.

able to sponsor members of their immediate family,²⁰⁹ a child recognised as a refugee is not able to do so.²¹⁰ The policy objective behind this measure is to prevent children being used as a pull factor for asylum-seekers to travel to the UK, which the UK government argues puts children at a higher risk of trafficking.²¹¹ However, the basis of this is unfounded as children are not more likely than their family members to be granted asylum and there is little evidence to support the need for this policy objective.²¹² The UK prioritises its deterrence and immigration control policy above the right of the child to family life, justified in the child's best interests. But this approach cannot be rationalised on the basis of the best interests of the child who is already in the UK or of the child who has family members in the UK.²¹³ The EU's Family Reunification Directive does allow a child to sponsor reunification with members of their family²¹⁴ and this must be interpreted consistently with the protection of fundamental rights, especially respect for family life and the best interests of the child.²¹⁵ Family reunification has been identified by the UNHCR and the CRC Committee as a durable solution for refugee and asylum-seeking children which I discuss in more detail in the next section.

3.5 Durable Solutions

Recently the UNHCR stated that '[d]urable solutions have become elusive, with ever-larger numbers of refugee children stranded in protracted displacement situations'.²¹⁶ The UNHCR has indicated that durable solutions in the best interests of the child are key protection objectives to secure a child's future.²¹⁷ The UNHCR is required to

²⁰⁹ Immediate family is defined as a spouse or partner or children under the age of 18, who formed part of the family unit before their refugee sponsor fled their country of origin or former habitual residence to claim asylum in the UK: Home Office, Immigration Rules, at paras 352A – FJ; Home Office Guidance: Family Reunion for Refugees and those with Humanitarian Protection (Version 2.0, 29 July 2016) at 5.

²¹⁰ Joint Agency Briefing, n 208 at 5.

²¹¹ UK House of Commons Library Briefing Paper: UK Family Reunion Rules: Striking the Right Balance? (1 March 2018) at 3.

²¹² Joint Agency Briefing, n 208 at 5.

²¹³ Ibid; For a discussion on the approach of governments to protect 'putative children' by harming embodied children see: M Crock, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' [2013] 20 *Australian International Law Journal* 33 at 35.

²¹⁴ EU Council Directive 2003/86/EC on the right to family reunification (22 September 2003) (Family Reunification Directive), Article 10(3), however, Denmark, Ireland and the UK opted not to implement this Directive.

²¹⁵ CJEU, *Parliament v Council* C-540/03 (27 June 2006), paras 36, 52, 58, 63 and 105.

²¹⁶ UNHCR, 'Children on the Move: Background Paper', The High Commissioner's Dialogue on Protection Challenges" (2017) *International Journal of Refugee Law* 356.

²¹⁷ Ibid, at 366.

'seek ...permanent solutions for the problems of refugees by assisting Governments [t]o facilitate the voluntary repatriation of such refugees or their assimilation within new national communities'.²¹⁸ The three durable solutions are voluntary repatriation, local integration and resettlement.²¹⁹ Goodwin-Gill argues that in relation to refugee children, the focus should not be on the three traditional solutions ('events horizons') but on the objectives of the CRC. A durable solution should contribute to a child's survival and development, protect their right to life, provide support for parents and legal guardians, maintain respect for culture and religious origins, protect from exploitation and ensure recognition of name, nationality and identity.²²⁰

Voluntary repatriation must be based on a free and informed decision, respect for the principle of *non-refoulement* and with the commitment of the country of origin to the re-integration or return of refugees.²²¹ According to the UNHCR, voluntary repatriation 'remains the preferred solution in the majority of refugee situations.'²²² In relation to resettlement in a safe country or integration in the community of the host country, these options will be in a child's best interests if it is for humanitarian or refugee status reasons or because the family resides there, but it must be based on a secure legal status.²²³ However, there are numerous obstacles to a durable solution for a child and their families on the basis of resettlement or integration. Alienikoff observes that globally, resettlement opportunities for refugees in protracted refugee situations are declining and host states are reluctant to encourage integration because the local population are resistant to it.²²⁴ The UNHCR reports that young refugees are deeply concerned about their futures and the lack of opportunities, particularly in education.²²⁵ Additionally, there is frustration that they are not permitted to integrate into their country of residence,

²¹⁸ Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res. 428 (V), adopted December 14 1950 (UNHCR Statute), Article 1(1).

²¹⁹ UNHCR, 10-point plan Chapter 7: Solutions for Refugees (2006) at 186.

²²⁰ GS 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 at 412 – 416.

²²¹ *Ibid*, para 86.

²²² *Ibid*.

²²³ P Jeronimo Vink and N Finch, n 4 at 44.

²²⁴ TA Alienikoff, 'The Unfinished work of the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law* 611 at 612.

²²⁵ UNHCR High Commissioner's Dialogue on Protection Challenges, *Children on the Move* (28 November 2018) at para 31.

which might be the only country they have lived in.²²⁶ Thus, a young refugee may be left with no option but to return to danger, if opportunities to live a secure and settled life are denied by the host state.²²⁷

I would argue that for children there is an age-related risk in the context of durable solutions because they may lose the protection of the host state at the age of 18. The UNHCR and the CRC Committee have urged states to find solutions in the child's best interests,²²⁸ but once children turn 18, the state is not obliged to consider their best interests and their rights associated with the CRC disappear overnight.²²⁹ Young people in this situation may not perceive being returned to countries of origin as a 'durable solution' because they may not feel that they 'belong' in their countries of origin.²³⁰ States often interpret their best interests obligation as providing minimum and temporary protection until the child turns 18.²³¹ A durable solution for a child should allow a child to 'acquire or re-acquire the full protection of a State'.²³² Thus, protection in the host state should extend beyond 18 until a solution is found to enable the young person to continue education or training.²³³

The CRC Committee asserts that in relation to an unaccompanied child, there is a need to identify 'a durable solution that addresses all their protection needs...and... leads to overcoming the situation of a child being unaccompanied or separated'.²³⁴ The CRC and CMW Committees promote solutions for all children in the context of migration, which are 'safe, secure and sustainable'. This type of solution is one which

to the greatest extent possible, caters to the *long-term best interests and welfare of the child* and is *sustainable* and secure from that perspective. The outcome should aim to ensure that

²²⁶ Ibid at para 32.

²²⁷ Ibid.

²²⁸ UNHCR *Framework for Protection*, sixth goal; CRC Committee, GC 6, section (c) under 'Applicable Principles'.

²²⁹ J Allsopp and E Chase, n 24 at 294.

²³⁰ Ibid.

²³¹ For example, in the UK, if unaccompanied children do not meet the refugee criteria or qualify for humanitarian protection, they may be granted a form of discretionary leave, which is known as Unaccompanied Asylum-Seeking Child Leave (UASC), which provides 'protection' for children until they are 17½, at which stage the young person is required to reapply for refugee status or humanitarian status or risk being removed to their country of origin (UK Immigration Rules).

²³² UNHCR and UNICEF, *Safe and Sound, What States Can do to ensure respect for the best interests of unaccompanied and separated children in Europe* (UNICEF, Geneva 2014) at 22.

²³³ P Jeronimo Vink and N Finch, n 4 at 44; Save the Children Fund, *Separated Children in Europe Programme, Statement of Good Practice*, (ed) T. Smith (4th Revised Edition, Save the Children Denmark 2009) at 39.

²³⁴ CRC Committee, GC 6, para 79.

the child is able to develop into adulthood, *in an environment that will meet his or her needs and fulfil his or her rights as defined by the Convention on the Rights of the Child.*²³⁵

In order to be sustainable and secure, in a child's best interests, a solution must include planning for the future, further integration and settlement in the host community and secure residence status.²³⁶ Any solution requires a resource intensive best interests determination process as well as robust child protection procedures and with minimum delay to give the child certainty, safety and security. Such a solution could require a lengthy stay in the host country after the child turns 18, if there is a risk of irreparable harm in the country of origin. The UNHCR specifies that any long-term planning especially with regard to finding a long-term solution must be in the best interests of the child and careful attention should also be paid to the principle of family unity.²³⁷

Both the UNHCR and the CRC Committee are of the view that for unaccompanied and separated children, family reunification is a key part of seeking a durable solution.²³⁸ It is right that family reunification should be considered, but states are obliged to adopt a more cautionary approach under the CRC.²³⁹ Family reunification should not be a primary focus of durable solutions as it may not necessarily be in a child's best interests²⁴⁰ and any applications or any steps to trace family members should not lead to adverse consequences either for the child or family members.²⁴¹

3.6 Returns and Deportation²⁴²

If the durable solution is 'voluntary' repatriation, then the state must prepare an individual plan for 'sustainable reintegration' on the child's return, which requires 'dedicated resources ... and comprehensive inter-institutional coordination mechanisms' with follow up and monitoring of the arrangements for the returning child.²⁴³ Any solutions 'should be

²³⁵ JGC 3 and 22, para 32(j), fn 9 (my emphasis).

²³⁶ Ibid, para 32j.

²³⁷ UNHCR *Refugee Children: Guidelines on Protection and Care* (UNHCR, Geneva 1994) (reprinted in 2001), 137.

²³⁸ UNHCR (2006), n 219 at 366.

²³⁹ The CRC Committee are beginning to use the Precautionary principle, which means that the states should err on the side of caution when deciding whether the child should be reunited with his or her family – see Chapter 5, section 7.

²⁴⁰ See in particular Article 9 CRC.

²⁴¹ Article 9(4) and 10(1) CRC.

²⁴² I deal with the principle of *non-refoulement* in Chapter 5.

²⁴³ JGC 3 and 22, at para 32(k).

sustainable from the perspective of the child's right to life, survival and development'.²⁴⁴ The process of return should include an individual assessment and determination of the child's best interests and that the child will be safe and provided with proper care and enjoyment of rights.²⁴⁵

Joint General Comment No 3 and 22 goes further than previous guidance on best interests in relation to decisions to return a child to their country of origin.²⁴⁶ It is not enough to simply decide that it is in the best interests of the child to return to their country of origin, justifying it on, for example, tenuous family reunification grounds. The CRC Committee has emphasised that a child's best interests can only 'exceptionally' be overridden by considerations which are rights-based²⁴⁷ and a child will only be returned if the child's best interests have been *carefully balanced* against other considerations.²⁴⁸ The two Committees remind states that considerations relating to general migration control can never override best interests considerations.²⁴⁹

The suggestion that best interests can be *carefully balanced* in this context raises some concerns. The state asserts its sovereignty alongside a right to determine who arrives, who stays and who leaves the territory and implements measures to manage migration flows. A child's best interests balanced against such considerations will inevitably lose against the greater weight of state interests. Best interests should not be a primary consideration in this context, but a determinative factor when a state is considering whether or not to return a child to a place they fled from. This is because the decision impacts the child directly is consistent the model proposed by Eekelaar.²⁵⁰ It must be about the best outcome for the child in these circumstances carefully evaluating all the factors in paragraph 84 of General Comment no 6, General Comment no 14, paras 59-76 and paragraph 32 of joint General Comment no 3 and 22. Additionally it is hard to reconcile a balancing of a refugee child's interests

²⁴⁴ Ibid, para 32(k).

²⁴⁵ Ibid, para 33.

²⁴⁶ Ibid.

²⁴⁷ Ibid at para 86; the example given by the Committee is a 'situation [...] in which the child constitutes a serious risk to the security of the state or to the society.' This seems to suggest a 'rights of others' argument could be employed to counter the best interests of the child and that a child can be viewed by the state as threat to its security.

²⁴⁸ CRC Committee GC 6, para 86.

²⁴⁹ JGC 3 and 22, para 33; see also General Comment no 6 at para 86.

²⁵⁰ J Eekelaar, The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children.' (2015) 23 *International Journal of Children's Rights* 3 at 5; UNHCR *Guidelines on Best Interests* (2008) n 73 at 15 and 21; *ZH (Tanzania) v SSHD* [2011] UKSC 4, para 25; see also Chapter 2.

against other considerations, when the state has an overarching duty to protect the child, ensure his or her well-being and prevent harm.

The best interests of a child should be also considered where the child is at risk of constructive removal or deportation because their parents are threatened with deportation and in this instance the best interests considerations are not determinative but are primary.²⁵¹ The best interests of the children of the family become more prominent when all other avenues, available to an adult to resist removal or deportation have been exhausted.

The question of returning children to their countries of origin has frequently been the subject of ECtHR jurisprudence, although the majority of cases are claims brought by adults claiming their rights to family life with their children, rather than claims seeking to protect the rights and interests of children themselves.²⁵² Nevertheless, the Court has 'consistently developed a child-orientated approach in ruling on these cases, giving primary consideration to the best interests of the child'.²⁵³

The Court significantly enhanced the best interests principle's recognition in international law in the case of *Neulinger and Shuruk v Switzerland*,²⁵⁴ acknowledging that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests *must be paramount*'.²⁵⁵ However, when the ECtHR has considered the best interests principle, there is less focus on the due weight to be accorded to a child's best interests, when the decision does not directly affect the child and there are several other considerations in the balance. For example in *Üner v The Netherlands*,²⁵⁶ a case where the parent was threatened with deportation because he had committed serious criminal offences, the ECtHR listed ten considerations to be weighed in the balance, of which the best interests of the child was the ninth! The Court agreed with the Dutch authorities to deport the applicant, leaving it up to the family to decide whether they should follow him. There was little discussion of the child's best interests and the impact of the father returning to his country of origin. Decisions under Article 8 ECHR

²⁵¹ Ibid.

²⁵² M de Boer-Buquicchio, 'Introduction' in G van Bueren, *Child Rights in Europe: Convergence and Divergence in Judicial Protection* (Council of Europe Publishing, Strasbourg 2007) at 12.

²⁵³ Ibid.

²⁵⁴ ECtHR, *Neulinger and Shuruk v Switzerland* Application no 41615/07 (GC) (6 July 2010).

²⁵⁵ Ibid, para 135 (my emphasis).

²⁵⁶ ECtHR, *Üner v The Netherlands* Application No. 46410/99 (18 October 2006).

are cases where a parent is threatened with expulsion because of immigration or criminal offences and there are obstacles to the children returning to the country of origin with that parent or when family life was established at a time when the immigration status of that family member was 'precarious' or irregular²⁵⁷ or where the parents are seeking reunification with their children who were left behind in their country of origin.²⁵⁸ In the context of best interests, the Court focuses on a narrow range of factors, namely country ties, age and effective family bond,²⁵⁹ rather than looking more broadly at a *child's well-being* and right to protection under Article 3(2) CRC. Thus, although best interests is regarded as an important and significant factor in decision-making, the ECtHR have been slow to develop a child rights-based or principled approach.²⁶⁰ However, there are exceptions and cases such as *Nunez v Norway*²⁶¹ and *Jeunesse v The Netherlands*²⁶² demonstrate the ability of the Court to adopt an approach which places the child's interests and rights centre stage.

As I have argued throughout this thesis, the best interests principle should be understood from a rights-based perspective and how it operates to ensure a child's right to protection for his or her well-being under the CRC. For a refugee child, this must include his or her right to 'appropriate protection' under Article 22 CRC. This chapter has highlighted the prominence of the best interests principle both within the IRL framework and the CRC framework and the way in which it should be utilised according to the UNHCR and the CRC Committee. However, despite its broad recognition in international instruments and guidance and in the supranational and national courts, the principle has not always been 'clear and rigorous in its application'.²⁶³

In the same way that *non-refoulement* is the basis of international protection and international refugee law, the best interests principle has become a central pillar in the protection of children seeking refuge. The best interests principle is crucial in decisions about a refugee or asylum-

²⁵⁷ ECtHR, *Nunez v Norway* Application No 55597/09 (28 June 2011), Cf ECtHR, *Antwi v Norway* Application no 26940/10 (14 February 2012).

²⁵⁸ ECtHR, *Berisha v Switzerland*, Application No 948/12 (30 July 2013).

²⁵⁹ C Smyth, 'The best interests of the child in the expulsion and first-entry jurisprudence of the European Court of Human Rights: How principled is the Court's use of the principle?' (2015) 17 *European Journal of Migration and Law* 70 at 90.

²⁶⁰ *Ibid.*

²⁶¹ ECtHR, *Nunez v Norway* Application No 55597/09 (28 June 2011).

²⁶² ECtHR, *Jeunesse v The Netherlands*, Application no 12738/10 (3 October 2014).

²⁶³ H Stalford, n 20 at 261.

seeking child, but is weighed in the balance against the state interests in immigration control. This is problematic in practice in terms of ensuring the rights of the refugee or asylum-seeking child due to the balance being struck between the state interest and the child's interests and rights. It is necessary to recalibrate the scales to ensure the child's right to appropriate protection.

4. Does balancing best interests ensure 'appropriate protection'?

Article 3(1) CRC has become a central pillar in a child's asylum claim, but without due consideration being given to Article 3(2) and other relevant articles, for example Article 22 CRC. At the end of Chapter 2, I discussed the key challenges and problems with the best interests principle. The indeterminacy of the principle has the potential to interfere with the child's enjoyment of his or her rights. The key concern is the way it is utilised in asylum cases where the balancing exercise is often a simple binary weighing of the child's best interests against the state's interests in migration control. A determination of a child's best interests is more complex and requires the state to act positively to fulfil the child's right to protection. In my thesis, I have advocated for a rights-based approach to the best interests principle, which upholds a child's right to protection where a child is a refugee or is seeking asylum. This is an approach supported, institutionally, by the UNHCR and by the CRC Committee.

Integral to Article 3(1) CRC is a balancing mechanism, inherited from the principle's origins in domestic family law²⁶⁴ and the recognition that the principle needs to be flexible to cover a broad range of circumstances.²⁶⁵ However, exceptions were made to the application of the principle in relation to adoption (Article 21 CRC) and in relation to the child's right to non-separation from his or her parents (Article 9 CRC). In both Articles, there is no implied or express balancing of a child's best interests against the interest of others, the child's best interests are paramount. As 'a primary consideration' in any other action concerning children, the child's best interests are balanced and weighed against other interests, which in immigration and asylum cases is the state's interests in immigration control. This focus does not acknowledge the obligation of the state under

²⁶⁴ See Chapter 2.

²⁶⁵ Ibid.

Article 3(2) CRC to protect and care for the child as is necessary for the child's well-being. The goal of any best interests assessment or determination should be the well-being of the child and, where a child is directly affected by the decision, finds a solution which pinpoints the best outcome for a child.²⁶⁶ The best interests assessment and determination should give appropriate weight to fulfilling the rights of the child.²⁶⁷

Article 22 CRC requires a state to take 'appropriate measures' to ensure the refugee and asylum-seeking child receives 'appropriate protection and humanitarian assistance'. The wording of Article 22 does not suggest that this should be balanced against other interests. However, balancing interests and rights is inevitable in any rights framework, but a focus on a rights-based approach to best interests, should tip the balance towards a child's right to protection. The CRC Committee emphasises that any 'elements [which] are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children'.²⁶⁸ Additionally, in chapter 2, I cited Eekelaar and Tobin's criteria for reducing the principle's indeterminacy, which are relevant to a refugee status determination process in which best interests are a primary consideration throughout.²⁶⁹

A right to protection is not an absolute right and a state is only obliged to ensure protection to the refugee or asylum-seeking child insofar as it is appropriate. Nevertheless, a child has a right to protection when seeking safety from persecution, violence, exploitation and abuse and has a concurrent right to have their best interests assessed and determined in order to support the right to protection. The scales require recalibration to ensure that only rights-based considerations of 'substantial moment' can be weighed against the interests of the child. It is not appropriate protection to give due weight to the state's interest in immigration control, alongside the obligation to protect the child.

²⁶⁶ J Eekelaar, n 250 at 5.

²⁶⁷ JGC 3 and 22, para 32 (c).

²⁶⁸ Ibid, para 51.

²⁶⁹ J Eekelaar and J Tobin, 'Article 3: The Best Interests of the Child' in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 73 at 85.

5. Conclusion

I started this chapter by acknowledging that there are two competing goals of IRL and the CRC - IRL allows states to manage their migration priorities, whereas CRC's main goals are to ensure the best interests and protection of children in addition to ensuring full enjoyment of all their rights. It is important to acknowledge that states' interests are going to play a significant role in the approach states adopt towards children seeking asylum. There is always likely to be a tension between the rights of a child who is seeking international protection and a state which has a policy of restricting migration.

The best interests principle is a fundamental guiding principle in children's rights and is prominent in a child's right to protection in situations of international migration. The UNHCR and the CRC Committee (with the CMW Committee) have given the principle a high priority and reminded states of their obligations to ensure that the best interests of the child are a primary consideration in all actions and decisions concerning refugee and asylum-seeking children. States are reminded that the principle must be applied 'at all stages of the displacement cycle'²⁷⁰ and considerations 'such as those relating to general migration control cannot override best interests considerations'.²⁷¹ Nevertheless the operationalisation of the best interests principle in domestic asylum procedures often result in a binary balancing exercise (of the best interests of the child against the state interests) without due consideration given to an outcome which ensures the child's right to protection.

For children seeking international protection, the CRC is central to their claim to ensure they receive 'appropriate protection and humanitarian assistance',²⁷² based on what is in their interests and, most importantly, to obtain care, protection and full access to their rights because they are children first and refugees or migrants second.

²⁷⁰ CRC Committee, GC 6, para 19.

²⁷¹ JGC 3 and 22, para 33.

²⁷² Article 22(1) CRC.

CONCLUSION

1. Thesis Objective and Main Argument

My thesis traverses two regimes of international law: children's rights and international refugee law. In my research I set out to analyse the interaction between IRL and the CRC and to evaluate the best interests principle in the context of a refugee and asylum-seeking child's claim for international protection. I analysed the concept of protection in IRL, IHRL and ICRL and demonstrated that in the CRC, the child's right to protection has three strands: the right to protection from harm, the right to protection for well-being and development and the right to a protective environment to enjoy rights.

The best interests principle (Article 3(1) CRC) is a central pillar of children's rights and is broadly recognised as a guiding principle for interpreting IRL from a children's rights perspective. In any action concerning children their best interests are 'a primary consideration' and thus are not the only consideration, so will be balanced against other interests. My key argument is that the operationalisation of the best interests principle for asylum-seeking and refugee children is often problematic because of the way in which children's rights and interests are balanced against the state interest in immigration control. This carries an inherent risk that a state's immigration concerns will outweigh the best interests of the child in the delicate balancing exercise played out in courts and by decision-makers in the asylum process.

What I propose is a re-interpretation of the best interests principle in light of the child's right to protection. This calls for a rights-based approach which ensures that the best interests of the child principle is operationalised to interpret the child's right to protection in light of *all* the rights in the CRC. This does not require new measures or international instruments, but my thesis provides for a novel approach to protection for the refugee child, focusing on Article 3(2) and Article 22 CRC.

Hathaway asserts that the 'strategic challenge...is...to frame the human rights vision of refugee protection in a way which takes reasonable account of the perceived self-interest of states, and hence stands a chance of adoption and meaningful implementation'.¹ State interests are going to

¹ JC Hathaway, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113 at 114.

play a significant role in claims by children seeking asylum, but states' obligations require states to balance this self-interest against a child's right to protection. There is always going to be a tension between the rights of a child who is seeking international protection and a state's policy restricting migration. Yet states already have obligations under the CRC (almost universally recognised) which 'provides a critical additional layer of protection, which may, in certain circumstances, provide a more appropriate and more child-friendly gateway for assessing the protection needs of a child seeking international protection.'² I would argue further, that these obligations must be operationalised in the manner I have proposed in this thesis.

2. My Key Findings

My thesis demonstrates that the best interests principle alone does not ensure a refugee or asylum-seeking child's right to protection. A rights-based approach to protection, which underpins my thesis, recognises that a refugee or asylum-seeking child is a rights bearer and articulates children's interests as rights as conceived in the CRC. This provides a structured and analytical approach to decision-making in relation to children, prioritising their interests, first and foremost, as children, as opposed to refugees. A rights-based approach reinforces the fact that the best interests of a child are a primary consideration in all actions concerning children (Article 3(1)) and in an asylum context, militates against using a simple binary balancing exercise between two competing interests. The asylum process and the decisions about a child in this process are complex, yet if courts and decision-makers adopt a child's rights-based approach to ensure the child has access to and is able to fully enjoy his or her rights, those actors can ensure the state's obligations are fulfilled. A consequence of this approach is that a child's right to protection must be interpreted in the light of all the rights in the CRC. A rights-based approach should be relevant and applicable throughout the asylum process, including the procedure adopted, the conceptualisation of the issues and the evidence before the court or the decision-maker, the child's perspective, the interpretation of the rights and

² JM Pobjoy, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017) at 238.

interests at issue and the reasoning adopted by the judge or the decision-maker.

As I have shown in Chapter 2 of this thesis, the best interests principle has the potential to be a gateway right,³ because it reflects a common purpose which focuses on the child's interests and protection needs, especially when due weight is given to the well-being and protection of the child in Article 3(2) CRC. The CRC Committee and domestic courts have acknowledged that best interests have a 'high priority' in any decision about a child and require decisions of 'substantial moment' to shift them. A refugee child's best interests assessment and determination gather more weight in the balancing exercise when the aim and purpose of best interests are identified in Article 3(2), to ensure the protection and well-being of the child. I have argued further, that this subparagraph provides a stronger basis for a child's claim when a rights-based approach to that protection is employed in the context of a child forced to migrate from their country of origin.

The refugee child is conceptualised in Article 22 CRC and the broad scope of Article 22 means that it applies to children who are refugees, children seeking asylum and children who have been refused refugee or other protection and children who have no status. In Chapter 3, I demonstrated that this provision establishes a child's right to 'appropriate protection and humanitarian assistance' and states are obliged to implement appropriate measures to ensure they respect, protect and fulfil a refugee child's rights, while the child remains within their jurisdiction.

As protection is a key concept in both IRL and children's rights, I analysed in Chapter 4 of this thesis, the normative content of the child's right to protection derived from the CRC and other international instruments. I focused on state protection in the IRL sense, the general obligation to protect under IHRL, and the specific rights to protection under the CRC. The content and meaning of protection from a child's rights perspective gives direction to the interpretation of the best interests principle. The concept of protection for a child, is not only about a right to be protected from harm, but also includes a right to protection for well-being and development and the right to a protective environment

³ U Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in EE Sutherland and LA Barnes MacFarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 51 at 64-65.

conducive to enjoying all the rights in the CRC. I demonstrated how appropriate protection under Article 22(1) CRC embraces these aspects of protection and provides for a more holistic interpretation of the rights of the child, in keeping with the purpose and objectives of the CRC.

In Chapter 5, I focused on an important aspect of IRL and in international law more broadly - the principle of *non-refoulement* which is also a key element of protection for a refugee or asylum-seeking child. Once a child has left danger and persecution behind in their country of origin, international law provides that states protect that child by ensuring that he or she does not face being returned to the risk of irreparable harm, either in their country of origin or in another state which may return him or her to the country of origin. In other words, the child's right to protection travels with them. A child rights-based perspective on *non-refoulement* provides children with a broader protection basis than an adult, because of the way children's rights are framed in the CRC. I examined the *non-entrée* and deterrence policies implemented by states to try to avoid their *non-refoulement* obligations and how these policies impact on and undermine a child's protection rights.

My final chapter drew together the key elements of my argument on the interplay of IRL, IHRL and children's rights and the interaction between protection and best interests. In this chapter I interrogated the interaction of the best interests principle at different points of the asylum process and considered to what extent state interests outweigh a child's right to protection. Drawing from the examples of cases before the ECtHR and the CRC Committee, I argued for a refocusing of the best interests principle infused with a child's right to protection. Ultimately the goals of the best interests assessment and determination process, for a refugee or asylum-seeking child are to ensure the well-being of the child, to ensure the full and effective enjoyment of all their rights in the CRC and to reach a durable solution. The aim is not to find solutions which align with a state's immigration policy, but to identify solutions which fulfil a state's obligation to protect and optimises the best interests of the child. When an appropriate and sustainable solution is found, any reasons to set it aside must be rights-based and sufficiently strong to outweigh the child's rights and interests ('considerations of substantial moment').

I asked five questions at the start of my thesis, which I have endeavoured to answer in the main chapters of my thesis. Essentially, my

thesis is about the operationalisation of the best interests principle in asylum and refugee claims involving children and to what extent the inherent risks to the child, when his or her interests are balanced against the state interest in immigration control, can be reduced when framed in the context of a child's right to protection. I focused on a right-based approach to analyse the way in which the operationalisation of the best interests principle in the asylum process fulfils the child's right to protection. Through this analysis I demonstrate the importance of a rights-based approach to the best interests principle to secure a refugee and asylum-seeking child's right to protection and to ensure the full and effective enjoyment of all rights in the CRC. Such a right to protection is important for a refugee child or asylum-seeking child, who has lost the protection of their home state and may also have lost the protection of their parents or other family members. My research provides an original perspective on the concept of protection in IRL and IHRL and a right to protection for a refugee child, focusing on Article 3(2) and Article 22 CRC. It is my hope that in doing so, the rights of the child in a forced migration context can be imagined differently and ensure children's protection when they need it the most.

Bibliography

Books and Articles

- Abram, EF, 'The Child's Right to Family Unity in International Immigration Law' (1995) 17 *Law and Policy* 397.
- Alienikoff, TA, 'State Centered Refugee Law: From Resettlement to Containment (1992) 14 *Michigan Journal of International Law* 120.
- Alienikoff, A and Zamone, L, *The Arc of Protection: Toward a New International Refugee Regime* (Public Seminar Books 2018).
- Alienikoff, TA 'The Unfinished work of the Global Compact on Refugees' (2018) 30 *International Journal of Refugee Law* 611.
- Allsop, J and Chase, E, 'Best interests, durable solutions and belonging: policy discourses shaping the futures of unaccompanied migrant and refugee minors coming of age in Europe' (2019) 45 *Journal of Ethnic and Migration Studies*, 293
- Alston, P, 'The Legal Framework of the Convention on the Rights of the Child' (1992) 91(2) *Bulletin of Human Rights* 1.
- Alston, P, 'Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of law and the Family* 1.
- Alston, P and Gilmour Walsh, B, *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (Innocenti Studies, UNICEF 1996).
- Alston, P and Tobin, J, *Laying the Foundations for Children's Rights* (Innocenti, UNICEF 2005)
- Altwickler, T, 'Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts' (2018) 29 *European Journal of International Law* 581.
- Anker, D, *Law of Asylum in the United States* (Thompson Reuters 2015)
- Archard, D, 'Children, Adults, Best Interests and Rights' (2013) 13 *Medical Law Journal* 55.
- Archard, D, *Children, Rights and Childhood* (Routledge, Abingdon 2015).
- Arnold, S, *Children's Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (Routledge, Abingdon 2017).
- Besson, S, 'The Extraterritoriality of the ECHR: Why Human Rights Depend on Jurisdiction and What Jurisdiction amounts to' (2012) 25 *Leiden Journal of International Law* 857.
- Bhabha, J, 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers' (2001) 3 *European Journal of Migration and Law* 283.

- Bhabha, J, Crock, M, Finch, N and Schmidt, S, *Seeking Asylum Alone: A Comparative Study: Unaccompanied and Separated Children and Refugee Protection in Australia, the UK and the US* (The Federation Press, Annandale 2007).
- Bhabha, J, 'Arendt's Children: Do today's Migrant Children Have a Right to Rights?' (2009) 31 *Human Rights Quarterly* 410.
- Biondi, P, 'The Best Interests of the Child and the Right to Family Unity under EU Law' (2018), School of Advanced Study, University of London.
- Biondi, P, 'The ZAT case and the far-reaching consequences for the Dublin Regulation', *European Database of Asylum Law Journal* (9 February 2017); available at: <https://www.asylumlawdatabase.eu/en/journal/zat-case-and-far-reaching-consequences-dublin-regulation>.
- Blake, N, 'Current Problems in Asylum and Protection Law: The UK judicial perspective' (9th World Conference of the International Association of Refugee Law Judges, Slovenia, 7 September 2011),
- Boer-Buquicchio, M de, 'Introduction' in G van Bueren, *Child Rights in Europe: Convergence and Divergence in Judicial Protection* (Council of Europe Publishing, Strasbourg 2007) 12.
- Brems, E, Desmet, E and Vandenhole, W (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration* (Routledge, London 2017).
- Brittle, R, 'A Hostile Environment for Children? The Rights and Best Interests of the Refugee Child in UK Asylum Law' (2019) 19 *Human Rights Law Review* [forthcoming].
- Bueren, G van, *The International Law on the Rights of the Child* (Martinus Nijhoff, Dordrecht 1998).
- Caverzasio, SG (ed), *Strengthening Protection in War: A Search for Professional Standards* (ICRC Geneva 2001).
- Cantwell, N, 'Are "Best Interests" a Pillar or Problem for Implementing the Human Rights of Children?' in T Liefaard and J Sloth-Nielsen (eds) *The United Nations Convention on the Rights of the Child: Taking Stock after 25 years and Looking Ahead* (Brill, Leiden 2016) 61.
- Cantwell, N, 'The Concept of the Best Interests of the Child: What Does it Add to Children's Human Rights?' in M Sormunen (ed), *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe, Strasbourg 2016) 18.
- Chetail, V, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R Rubio-Marin (ed) *Human Rights and Immigration* (Oxford University Press, Oxford 2014) 19.
- Crock, M, 'Re-thinking the Paradigms of Protection: Children as Convention Refugees in Australia' in J. McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford and Portland, Oregon 2008) 155.

- Crock, M, 'Of Relative Rights and Putative Children: Rethinking the Critical Framework for the Protection of Refugee Children and Youth' [2013] 20 *Australian International Law Journal* 33
- Crock, M, 'Justice for the Migrant Child: The Protective Force of the Convention on the Rights of the Child' in S Mahmoudi, P Leviner, A Kaldal and K Lainpelto (eds) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill Nijhoff, Leiden and Boston 2015) 221.
- Crock, M and Benson, L (eds), *Protecting Migrant Children: In Search of Best Practice* (Edwards Elgar, Cheltenham 2018).
- Crock, M and Martin, H, 'First Things First: International Law and the Protection of Migrant Children', in M Crock and L Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edwards Elgar, Cheltenham 2018) 75.
- Crock, M and Yule, P, 'Children and the Convention Relating to the Status of Refugees' in Crock and Benson (eds) *Protecting Migrant Children: In Search of Best Practice* (Edward Elgar, Cheltenham 2018) 97.
- Darrow, M and Arbour, L, 'The Pillar of Glass: Human Rights in Development Operations of the United Nations' (2009) 103 *American Journal of International Law* 446.
- Daly, A, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (Brill, Leiden 2018).
- Davitti, D and La Chimia, A, 'A Lesser Evil? The European Agenda on Migration and the Use of Aid Funding for Migration Control' (2015) *The Irish Yearbook of International Law* 133.
- Donson, F, 'Commentary on *R (on the Application of Castle v Commissioner of the Police for the Metropolis)*' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, Oxford 2017) 275.
- Drywood, E, 'Challenging concepts of the 'Child' in Asylum and Immigration Law: the example of the EU' (2010) 32 *Journal of Social Welfare and Family Law* 309.
- Dudley, M, Steel, Z, Mares, S and Newman, L, 'Children and Young People in Immigration Detention' (2012) 25 *Current Opinion in Psychiatry* 285.
- Durieux, J, 'Three Asylum Paradigms' (2013) 20 *Journal of Minority and Group Rights* 147.
- Eastmond M and Ascher, H, 'In the Best Interest of the Child? The Politics of Vulnerability and Negotiations for Asylum in Sweden' (2011) 37 *Journal of Ethnic and Migration Studies* 1185.
- Edwards, A, 'Human Rights, Refugees and the Right to "Enjoy" Asylum' (2005) 17 *International Journal of Refugee Law* 293.
- Edwards, A, 'Tampering with Refugee Protection: The Case of Australia' (2003) 15 *International Journal of Refugee Law* 192.
- Eekelaar, J, 'Trust the Judges: How far should Family Law go?' (1984) 47 *Modern Law Review* 593.

- Eekelaar, J, 'The Importance of Thinking That Children Have Rights' (1992) 6 *International Journal of Law and the Family* 230.
- Eekelaar, J, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237.
- Eekelaar, J, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 *International Journal of Children's Rights* 3.
- Eekelaar, J and Tobin, J, 'Article 3: The Best Interests of the Child' in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 73.
- Fabre, C, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, Oxford 2000).
- Farmer, A, A Commentary on the Committee of the Rights of the Child's Definition of Non-Refoulement for Children: Broad Protection for Fundamental Rights' (2011) 80 *Fordham Law Review Res Gestae* 39, available at: https://www.hrw.org/sites/default/files/related_material/Fordham%20Law.pdf (accessed 6 May 2019).
- Ferris, EG, *The Politics of Protection: The Limits of Humanitarian Action* (Brookings Institution Press, Washington DC 2011).
- Fierens, J, 'Alpha Ursae Minoris: The North Star and the child's best interests among competing interests' in M Sormunen (ed), *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe, Strasbourg 2016) 36.
- Fortin, J, 'Accommodating Children's Rights in a Post Human Rights Act Era' (2006) 69 *Modern Law Review* 299.
- Fortin, J, *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, Cambridge 2009).
- Foster, M, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge 2007).
- Foster, M, 'Non-Refoulement on the Basis of Socio-Economic Deprivation: The Scope of Complementary Protection in International Human Rights Law' (2009) *New Zealand Law Review* 257.
- Freeman, MDA, 'Article 3. The Best Interests of the Child' in A Alen, J Vande Lanotte, E Verhellen, F Ang, E Berghmans and M Verheyde (eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2007).
- Gammeltoft-Hansen, T, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, Cambridge 2011).
- Gammeltoft-Hansen, T, 'International Refugee Law and Refugee Policy: The Case of Deterrence Policies' (2014) 27 *Journal of Refugee Studies* 574.
- Gammeltoft-Hansen, T and Hathaway, JC, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235.

- Gil-Bazo, M, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27 *Refugee Survey Quarterly* 33.
- Gil-Bazo, M, 'Asylum as a General Principle of International Law' (2015) 27 *International Journal of Refugee Law* 3.
- Goodwin-Gill, GS, 'The Language of Protection' (1989) 1 *The International Journal of Refugee Law* 6
- Goodwin-Gill, GS, '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.
- Goodwin-Gill, GS, 'Who to Protect. How...and the Future?' (1997) 9 *International Journal of Refugee Law* 1.
- Goodwin-Gill, GS, 'Editorial: Asylum 2001 – A Convention and A Purpose' (2001) 13 *International Journal of Refugee Law* 1.
- Goodwin-Gill, GS and McAdam, J, *The Refugee in International Law* (3rd ed, Oxford University Press, Oxford 2007).
- Goodwin-Gill, GS, 'Introduction to the Expert Roundtable on The United Nations Convention of the Rights of the Child and its application to child refugee status determination and asylum processes' (2012) 26 *Journal of Immigration, Asylum and Nationality Law* 226.
- Grahl-Madsen, A, *Commentary on the Refugee Convention 1951* (1963) (UNHCR 1997).
- Grahl-Madson, A, *The Status of Refugees in International Law* (AW Sijthoff, Leiden 1972).
- Griffin, J, *Well-Being: Its Meaning, Measurement and Moral Importance* (Oxford University Press, 1986).
- Haddad, E, 'Refugee Protection: A Clash of Values' (2003) 7 *International Journal of Human Rights* 1.
- Hammarberg, T, 'The UN Convention on the Rights of the Child-and How to make it work' (1990) 12 *Human Rights Quarterly* 97.
- Hanson, K and Lundy, L, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called 'General Principles' of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 285.
- Harvey, C, 'Is Humanity Enough?' Refugee, asylum seekers and the rights regime', in S.S. Juss and C. Harvey, (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham 2013) 68.
- Hathaway, JC, *The Law of Refugee Status* (Butterworths, Toronto 1991).
- Hathaway, JC, 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 *Journal of Refugee Studies* 113.
- Hathaway, JC, 'The Relationship between Human Rights and Refugee Law: What Refugee Judges can Contribute?' (1998) *International Association of Refugee Law Judges: The Realities of Refugee Determination on the Eve of a New Millennium: The Role of the Judiciary*.

- Hathaway, JC, *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge 2005).
- Hathaway, JC, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503.
- Hathaway, JC, 'Refuge and asylum' in B Opeskin, R Perruchoud and J, Redpath-Cross (eds) *Foundations of International Migration Law* (Cambridge University Press, Cambridge 2012) 194.
- Hathaway, JC, North, AM and Pobjoy, JM, 'Supervising the Refugee Convention: Introduction' (2013) 26 *Journal of Refugee Studies* 323.
- Hathaway, JC and Foster, M, *The Law of Refugee Status* (2nd ed, Cambridge University Press, Cambridge 2014).
- Hathaway, JC and Storey, H, 'The Meaning of Protection in Refugee Law' (2016) 28 *International Journal of Refugee Law* 480.
- Heijer, M den, 'Article 18 - Right to Asylum' in S Peers, T Harvey, J Kenner and A Ward (eds), *The European Charter of Fundamental Rights: A Commentary* (Hart Publishing, Oxford 2014) 519.
- Hodgkin, R and Newell, P, *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, UNICEF, Geneva 2007).
- Hollingsworth, K and Stalford, H, 'Towards Children's Rights Judgments' in H Stalford, K Hollingsworth and S Gilmore, *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Hart, Oxford 2017) 53
- Humphris, R and Sigona, N, 'Outsourcing the "best interests" of unaccompanied asylum-seeking children in the era of austerity' (2019) 45 *Journal of Ethnic and Migration Studies*, 312
- Jaroiniska, D and Gee, D, 'Children's Environmental Health and the Precautionary Principle' (2007) 210 *International Journal of Hygiene and Environmental Health*:
<https://www.sciencedirect.com/science/article/pii/S1438463907001186>
- Jastram, K and Newland K, 'Family Unity and Refugee Protection' in E Feller, V Turk, and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003, reprinted 2005) 555.
- Kalin, W, 'Non-State Agents of Persecution and the Inability of the State to Protect' (2001) 15 *Georgetown Immigration Law Journal* 415.
- Kalverboer, M, Beltman, D, van Os, C, Zijlstra, E, 'The Best Interests of the Child in Cases of Migration: Assessing and Determining the Best Interests of the Child in Migration Procedures' (2017) 25 *International Journal of Children's Rights* 114.
- Kilkelly, U, 'The Best Interests of the Child: A Gateway to Children's Rights?' in EE Sutherland and L Barnes MacFarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 51.

- Kleinig, J, 'Crime and the Concept of Harm' (1978) 15 *American Philosophical Quarterly* 27.
- Kohli, R, 'Protecting Asylum Seeking Children on the Move' (2014) 30 *Revue Européenne des Migrations Internationales*, 83.
- Lauterpacht E and Bethlehem, D, 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Turk and F Nicolson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003).
- LeBlanc, L, *The Convention on the Rights of the Child* (University of Nebraska Press, Lincoln 1995)
- Legomsky, S, 'Secondary Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection' (2003) 15 *International Journal of Refugee Law* 567.
- Llorens, J.C., Presentation of General Comment No 14: Strengths and Limitations, Points of Consensus and Dissent Emerging in its Drafting, in Sormunen, M.(ed) *The Best Interests of the Child: A Dialogue Between Theory and Practice* (Council of Europe, Strasbourg 2016), 11.
- Lundberg, A, The Best Interests of the Child Principle in Swedish Asylum Cases: The Marginalization of Children's Rights (2011) 3 *Journal of Human Rights Practice* 49.
- Lundy, L and McEvoy, L, 'Childhood, the United Nations Convention on the Rights of the Child and Research: What Constitutes a "Rights-Based" Approach?' In MDA Freeman (ed) *Law and Childhood Studies* (Oxford University Press, Oxford 2012) 75.
- Lundy, L, Kilkelly, U, Byrne, B and Kang, J, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries* (UNICEF-UK and Queen's University Belfast, November 2012).
- Lundy, L, 'United Nations Convention on the Rights of the Child and Child-Wellbeing', in A Ben-Arieh, F Casas, I Frønes and J Korbin (eds.) *Handbook of Child Well-Being* (Springer, Dordrecht 2014) 2439.
- Maguire, A, 'High Court Challenge to Offshore Immigration Detention Power Fails', *The Conversation* (17 August 2017).
- Marx, R, 'The Notion of Persecution by Non-State Agents in German Jurisprudence' (2001) 15 *Georgetown Immigration Law Journal* 447.
- McAdam, J, 'Seeking Asylum under the Convention on the Rights of the Child: A case for Complementary Protection' (2006) 14 *The International Journal of Children's Rights* 251.
- McAdam, J, *Complementary Protection in International Refugee Law* (Oxford University Press, Oxford 2007).
- McAdam, J, 'The Refugee Convention as a Rights Blueprint for Persons' in Need of International Protection' in J McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford 2008) 263.
- Messineo, F, '*Non-Refoulement* Obligations in Public International Law: Towards a New Protection Status?' in SS Juss (ed) *The Ashgate*

- Research Companion to Migration Law, Theory and Policy* (Ashgate, London 2013) 129.
- Meyler, F and Morrish, D, 'Best Interests of the Unaccompanied Refugee Child: United Kingdom and Canadian Approaches in Legislation and Case Law' (2017) (unpublished paper presented to the 11th Conference of the International Association of Refugee Law Judges).
- Milanovic, M, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford University Press 2011).
- Milanovic, M, 'Extraterritoriality and Human Rights: Prospects and Challenges' in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge, Abingdon 2017) 53.
- Moreno-Lax, V, *Assessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights Under EU Law* (Oxford University Press, Oxford 2017).
- Moreno-Lax, V and Giuffre, M, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Edwards Elgar, forthcoming).
- Moreno-Lax, 'Responsibility by Proxy and the Functional Approach to Jurisdiction: Closing the Accountability Gaps in Multi-actor Constellations of Extraterritorial Cooperation' (paper presented at *Accountability for Human Rights Violations in Migration Control* Workshop at the Refugee Studies Centre, Oxford, 10 November 2018).
- Mullally, S, 'Separated Children in Ireland: Responding to "Terrible Wrongs"' (2011) 23 *International Journal of Refugee Law* 632.
- Nicolson, F, 'The Right to Family Life and Family Unity of Refugees and Others in Need of International Protection and the Family Definition Applied' in UNHCR *Legal and Protection Policy Research Series* (January 2018).
- Nicholson, F, 'The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification', in UNHCR *Legal and Protection Policy Research Series* (January 2018).
- Nolan, A, 'Addressing Economic and Social Rights Violations by Non-State Actors through the Role of the State: A Comparison of Regional Approaches to the "Obligation to Protect"' (2009) 9 *Human Rights Law Review* 225.
- Nolan, A, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart, Oxford 2011).
- Nolan, A, 'Privatization and Economic and Social Rights' (2018) 40 *Human Rights Quarterly* 815.
- Nolan, A, 'Children's Economic and Social Rights' in T Liefaard and U Kilkelly (eds) *International Human Rights of Children* (Springer, Singapore 2019) 239.

- Noll, G, 'Seeking Asylum at Embassies: A Right to Entry Under International Law' (2005) 17 *International Journal of Refugee Law* 542.
- Parker, S, 'The Best Interests of the Child: Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26.
- Parkes, A, *Children and International Human Rights Law: The Right of the Child to be Heard* (Routledge, Oxford 2013).
- Peleg, N, *The Child's Right to Development* (PhD Thesis, University College London 2012).
- Peleg, N, *The Child's Right to Development* (Cambridge University Press, Cambridge 2019).
- Pijnenburg, A, 'From Italian pushbacks to Libyan pullbacks: Is *Hirsi* 2.0 in the Making in Strasbourg?' (2019) 20 *European Journal of Migration and Law* 396.
- Pobjoy, JM, 'A Child Rights Framework for Assessing the Status of Refugee Children' in S.S. Juss and C Harvey *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham 2013) 91.
- Pobjoy, JM, 'The Best Interests Principle as an Independent Source of International Protection' (2015) 64 *International and Comparative Law Quarterly* 327.
- Pobjoy, JM, *The Child in International Refugee Law* (Cambridge University Press, Cambridge 2017).
- Pobjoy, JM 'Article 22: Refugee Children', in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) 818.
- Price-Cohen, C, 'The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children' (1990) 3 *International Journal of Refugee Law* 675.
- Quennerstedt, A, 'Children, but not really humans: Critical Reflections on the Hampering Effect of the 3Ps', (2010) 18 *International Journal of Children's Rights* 619.
- Rap, S 'The Right to Effective Participation of Refugee and Migrant Children: A Critical Children's Rights Perspective' (2019) UN University Working Paper Series W-2019/3.
- Raz, J, *Ethics in the Public Domain*, (Clarendon Press, Oxford 1994).
- Raz, J, *The Morality of Freedom* (Clarendon Press, 1986),
- Reece, H, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267.
- Robinson, P, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation - A Commentary* (New York, Institute for Jewish Affairs 1953).
- Ross, H, 'Children's Rights and Theories of Rights' (2013) 21 *International Journal of Children's Rights* 679.
- Sandland, R, 'Lessons for children's rights from disability rights', in E Brems, E Desmet and W Vandenhoele (eds) *Children's Rights Law in the Global Human Rights Landscape: Inspiration, Integration?* (Routledge, Abingdon 2017) 109 at 122 - 123.

- Sandberg, K, 'The Role of National Courts in Promoting Children's Rights: The Case of Norway' (2014) 22 *International Journal of Children's Rights* 1.
- Schutter, O De, Eide, A, Khalfan, A and Orellana, M, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2012) 34 *Human Rights Quarterly* 1084.
- Sepulveda, MM, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, Antwerp, Oxford, New York 2003).
- Sen, A, 'Well-Being, Agency and Freedom' (1985) 82 *The Journal of Philosophy* 169.
- Shacknove, AE, 'Who is a Refugee' (1985) 95 *Ethics* 274.
- Smyth, C, *European Asylum Law and the Rights of the Child* (Routledge, Oxford 2014).
- Smyth, C, 'The best interests of the child in the expulsion and first-entry jurisprudence of the European Court of Human Rights: How principled is the Court's use of the principle?' (2015) 17 *European Journal of Migration and Law* 70.
- Smyth, C 'Towards a Complete Prohibition on the Immigration Detention of Children' (2019) 19 *Human Rights Law Review* 1.
- Spinak, J, 'When did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate' (2007) 41 *Family Law Quarterly* 393.
- Stalford, H, 'The broader relevance of features of children's rights law: the "best interests of the child" principle' in E Brems, E Desmet and W Vandenhoele (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge, Abingdon 2017) 37.
- Stalford, H, 'David and Goliath: Due Weight, the State and Determining Unaccompanied Children's Fate' (2018) 32 *Journal of Immigration, Asylum and Nationality Law* 258.
- Stevens, D, 'What Do We Mean by Protection?' (2013) 20 *International Journal on Minority and Group Rights* 233.
- Storey, H, 'The Meaning of 'Protection' within the Refugee Definition' (2016) 35 *Refugee Survey Quarterly* 1.
- Sutherland, EE, 'Article 3 of the CRC: The Challenges of Vagueness and Priorities' in EE Sutherland and LA Barnes MacFarlane (eds) *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, Cambridge 2016) 21.
- They, 'The interest of the child and the Regulation of the post-Divorce Family' in C Smart and S Sevenhuijsen (eds), *Child Custody and the Politics of Gender* (1989) 78.
- Thorburn Stern, R, 'Unaccompanied and Separated Asylum-seeking Minors: Implementing a Rights-based Approach in the Asylum Process' in S Mahmoudi, S, P Leviner, A Kaldal, and K Lainpelto (eds) *Child-Friendly Justice: A Quarter of a Century of the UN*

- Convention on the Rights of the Child* (Brill Nijhoff, Leiden and Boston 2015) 242.
- Tisdall, K, 'Children's Rights and Children's Well-Being: Equivalent Policy Concepts' (2015) 44 *Journal of Social Policy* 807.
- Tobin, J, 'Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights' (2005) 12 *South African Journal on Human Rights* 86.
- Tobin, J, 'Beyond the Supermarket Shelf: Using A Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275.
- Tobin, J, 'Judging the Judges: Are they Adopting the Rights Approach in Matters Involving Children' (2009) 33 *Melbourne University Law Review* 579.
- Tobin, J, 'Courts and the Construction of Childhood: A New Way of Thinking' in MDA Freeman (ed) *Law and Childhood Studies* (Oxford University Press 2012) 55.
- Tobin, J, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395.
- Tobin, J, 'Understanding a Human Rights Based Approach to Matters involving Children: Conceptual Foundations and Strategic Considerations' in A Invernizzi and J Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate, Farnham 2013) 61.
- Triggs, G, 'The Impact of Detention on the Health, Well-being and Development of Children: Findings from the Second National Inquiry into Children in Immigration Detention' in M Crock and L Benson (eds), *Protecting Migrant Children: In Search of Best Practice* (Edwards Elgar, Cheltenham 2018).
- Turk, V and Nicolson, F, 'Refugee Protection in international Law: an overall Perspective' in E Feller, V Turk and F Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge 2003 (reprinted 2005)).
- Vandenhoe, W, 'Distinctive characteristics of children's human rights law' in E Brems, E Desmet and W Vandenhoe (eds) *Children's Rights Law in the Global Human Rights Landscape: Isolation, Inspiration, Integration?* (Routledge, Abingdon 2017) at 26.
- Veerman, P, *The Rights of the Child and the Changing image of Childhood* (Martinus Nijhoff Publishers, Dordrecht 1992).
- Weis, P, 'Territorial Asylum' (1966) 6 *Indian Journal of International Law* 173.
- Wouters, CW (Kees), *International Legal Standards for the Protection from Refoulement* (Doctoral Thesis), Leiden University (Intersentia Publishing, Antwerp 2009)
- Wolf J, 'The Concept of the 'Best Interest' in Terms of the UN Convention on the Rights of the Child' in M Freeman and P Veerman (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers, Dordrecht 1992) 125.

Zermatten, J., 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights* 483 – 499.

Zermatten, J, 'Best Interests of the Child' in S Mahmoudi, P Leviner and A Kaldal (eds) *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (Brill, Leiden 2015) 30.

Reports, Policy Papers, Guidelines and Guiding Principles

Australian Human Rights and Equal Opportunity Commission: *A Last Resort? National Inquiry into Children in Immigration Detention* (2004).

Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2015).

Australian Senate Inquiry and Report of Serious allegations of abuse, self-harm and neglect of asylum seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre (21 April 2017).

Brown, T, Johnson, H, Adams, N, Cronin, K, Kohli, R, Sandhu, B, *Put Yourself in Our Shoes: Considering Children's Best Interests in the Asylum System* (9 November 2015) Law Centres Network.

Corlett, D, Mitchell, G, Van Hove, J, Bowring, L and Wright, K, *Captured Childhood* (International Detention Coalition, 2012).

European Center for Constitutional and Human Rights (ECCHR), *Dossier on Migration* (April 2019), available at: https://www.ecchr.eu/fileadmin/Sondernewsletter_Dossiers/Dossier_Migration_April2019.pdf [accessed 18 May 2019].

Finch, N., CONNECT Country Report on the United Kingdom, 'Always Migrants, Sometimes Children: Mapping of the Reception and Protection of Unaccompanied Children in the United Kingdom' (2014).

Goodwin-Gill, GS and Hurwitz, A, 'Memorandum' reprinted in Minutes of Evidence Taken before the European Union Committee (Sub-Committee E) (10 April 2002) in House of Lords Select Committee on the European Union, 'Defining Refugee Status and Those in Need of International Protection', House of Lords Paper No 156, Session 2001–02 (2002) Appendix 2.

Gregg, L and Williams, N, *Not Just a Temporary Fix: The Search for Durable Solutions for Separated Migrant Children* (The Children's Society, London 2015).

Inter-Agency Group on Children on the Move: *The UN High Level Dialogue on Migration and Development 2013: Why Children Matter, Background Paper* (April 2013).

Inter-Agency Standing Committee, Protection of Internally Displaced Persons, Policy Paper, December 1999, available at https://interagencystandingcommittee.org/system/files/legacy_files/FINALIDPPolicy.pdf

International Commission of Jurists (ICJ), ECRE, AIRE Centre, Dutch Council for Refugees, *Third Party Intervention in DD v Spain, 4/2016 to the UN Committee on the Rights of the Child* (31st May 2018),

available at: <http://www.asylumlawdatabase.eu/en/content/third-party-intervention-dd-v-spain-42016-un-committee-rights-child-interveners>.

- International Office for Migration (IOM), *Children on the Move* (2013).
- Jeronimo Vink, P and Finch, N, *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 OHCHR, Regional Office for Europe 2012).
- Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights (International Commission of Jurists, 1997).
- Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (ETO, FLAN international 2013).
- O'Donnell, R and Hagan, M, *Identification, Reception and Protection of Unaccompanied Children: Connect Project Report* (2014).
- O'Flaherty, M, (ed) *Guiding Principles for Human Rights Field Officers Working in Conflict and Post-Conflict Environments* (University of Nottingham Human Rights Law Centre, Nottingham 2008).
- Ruxton, S, *Separated Children Seeking Asylum in Europe: A Programme for Action*, (Save the Children and UNHCR 2000)
- San Remo Declaration on the Principle of *Non-Refoulement* (September 2001) and Explanatory Note on the Principle of Non-Refoulement of Refugees as Customary International Law; available at: https://www.peacepalacelibrary.nl/ebooks/files/IIHL1_en.pdf [accessed 17.09.18].
- Save the Children Fund, *Separated Children in Europe Programme, Statement of Good Practice*, (ed) T. Smith (4th Revised Edition, Save the Children, Denmark 2009).
- Save the Children, *From Europe to Afghanistan: Experiences of Child Returnees* (Save the Children and Samuel Hall, Sweden 2018).
- UNHCR and UNICEF, *Safe and Sound, What States Can do to ensure respect for the best interests of unaccompanied and separated children in Europe* (UNICEF, Geneva 2014).
- UNICEF, *A Human Rights Approach to UNICEF's Programming for Children and Women: What it is and Some Changes it will Bring* (UNICEF, New York 1998).
- UNICEF, *Law Reform and Implementation of the CRC* (UNICEF Innocenti Research Centre, Florence 2007).
- UNICEF, *Uprooted: The Growing Crisis for Refugee and Migrant Children*, (UNICEF, New York 2016).
- UNICEF, *A Child is a Child: Protecting Children on the Move from Violence, Abuse and Exploitation* (UNICEF, New York 2017).
- UNICEF *Strategic Plan, 2014-2017*, E/ICEF/2013/21 and the *Final Results Framework for the UNICEF Strategic Plan, 2014 – 2017*, E/ICEF/2014/8.

- UK House of Lords and House of Commons Joint Committee on Human Rights, 'Human rights of Unaccompanied Migrant Children and Young People in the UK' (2013 - 2014).
- UK House of Lords European Union Committee, 'Children in Crisis: Unaccompanied Migrant Children in the EU' (2016).
- UK Joint Agency Briefing Note, *Together Again: Reuniting Families in Safety-What the UK Can Do* (Oxfam, Refugee Council, Amnesty International and British Red Cross, February 2017).
- UK House of Commons Library Briefing Paper: UK Family Reunion Rules: Striking the Right Balance? (1 March 2018).

[Travaux Préparatoires of the Working Group on the Question of a Convention on the Rights of a Child 1978 – 1990.](#)

- UN ECOSOC, Commission on Human Rights, thirty-fourth session, Letter dated 17th January 1978 from the Permanent Representative of Poland to the Director of the Division of Human Rights, UN doc. E/CN.4/1284 (18 January 1978).
- UN ECOSOC, Commission on Human Rights, thirty-fifth session, Question of a Convention on the Rights of a Child: Report of the Secretary General, UN Doc. E/CN.4/1324/Add.1 (27 December 1978).
- UN ECOSOC, Written Statement submitted by the Women's International Democratic Federation, a Non-Governmental Organisation in Category I Consultative Status (Commission on Human Rights, 35th Session, agenda item 13) UN Doc. E/CN.4/NGO/244 (19 February 1979).
- UN ECOSOC, Commission on Human Rights, thirty-fifth session, Report of the Working Group to the Commission on Human Rights on a draft convention on the rights of the child UN Doc. E/CN.4/L.1468 (12 March 1979).
- UN ECOSOC, Commission on Human Rights, thirty-sixth session, Question of a Convention on the Rights of the Child, Note verbale dated 5 October 1979 addressed to the Division of Human Rights by the Permanent Representation of the Polish People's Republic to the United Nations in Geneva, E/CN.4/1349 (10 October 1979, reissued 17 January 1980).
- UN ECOSOC, Commission on Human Rights, thirty-sixth session, Question of a Convention on the Rights of the Child: Report of the Working Group, UN Doc. E/CN.4/L.1542 (10th March 1980).
- UN ECOSOC, Commission on Human Rights, thirty-seventh session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/L.1575 (17 February 1981).
- UN ECOSOC, Commission on Human Rights, thirty-eighth session, Report of the Working Group on a Draft Convention on the Rights of the Child, UN Doc. E/CN.4/1349 (14 January 1982).
- UN ECOSOC, Report of the Informal Open-Ended Working Group on the Rights of the Child, UN Doc. E/1982/12/Add.1 and E/CN.4/1982/30/Add.1 (15 March 1982).

- UN ECOSOC, Commission on Human Rights, Considerations of the Working Group 1982, E/1982/12/Add.1.C.
- UN ECOSOC, Commission on Human Rights, thirty-ninth session, UN Doc. E/CN.4/1983/WG.1/WP.21.
- UN ECOSOC, Commission on Human Rights, thirty-ninth session, Written Statement submitted by two non-governmental organisations in consultative status: The international Federation of Women in Legal Careers and the International Abolitionist Federation, UN Doc. E/CN.4/1983/NGO/33 (17 February 1983).
- UN ECOSOC, Commission on Human Rights, Written Statement on behalf of International Federation of Human Rights, International Federation of Women in Legal Careers, Pax Romana, UN Doc. E/CN.4/1984/WG.1/WP.6 (1984).
- UN ECOSOC, Commission on Human Rights, forty-second session, Report of the Working Group to the Commission on Human Rights on a draft convention on the rights of the child, UN Doc. E/CN.4/1986/39 (13 March 1986).
- UN ECOSOC, Commission on Human Rights, forty-third session, Report of the Working Group Commission on Human Rights on a draft convention on the rights of the child, UN Doc. E/CN.4/1987/25 (9 March 1987),
- UN ECOSOC, Commission on Human Rights, forty-fourth session, Report of the Working Group on a draft convention on the rights of the child, UN Doc. E/CN.4/1988/28 (6 April 1988).
- UN ECOSOC, Commission on Human Rights, Written Statements of UNICEF and WHO, UN Doc. E/CN.4/1989/WG.1/CRP.1 (1989).
- UN ECOSOC, Commission on Human Rights, forty-fifth session, Report of the Working Group on a draft Convention on the Rights of the Child, UN Doc. E/CN.4/1989/48 (2 March 1989).

[Committee on the Rights of the Child \(CRC Committee\)](#)

- CRC Committee, General guidelines regarding the form and content of initial reports to be submitted by State Parties under Article 44, paragraph 1 (a) of the Convention, adopted by the Committee on its 22nd meeting (first session) (15 October 1991), UN Doc. CRC/C/5.
- CRC Committee, General Comment no. 5, General Measures of Implementation of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/5 (2003) (GC 5).
- CRC Committee, General Comment no. 6, Treatment of unaccompanied and separated children outside their country of origin, UN Doc. CRC/GC/2005/6 (2005) (GC 6).
- CRC Committee, General Comment no. 7, Implementing Child Rights in Early Childhood, UN Doc. CRC/GC/7 Rev.1 (2006) (GC 7).
- CRC Committee, General Comment no. 12, The Right of the Child to be Heard, UN Doc. CRC/C/GC/12 (1 July 2009) (GC 12).

- CRC Committee, General Comment no. 13, The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2011) (GC 13).
- CRC Committee, Report on the Day of General Discussion: 'The Rights of all Children in the Context of International Migration' (2012); available at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2012.aspx>.
- CRC Committee, General Comment no. 14, The right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), UN Doc. CRC/C/GC/14 (2013) (GC 14).
- CRC Committee, General Comment No 16, on State Obligations Regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16 (17 April 2013) (GC 16).
- Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and the General Comment No. 18 of the Committee on the Rights of the Child on harmful practices (2014) (JGR 31 and GC 18).
- CRC Committee, General Comment No 19 on Public Budgeting for the Realization of Children's Rights (art.4) UN Doc CRC/C/GC/19 (20 July 2016)(CRC GC 19).
- Joint General Comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration, UN Doc. CMW/C/GC/3 and CRC/C/GC/22 (2017) (JGC 3 and 22).
- Joint General Comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, UN Doc. CMW/C/GC/4 and CRC/C/GC/23 (2017) (JGC 4 and 23).

Treaty Monitoring Bodies

- CESCR, General Comment No. 20 on non-discrimination in economic, social and cultural rights (art 2, para 2) UN Doc. E/C.12/GC/20 (2 July 2009).
- CESCR, General Comment No 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities UN Doc. E/C.12/GC/24 (10 August 2017).
- CESCR, Statement on the Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2017/1 (13 March 2017).
- UNHRC General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004)

UNHRC, General Comment No 35, Article 9, Liberty and Security of Person, UN Doc. CCPR/C/GC/35 (16 December 2014).

CMW Committee General Comment No 2 on the Rights of Migrant Workers in an irregular situation and Members of their Families, UN Doc CMW/C/GC/2 (28 August 2013).

Committee against Torture, General Comment No 4 on the implementation of article 3 of the Convention in the context of article 22, UN Doc. CAT/C/GC/4 (4 September 2018).

United Nations (UN) (date order)

UN *Report of the Temporary Social Commission*, Session held in New York, 29 April – 14 May 1946, UN Doc. E/41.

UN ECOSOC Resolution 248(IX)A (6 August 1949); General Assembly resolution 319(IV) A (3 December 1949) [establishing UNHCR].

UN Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/108/Rev.1 (26 November 1952) Recommendation B.

UN Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN Doc. A/CONF.2/108/Rev.1 (26 November 1952) Recommendation E.

UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict (General Assembly resolution 3318 (XXIX))(14 December 1974).

UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, UN General Assembly UN Doc. A/RES/41/85 (3rd December 1986).

Eide, A, UN Special Rapporteur for the Right to Food, 'The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide', UN Doc E/CN.4/Sub.2/1987/23 (1987).

UN, Secretary General's Report, *Renewing the United Nations, A Programme for Reform*, UN Doc. A/51/950 (14 July 1997).

UN Statement of Common Understanding on a Human-Rights Based Approach to Development Cooperation (UN, Geneva 2003) (Stamford Statement).

UN ECOSOC, *UNICEF Child Protection Strategy*, UN Doc. E/ICEF/2008/5/Rev.1 (20 May 2008).

UN General Assembly, *Guidelines for Alternative Care of children* UN Doc A/RES/64/142 (24 February 2010).

UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/22/53 (5 March 2013).

UN Special Rapporteur on Torture, *Thematic Report on Torture and Ill-Treatment of children deprived of their liberty*, UN Doc. A/HRC/28/68 (5 March 2015).

- UN Human Rights Committee (UNHRC), General Comment No 35, *Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35 (16 December 2014).
- UN Secretary General's Report to the General Assembly on the Status of the Convention on the Rights of the Child, UN Doc. A/71/413 (27 September 2016).
- UN General Assembly, New York Declaration for Refugees and Migrants, UN Doc. A/Res/71/1 (Resolution adopted by UNGA on 19 September 2016).
- UN General Assembly, Report of the UN High Commissioner for Refugees: Global Compact on Refugees, UN Doc. A/73/12 (Part II) (13 September 2018, affirmed by UNGA on 17 December 2018).

[Office of the High Commission for Human Rights \(OHCHR\)](#)

- OHCHR and Save the Children Fund, *Legislative History of the Convention on the Rights of the Child* (United Nations, New York and Geneva, 2007), HR/PUB/07/1.
- OHCHR Study on the challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration UN Doc. A/HRC/15/29 (5 July 2010) (OHCHR Study).
- OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (OHCHR, Geneva 2014).

[United Nations High Commissioner for Refugees \(UNHCR\)](#)

- Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the UN General Assembly Resolution 428 (V) (14 December 1950) (UNHCR Statute).
- UNHCR, ExCom Conclusion No. 22, Protection of Asylum-seekers in Situations of Large-Scale Influx (XXXII) UN Doc A/36/12/Add.1 (21 October 1981).
- UNHCR ExCom, Conclusion No 24, Family Reunification (XXXII) UN Doc. A/36/12/Add.1 (21 October 1981).
- UNHCR ExCom Conclusion No 47, Refugee Children (XXXVIII) UN Doc. A/42/12/Add.1 (12 October 1987)
- UNHCR *Note on Refugee Children* UN Doc. EC/SCP/46 (9 July 1987).
- UNHCR *Policy on Refugee Children* UN Doc. EC/SCP/82 (1988)
- UNHCR *Policy on Refugee Children*, UN Doc. EC/SCP/82 (6 August 1993).
- UNHCR *Refugee Children: Guidelines on Protection and Care* (Geneva 1994).
- UNHCR, *Note on International Protection* UN Doc. A/AC.96/830 (7 September 1994).
- UNHCR, ExCom General Conclusion on International Protection No 71 (XLIV) UN Doc 12 A A/48/12/Add.1 (8 October 1993)

- UNHCR, ExCom Conclusion No 74, General Conclusion on International Protection (XLV) UN Doc.12A A/49/12/Add.1 (7 October 1994).
- UNHCR, ExCom Conclusion No 82, Safeguarding Asylum (XLVIII) UN Doc A/52/12/Add.1 (17 October 1997).
- UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children seeking Asylum* (UNHCR, Geneva 1997).
- UNHCR *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva April 2001).
- UNHCR, Global Consultation on International Protection, *Summary Conclusions – Family Unity*, Geneva Expert Roundtable, (November 2001).
- UNHCR, 'Global Consultations on International Protection: Refugee Children' UN Doc. EC/GC/02/9 (25 April 2002) (4th Meeting).
- Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/MMSP/2001/09 (16 Jan 2002).
- UNHCR ExCom Conclusion No. 103 on the Provision of International Protection including through Complementary Forms of Protection (LVI) (7 October 2005).
- UNHCR, 10-point plan Chapter 7: Solutions for Refugees (2006).
- UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (UNHCR, Geneva 26 January 2007).
- UNHCR ExCom, *Conclusion on Children at Risk*, No. 107 (LVIII) (5 Oct. 2007).
- UNHCR, Guidelines on Determining the Best Interests of the Child (UNHCR, Geneva May 2008).
- UNHCR, *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* HCR/GIP/09/08 (UNHCR, 22 December 2009).
- UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/IP/4/REV.3 (2011).
- UNHCR, *A Framework for the Protection of Children* (Geneva 2012).
- UNHCR, *Guidelines on International Protection No 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions* HCR/GIP/16/12 (2 December 2016).
- UNHCR, High Commissioner's Dialogue on Protection Challenges: Children on the Move Background Paper (28 November 2016). [See also: UNHCR, 'Children on the Move: Background Paper', The High Commissioner's Dialogue on Protection Challenges'' (2017) *International Journal of Refugee Law* 356].

- UNHCR, High Commissioner's Dialogue on Protection Challenges, Summary of thematic session 3: Securing Solutions for children on the move (8-9 December 2016), available at: <https://www.unhcr.org/uk/58d0fdbd7> [accessed 22 January 2019].
- UNHCR, *Persons in need of international protection* (Geneva 2017).
- UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child* (UNHCR, Geneva 2018).

Council of Europe

- Council of Europe, *Strategy for the Rights of the Child* (2012 – 2015).
- Council of Europe, *Non-Refoulement as a Principle of International Law and the Role of the Judiciary in its Implementation: Dialogue Between Judges 2017* (ECtHR 27 January 2017).
- Parliamentary Assembly of the Council of Europe (PACE)
Recommendation 1686 (2004) on Human Mobility and the Right to Family Reunion, 23 November 2004.
- Parliamentary Assembly of the Council of Europe (PACE)
Recommendation 1327 (1997) on Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe.

European Union (EU)

- Council Directive 2011/95/EU of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (13 December 2011) (Qualification Directive).
- Council Directive 2013/33/EU of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (26 June 2013) (Reception Conditions Directive).
- EU Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (16 December 2008) (Returns Directive).
- EU Council Directive 2003/86/EC on the right to family reunification (3 October 2003) (Family Reunification Directive).
- EU Regulation No 604/2013 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; OJ L 180 (26 June 2013)(Dublin III).
- European Agency for Fundamental Rights (FRA), *Report on Separated, Asylum-seeking Children in European Union States* (2010).
- European Commission, *Communication from the Commission to the Parliament and Council: Action Plan on Unaccompanied Minors* (2010-14).

European Commission, *Shaping a common approach on 'unaccompanied minors'* (2012).

EU-Turkey deal of 18 March 2016, available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> (accessed 18 August 2018).

EU EASO, *Practical guide on the best interests of the child in asylum procedures* (European Asylum Support Office, 2018).

[Inter-American Court of Human Rights \(IACtHR\)](#)

IACtHR Advisory opinion OC-21/14 (August 19 2014): Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection.

[World Health Organization](#)

World Health Organization (WHO), *Constitution*, adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.

[Websites](#)

International Office of Migration (IOM), UN Migration: Key Migration Terms, available at: <http://www.iom.int/key-migration-terms>.

UNHCR RefWorld Court interventions/Amicus Curie, available at: <https://www.refworld.org/type/AMICUS.html>.