



Book Review

Children's Rights and Refugee Law: Conceptualizing Children within the Refugee Convention

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"One day at school, I heard the war; the guns that sounded like 'tow tow tow'. The soldiers came and fought the pupils and I hid there for three days. My parents came and collected me and we went home for two days. It was so nice and quiet and we didn't think it would get noisy again. When it did, there was no time to think about clothes. Nine-year-old Nyaboth and her twin sister fled their home in South Sudan after witnessing mass killings. They found safety in Pugnido refugee camp, Ethiopia."¹

Children constitute half of the world's refugee population and many of them spend their entire childhood away from their home often being separated from their families. The reason for their displacement can be attributed to violent acts, abuse, neglect, exploitation, trafficking or even military recruitment. These children mentioned above have little or no control of their own destinies, as most of the times they are sent by their parents in desperation to keep them safe as they arrive in countries where they are unaccompanied and totally alone. Many times children between the age group of 16 to 18 are accused of lying about their

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¹ Available at <https://www.unhcr.org/children-49c3646c1e8.html>. (last visited 8/07/2019)

age and are categorized wrongly as adults who are placed with adults subjecting them to further exploitation.

Around 27,600 unaccompanied and children separated from their families seek asylum and a total of 111,000 child refugees were reported in 2018. Children below 18 years of age constituted about half of the refugee population in 2018, up from 41 per cent in 2009. Without the protection of family, unaccompanied and children separated from their families are often at risk of exploitation and abuse. Around 138,600 children were in that situation at the end of 2018.²

In this book, the author has very lucidly worked on the area of refugee children which has been gaining momentum as a matter of debate in recent years. In the introductory chapter (Chapter 1) itself the author has made it clear that this book does not deal with, or examine the procedural aspects of seeking refugee status. The author focuses only on the ways in which refugee children are conceptualized within the refugee law and not on the process of seeking asylum, their applications, interview process or guardianship which are the procedural aspects of giving the status of a refugee. This book examines the suitability of the 1951 Convention Relating to the Status of Refugees (Refugee Convention), as a framework for interpreting child rights and child claims and also analyses as to how far the child rights approach can be appended to the Refugee Convention. This debate according to the author holds more prominence because of the fact that rights accruing to children under Refugee Convention were identified even before the Convention on the Rights of Child, 1989 (CRC) came into existence. Although, the Refugee Convention was adopted when the CRC was not there, rights for children were still emerging and this poses a serious challenge to further development of children's rights, refugee discourses and refugee determinations. The aspect on which the author has relied is that without a children's rights approach, child refugee claims may be at risk of being disallowed, which in turn impacts children's access to other procedural rights as well.

²UNHCR, *Global Trends, Forced Displacement in 2018*, available at <https://www.unhcr.org/globaltrends2018/>, (last visited 8/07/2019)

The author in the introduction further deals with the subject matter by analyzing the dichotomy between child rights and refugee law. The concept of child refugee was not provided in the early instruments of refugee law. However, they were dealt in the context of administrative arrangements such as *Kindertransport* in the 1930's or in the non-binding 1924 Declaration of the Rights of the Child. The author through this book tries to examine the reasons for the invisibility of children within early refugee discourse and the relative invisibility of children in the contemporary refugee discourse. The reason why it has been chosen to discuss this dichotomy is to demonstrate the existing relationship between the two regimes and the scope for children's rights approach.

After dealing with perspectives of rights of children under refugee law and other human rights law, the author then moves on to discuss the role of Article 6 of the CRC in providing protection and rights to refugee children, where emphasis is laid on the 'Three Ps Approach' which has better mechanism for rights based approach to protect the refugee children. There is negation of the interpretation of the term refugee provided under the Refugee Convention 1951, based on the five convention grounds namely-race, nationality, religion, membership of a particular social group and political opinion and there is an opinion that this approach that stems from the Refugee Convention itself is not child focused or centered. The Three Ps Approach comprises Provision, Protection, and Participation rights.

Provision rights include: right to life³, the highest attainable standard of health⁴, an adequate standard of living⁵ and education.⁶

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

³Convention on Rights of Child, 1989, Article 6

⁴ Ibid, Article 24

⁵Ibid, Article 27

⁶Ibid, Article 28

Participation rights include the rights to freedom of expression⁷, thought, conscience, religion⁸ and association⁹.

In this way the author portrays the need for establishment of a forum which caters to the rights of the refugee children, which is provided in the CRC. However, it has been found that over reliance on CRC for child rights might lead to complacency, which is addressed in this book.

The second chapter deals with children, childhood and refugee law. The author looks into the characteristics of childhood and starts with a discussion on the qualification of child refugees, specifically the terms 'child' and 'childhood'. Most of the international instruments that deal with child rights are impacted by the sociological constructions of 'child' and 'childhood' and the debates on such impact can still be seen in the implementation and interpretation of children's rights law, human rights law and refugee law. The first part defines the concepts of 'child' and 'childhood' and the second part, delves into the historical discourses of development of childhood, since the seventeenth century. The last part, seeks to show, that the early developments in child and childhood studies, philosophy and rights based discourses continue to be relevant and indicate that children's rights have evolved less than expected. The purpose of this discussion, is not only to show that there has been problems with child rights since centuries, but also that there is a lot to be done for children in general and children's rights and refugee law in specific. This chapter acts as a prelude to the other chapters and establishes a conceptualization that can be relied upon in subsequent chapters. The analyses done, sets the baseline for gauging the progress in the developments in international law, including refugee law and its application in international law.

The Third chapter titled 'International Children's Rights Law' expands on the contemporary conceptualization of childhood, discussed in Chapter 2. It further identifies the characteristics of childhood which are derived from the development of

⁷Ibid, Article 40

⁸Ibid, Article 41

⁹Ibid, Article 15

international conventions like The Convention on Rights of the Child, 1989 (CRC) and such other sources of international law. The author discusses the importance of CRC in representing the international child rights movement and states that the CRC is the foundation of modern children's rights law because the rights contained within the CRC are rights that are directly attributed to children 'irrespective of the child's or their parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth of other status.'¹⁰In addition to the CRC, children have rights set out in the Universal Declaration of Human Rights (UDHR)¹¹, The International Covenant on Civil and Political Rights (ICCPR)¹², The International Covenant on Economic and Social Rights (ICESR)¹³ and international labour laws, including the Worst Forms of Child Labour Convention (WFCLC).¹⁴There is no dispute to the existence of children's rights but this chapter rather looks at how children are conceptualized within international law and the way these provisions may interact with refugee law. A question of great relevance has been addressed in this section as to how this conceptualization of children and childhood has influenced, or indeed should influence refugee law.

In chapter 4, the author discusses the development of refugee law and addresses in particular, at the extent to which children were considered in refugee law and other protection initiatives leading up to the adoption of the Refugee Convention. In the introduction part, there is a brief analysis of the emergence of international law and how during the time of World War I, three distinct areas of international law emerged: children's rights, human rights and migrant rights, which are reflected in bilateral and multilateral initiatives and agreements. The author initiates a very interesting discussion that the pre-Convention on the Rights of the Child (CRC) did not influence human rights and refugee law in the same way that human rights and refugee law influenced each other. To

¹⁰Convention on the Rights of the Child 1989, Article 2.

¹¹Universal Declaration of Human Rights, 1948.

¹²The International Covenant on Civil and Political Rights, 1976.

¹³The International Covenant on Economic and Social Rights, 1976.

¹⁴Worst Forms of Child Labour Convention (no. 182), 1999.

provide a better understanding of the approach, it is stated that, when the CRC was adopted in the year 1989, it inspired the development and expansion in children's rights law all over the world, including international law and also had an impact on the refugee children. However, aside from soft law guidance and case law, very little changed by way of targeted approach to child refugee law. The reason why an in-depth understanding of the historical evolution of the children's rights is provided is because of the fact that analyzing historical and contemporary debates and dialogues between children's rights law and refugee law provides a foundation for the promotion of a children's rights approach. To conclude, the author has reiterated the work done by Goodwin-Gill and Hathaway in which they have failed to address children with reference to the early treaties and arrangements dealing with refugees and also that the Refugee Convention does not include any specific provisions for children. The reason that has attributed to this is that children were not considered to be rights holders in their own right and the assumption in the context of refugee law is that the child has the same rights as the parents and that the child would be attached to the family in these circumstances, with the exception of those orphaned by conflict and war.

Chapter 5 seeks to establish whether or not a children's rights approach to the interpretation of the Refugee Convention is possible and shows that there is a precedent that proves that for one human rights regime there is another human rights regime that influences it and that the international children's rights law influences the refugee law. An attempt is made to identify the scope of cross treaty interpretation and analyze the object and purpose of both the CRC and the Refugee Convention. Some of the key terms relating to the interpretation of the Refugee Convention concerning children are also examined in this chapter. The definition of 'refugee', the interpretation of persecution and the convention grounds in their application in children's cases are also examined. The main focus has been to trace the developments and influences in the realm of Refugee Convention regarding the interpretation of the term 'refugees' and the inclusion of children within the definition of refugees provided in Article 1A of the Refugee Convention. Children as of today have been recognized as refugees within the framework of Refugee Convention and this can

be attributed to the interpretative guidance provided by the UNHCR and the Committee following the publication of the CRC. In the light of the post-CRC developments, this chapter explores how the current refugee regime is positioned to continue to take into account the different forms of child-specific persecution that are emerging through various fora, which includes persecutions like, fear on the basis of military conscription, female genital mutilation, familial or domestic violence, forced marriage, labour and sexual exploitation, among other forms of persecution.¹⁵ Further this chapter also examines the potential for breaches of children's rights including those not traditionally associated with the refugee protection, to be considered within the refugee determination process.

Chapter 6 is divided into two parts where in Part I, the author has dealt with the issues concerning non identification of children in the Refugee Convention, who are possible beneficiaries of international protection. This was done only post 1987 where guidance was produced to assist States in dealing with refugee claims from children. It also explores the relationship between violations of children's rights and persecutions and focuses on the advances in refugee law relating to children in the past two decades. The second part focuses more on the definition of persecution under the Refugee Convention and has to do more with the persecution of children under international law. The term persecution has not been defined in any international instrument and as per the author, any attempt to do, have also met with little success. In the back drop of this, the author draws attention towards the history behind different forms of persecution and the role played by international instruments, specifically, the Refugee Convention, in identifying different forms of persecution against children.

This chapter further discusses UN soft law guidance that indicates that there is scope for the CRC to influence the treatment of children seeking refugee protection and the qualification of child

¹⁵ United Nations High Commissioner for Refugees, 'Guidelines on International Protection: Child Asylum Claims under Articles 1A(2) and 1 (F) of the 1951 Convention and 1967 Protocol relating to the status of the Refugees

refugees. A further demonstration is made, where there is inconsiderable justification for the creation of a children's rights approach, which actually grew considerably after the publication of CRC. There is also an indication that there is an expansion of the interpretation of the term persecution to also include breaches in children's rights, which now is gaining ground. The arguments put forth by the author is that, the children's rights approach is possible and it seeks to determine where we are now in terms of the protection for children's rights approach and what that approach might look like based on existing scenario.

Chapter 7 focuses on constructing a children's rights approach and the application of these rights in refugee law. There is an attempt to analyze as to how refugee law has dealt with children through case law and the purpose is to identify trends in the recognition of child refugee applicants. These decisions indicate which rights when violated may amount to persecution. The author, discusses that the focus on the rights of the children has been shifting from considering children as beneficiaries within families or children indiscriminately affected by war to children being targets of persecution themselves, in their own rights. This shift is attributed to the general evolution of children's rights, child and childhood studies. The purpose enumerated is to conceptualize children within refugee law and further develop a framework for children's rights approach to the interpretation of the Refugee Convention. The discussions put forth, assist in the assessment of the ability of the Refugee Convention to accommodate children's rights approach or child claims. It is however, suggested that, a children's rights approach may be beneficial in determining child claims, while recognizing that a violation of children's rights does not automatically amount to persecution. The rights violations must not only amount to persecution, but must be characterized by differential impact on the basis of discrimination.

The author identifies three main challenges to designing a children's rights approach: the limited number of applications made by the children, the tendency for children's applications to be subsumed within head-of-household applications, and the anxiety with which determination bodies approach claims from children. The three points mentioned above have been elaborately

dealt in the three parts of this chapter. Part I, deals with the provision rights and the refugee protection wherein the author, bundles certain rights as provision rights mentioned in Article 6 of the CRC and other international instruments protecting children's rights. The conditions for these rights includes: the role of the parent as protector; educator and provider of emotional support¹⁶; health¹⁷; and the standard of living¹⁸ as prerequisites to accessing other rights and opportunities for growth and education. Each of the conditions is then separately dealt under in Part I.

Part II deals with the concept of protection rights and refugee protection. Protection rights relate to protection from *inter alia*-exploitation including labour and trafficking, forced military recruitment and participation in armed conflict, involvement in illicit activities, and other forms of harm, including indiscriminate violence and torture. This Part elaborates on forms of persecution based on a violation of a protection right with a refugee nexus. The role of the family as protector and as persecutor is also discussed and the purpose of this exercise is to identify those rights violations deriving from children's rights that amount or may amount to persecution in the context of refugee law.

Part III deals with the participation rights and refugee protection. But it only looks at the persecution of children, based on exercising their agency rather than the way they exercise it in the context of making an application for asylum. In addition, Part III also takes into account the fact that religion and political opinion can be and are grounds cited in cases not involving children exercising their agency, including where religious and political beliefs or opinions are imputed onto them. The rights that are most relevant to CRC provide for individual and autonomous rights such as: freedom of expression,¹⁹ thought, conscience and religion,²⁰ freedom of association and peaceful assembly,²¹ privacy,²² and the protection

¹⁶ Convention on the Rights of the Child 1989, Preamble and Articles 20 and 22.

¹⁷ Ibid, Article 24

¹⁸ Ibid, Article 27

¹⁹ Convention on the Rights of the Child 1989, Article 13.

²⁰ Ibid, Article 14.

²¹ Ibid, Article 15.

of the right to practice one's own religion and speak one's language.²³

The author therefore, in Part I elaborate on four provision rights sub-categories associated with childhood in the refugee context, namely - the right to family, the right to highest attainable standard of health and an adequate standard of living and the right to education. It provides that, cases involving children's provision rights, which are heavily grounded in social and economic rights, were uncommon and instances where a breach related to non-discrimination and was state sponsored were favoured. Part II shows that the social and economic circumstances of the child, those reflected in the provisions set out in Part I, make children more vulnerable to protection rights violations. It also brings to the light the fact that the CRC was at times explicitly relied upon in the interpretation of the Refugee Convention is respect to protection rights. In Part III, the author, elaborates on participation rights deriving from the CRC, but with the focus on the religion and political opinion.

The concluding Chapter reflects on those violations of children's rights that amount to persecution, whether or not the Refugee Convention provides a satisfactory framework for the determination of child refugee applications and whether or not children's rights approach to the interpretation of the Refugee Convention is possible. In this regard, this book analyses the conceptualization of childhood and children within refugee and refugee literature. The catalyst for this particular research according to the author was the rapid growth in children's rights discourse following the publication of the CRC and its universal acceptance. In the concluding remark the author states that, the hypothesis, that the Refugee Convention is capable of accommodating claims from children is supported by the findings that children's rights approach is possible and there is evidence that the jurisprudence on it is already developing. The conceptualization of the child refugee that emerges is one of innocence and vulnerability, yet there are indications that

²² Ibid, Article 16.

²³ Ibid, Article 30.

autonomous rights are increasingly the subject of refugee determinations.

On an overall analysis, it can be stated that this book is meticulously researched and the findings provided, stand testimony to the fact that, due care and thorough research has been undertaken by the author. At a time when children and children's rights have specific significance in the refugee discourse, the need for interpretation of the term refugee and the provisions of CRC have to be identified and studied in greater details, which the author through this work has lucidly justified. This book will be a valuable resource to all those who wish to work on children's rights in general and refugee children in particular.