Situating the Refugee Child in International Law

Introduction

International law has long recognised that a refugee child is entitled to special care and protection. Since the 1924 Declaration – which arose out of a concern about the particular problems faced by children during and subsequent to war – the need to prioritise the protection of refugee children has been affirmed repeatedly by the UN General Assembly.¹

the UNCRC\textsuperscript{2} and UNHCR.\textsuperscript{3} The international community has also adopted two treaties that respond independently to the particular difficulties occasioned by involuntary alienage and to the special care and assistance required by children: the \textit{Refugee Convention} and the \textit{CRC}.

Attentiveness at the international level to the distinct needs of refugee children has not always found a counterpart in domestic practice. At the domestic level, there has been a tendency for states to focus on a child’s status as a migrant (inevitably enlivening discourses of suspicion and immigration control) rather than their status as a child (more likely to evoke discourses of welfare and protection).\textsuperscript{4} The child refugee, by reason of her asylum-seeking status, effectively ceases to be a child.\textsuperscript{5} The tension between immigration control and the protection of children was evident throughout the drafting of the \textit{CRC}, when a number of states sought, unsuccessfully, to limit the jurisdictional scope of the \textit{CRC} to apply only to children ‘lawfully’ within a state’s territory.\textsuperscript{6} The United Kingdom subsequently entered a general reservation to the \textit{CRC} to prevent the treaty from applying to migrant children.\textsuperscript{7} This was withdrawn in 2008 following widespread international\textsuperscript{8} and

\begin{enumerate}
\item See infra text accompanying n 67–111.
\item See infra text accompanying n 67–111.
\item ‘In spite of the manifest vulnerability of unaccompanied and separated children, the tendency of all the governments studied has been to treat them as migrants first, and children a distant second, placing the issue of border control above that of child protection’: J Bhabha and M Crock, \textit{Seeking Asylum Alone: A Comparative Study} (2007) 21. See also G Doná and A Veale, ‘Divergent Discourses, Children and Forced Migration’ (2011) 37 \textit{Journal of Ethnic and Migration Studies} 1273.
\item The representative of the United States proposed that what is now art 2 of the \textit{CRC} should read: ‘Each State Party to the present Covenant shall respect and extend all the rights set forth in this Convention to all children lawfully in its territory’ (emphasis added). The representative later amended the proposal to read: ‘The States Parties to the present Covenant shall respect and extend all the rights set forth in this Convention to all children (lawfully) in their territories without distinction of any kind’. \textit{Report of the Working Group on a Draft Convention on the Rights of the Child}, E/CN.4/L.1575 (1981), [40], [44]. Other delegates were uncomfortable with limiting the \textit{CRC}’s application to children lawfully in the territory of a State Party: at [40]. An earlier Polish draft contained an express provision (then art 5) emphasising that ‘[t]he States Parties . . . recognize the right of alien children staying in their territories to enjoy the rights provided for in this Convention’: \textit{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 (1979). The US representative ultimately agreed to withdraw the word ‘lawfully’ from its proposed text, but only on the understanding that the proposed art 5 would be deleted: E/CN.4/L.1575 (1981), [47]. Throughout the drafting the UK and German representatives repeatedly noted their concerns about the extension of the \textit{CRC} to non-nationals: \textit{Report of the Working Group on a Draft Convention on the Rights of the Child}, E/CN.4/1984/71 (1984), [9], [11].
\item ‘The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time’: 1658 UNTS 682 (United Kingdom of Great Britain and Northern Ireland). Although this reservation is often referred to as a reservation to art 22, it is clear from its language that it applies to the application of the entire treaty. See N Blake and S Drew, ‘In the Matter of the United Kingdom Reservation to the UN Convention on the Rights of the Child’ (Opinion, 30 November 2001).
\item UNCRC, \textit{Concluding Observations: United Kingdom of Great Britain and Northern Ireland}, CRC/C/15/ Add.188 (2002), [6]–[7].
\end{enumerate}
domestic criticism. Germany, Japan, Switzerland, Singapore and New Zealand also entered reservations or made declarations seeking to limit the rights available to non-citizen children.

It has been suggested that the resolution of this ‘Janus-like’ tension lies in treating each refugee child as a child first and a refugee second. The more critical point is that the identity of a refugee child is layered and complex, and it is important that protection is tailored to respond both to the difficulties associated with refugeehood and the distinct needs and vulnerabilities of childhood.

This chapter situates the refugee child in international law. It considers how international refugee law and international law on the rights of the child might be more creatively aligned to respond to the reality that the at-risk individual is both a child and a refugee. The focus of the chapter is on the capacity of the two legal regimes to respond to the distinct needs of a refugee child in the context of the status determination process. Notwithstanding this focus, the chapter’s central thesis – that greater interaction between the two legal regimes has the capacity to enhance the protection afforded to refugee children – has application well beyond the issue of qualification. There is, in particular, extraordinary scope for greater alignment between the CRC and the full range of rights which follow from recognition of a child’s Convention refugee status.

Against this background, Section 1.1 of the chapter traces the development of international law relating first to refugees and then to children. This exposition introduces the reader to the two key international instruments operating within the respective fields. Section 1.2 examines the manner in which the two international legal regimes have spoken

9 ‘[T]he reservation sends out a powerful signal that the rights of asylum seeking children are less important than those of other children’: JCHR, The Treatment of Asylum Seekers, HL 81-I, HC 60-I, Session 2006–07 (2007), [176].

10 New Zealand has retained its reservation that ‘[n]othing in [the CRC] shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand’: 1719 UNTS 495, 495. Similarly, Singapore has retained its reservation reserving its ‘right to apply such legislation and conditions concerning the entry into, stay in and departure from the Republic of Singapore of those who do not or who no longer have the right under the laws of the Republic of Singapore, to enter and remain in the Republic of Singapore’: 1890 UNTS 526, 537. Switzerland has also retained its reservation that ‘Swiss legislation, which does not guarantee family reunification to certain categories of aliens, is unaffected [by the CRC]’: 1965 UNTS 505. Japan has maintained its initial declaration that the right to family unity in art 9(1) of the CRC is to be interpreted ‘not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law’: 1775 UNTS 447. Germany’s declaration (withdrawn on 15 July 2010) provided that ‘[n]othing in the [CRC] may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens’: 1669 UNTS 475, 479–80.


12 ‘Refugee children are children first and foremost, and as children, they need special attention’: UNHCR, Refugee Children: Guidelines on Protection and Care (1994) preface.

13 ‘It is therefore vital to view the rights of child-asylum seekers not only in the context of the Refugee Convention, but also in the specific framework of the CRC, in an attempt to fill the gaps and achieve the best possible combination of protection measures available under international law’: 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, 269.
to or disregarded each other over the past century. Section 1.3 sets out a framework for greater interaction between international refugee law and international law on the rights of the child. It does this by outlining three contexts – defined as ‘modes of interaction’ – where the CRC might appropriately be engaged to assist in determining the status of a refugee child: first, as a procedural guarantee to incorporate safeguards into the refugee status determination process; second, as an interpretative aid to inform the interpretation of the Convention definition; and, third, as an independent source of status outside the international refugee protection regime. Section 1.4 draws on the international rules of treaty interpretation to provide a principled anchor for that framework.

1.1 The Refugee and the Child – The International Legal Framework

1.1.1 The Refugee Convention

The 1951 Convention and the attendant 1967 Protocol are the primary instruments governing refugee status under international law. The Convention has been described as ‘the cornerstone of the international refugee protection regime’, an elevation hardly surprising given the extensive and continued endorsement of the standards codified in the instrument. There are currently 145 states party to the 1951 Convention and 146 states party to the 1967 Protocol, with 98 states participating in the work of the Executive Committee of the High Commissioner’s Programme (‘UNHCR ExCom’), responsible for the Convention’s ongoing supervision. The Convention therefore provides the appropriate platform from which to consider the manner in which international law has attempted to address the challenges associated with the involuntary migration of children.

The Convention defines a refugee as an individual who satisfies the definition proscribed under art 1A(2) and is not otherwise excluded by operation of art 1. Article 1A(2) defines a refugee as a person who

owing to a 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.

A person will thus be a refugee only if there is a genuine risk of the applicant ‘being persecuted’ that is causally connected to one of five enumerated forms of civil or political status. Article 1 also contains a number of carve-out provisions, for persons not deserving of protection (art 1F) and persons no longer needing protection (arts 1C–1E). Articles 3 to 34 of the Convention outline a comprehensive set of rights that attach to all refugees, including freedom from discrimination (art 3), access to courts (art 16), access to housing (art 21), access to public education (art 22), freedom of movement (art 26) and protection against refoulement (art 33).

14 UNHCR ExCom, Conclusions on the Provision of International Protection Including through Complementary Forms of Protection, No 103 (LVI) (2005) Preamble para 1. See also UNHCR, Ministerial Communiqué, HCR/MINCOMMS/2011/6 (8 December 2011), [2], ‘reaffirm[ing] that the [1951 Convention] and [1967 Protocol] are the foundation of the international refugee protection regime and have enduring value and relevance in the twenty-first century’.
The mandate of the Refugee Convention is age-neutral, applying to all individuals irrespective of age and containing no express reference to or provision for refugee children. A number of commentators have suggested that this ‘deficiency’ is not surprising in light of the Convention’s historical context. While it is certainly true that the Convention was strategically conceptualised to respond to a particular political climate, it is not altogether self-evident why this political context obviated a need to recognise the fact that child refugees may require special protection. At the time the Convention was drafted, a number of international instruments had already explicitly recognised the special needs of children, specifically refugee children. Of particular salience, the mandate of the IRO – the first international agency created by the UN and the immediate predecessor to UNHCR – made express provision for ‘unaccompanied children’.

An examination of the IRO Constitution and a review of the IRO’s operations in the period 1947–52 provide an interesting historical backdrop to the drafting of the Refugee Convention. The IRO was established in 1946 to coordinate the international action then required to respond to the ‘urgent problem’ generated by the mass displacement and dislocation of populations following the Second World War. The IRO’s function was expressed in the following terms: ‘the repatriation; the identification, registration and classification; the care and assistance; the legal and political protection; the transport; and the resettlement and re-establishment, in countries able and willing to receive them, of

15 The only references to children in the Convention itself relate to refugee parents’ freedom as regards the religious education of their children (art 4) and the effect on an adult refugee’s right to employment of having one or more children possessing the nationality of the country of residence (art 17(2)(c)). Even the article on public education fails to mention age or childhood specifically (art 22). See also infra text accompanying n 31 for discussion on Recommendation B of the Final Act of the Conference of Plenipotentiaries.

16 G S 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, 406 (‘[c]onsidered in historical context, this deficiency is not surprising’); Bhabha and Crock (2007) supra n 4, 22 (‘[T]he Convention was focused from its inception on problems and conflicts familiar to the Cold War era in Europe, where the label of “refugee” was applied most readily to the political and intellectual dissidents escaping to the West from the Communist Bloc countries’).


18 Indeed, it seems arguable that the omission of protection measures is surprising because of the historical context, including the specific targeting of Jewish children during the Second World War. See E D Pask, ‘Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-Making and Representation’ (1989) 1(2) International Journal of Refugee Law 199.


22 Holborn describes the Second World War as causing ‘the most formidable displacements of population ever experienced’: ‘At its outbreak there had been more than a million refugees in various parts of Europe and Asia. This number was swelled almost beyond calculation by mass movements which brought vast human misery and suffering in their wake’: L W Holborn, The International Refugee Organization: A Specialized Agency of the United Nations – Its History and Work, 1946–1952 (1956) 15.

23 IRO Constitution, art 2.
persons who are the concern of the Organization under the provisions of Annex I’. A large number of children were separated from their families throughout the Second World War: many were forcibly removed from non-Germanic families and sent to special institutions for ‘Germanization’; others found themselves separated as a consequence of the vicissitudes of the war and the deportation, kidnapping or execution of their families.

The definition of the term ‘refugee’ set out under Annexure 1, Part 1 of the IRO Constitution included the following category:

(4) The term ‘refugee’ also applies to unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin. Such children, sixteen years of age or under, shall be given all possible priority assistance, including, normally, assistance in repatriation in the case of those whose nationality can be determined.

The IRO Constitution thus established a priority obligation to render all possible assistance to unaccompanied children. This proved to be one of the IRO’s most politically divisive tasks, with divergent interests and views as to who ultimately had jurisdiction to make a determination about the repatriation or resettlement of an unaccompanied child. Was it the IRO, the child’s family (if they could be located), the government of the country of origin or the government of the host country? And to what extent, if at all, should the IRO take into account the wishes of any individual child?

One of the key debates during the drafting of what became art 1 of the Refugee Convention was whether the Convention should list categories of known refugee groups in a manner similar to the IRO Constitution, or whether a more general definition should be adopted based on what was perceived, at the time, to reflect the refugee experience. The United States was the lead proponent of the former approach, proposing four categories of refugees that included, among others, ‘[a]ny unaccompanied child sixteen years of age or under, who is a war orphan, or whose parents have disappeared, who is unable or unwilling to avail herself of the protection of the government of his country of nationality or former nationality, and who has not acquired another nationality’. A similar category was included in a provisional draft of the Convention definition, but was removed after receipt of a cable from the then Director-General of the IRO, who noted his doubts about the ‘continued usefulness’ of the express inclusion of ‘unaccompanied children’ as a category in the refugee definition. The observer for the IRO expanded on the Director-General’s observation with the rather curious statement that the inclusion of ‘unaccompanied minors’ in the IRO Constitution ‘purported mainly to give priority assistance to this group, i.e. physical assistance with regard to care and maintenance, repatriation and resettlement’ and that ‘[t]he Director General doubts the continued usefulness of including this group in the

24 Holborn (1956) supra n 22, 493. 25 Ibid., 495.
29 Ad Hoc Committee on Statelessness and Related Problems, Memorandum from the Secretariat of the International Refugee Organization, E/AC.32/L.16 (1950).
 Convention and in the mandate of the High Commissioner who will be concerned with international protection only.  

Although the final text of the Convention contains no express provision on refugee children, the drafters’ consideration of the special protection needs of this particular category of refugee is reflected in the summary of conference proceedings appended to the Convention. Recommendation B of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons provides for ‘[t]he protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption’.  

Although not binding, the declaration contained in Recommendation B provides a compelling affirmation of the responsibility of states to take special measures to protect refugee children. 

1.1.2 The Convention on the Rights of the Child

International law has played an important role in advancing the rights of children. The League of Nations adopted the 1924 Declaration, which provided that ‘mankind owes to the [c]hild the best that it has to give’. In 1959 the UN adopted a more comprehensive declaration, which emphasised the ‘special protection’ needs of children. The idea that children are entitled to special protection was also firmly entrenched in the 1949 Geneva Conventions. And each of the UDHR, the ICCPR and the ICESCR contain express provisions emphasising the obligations on states to provide special protection measures for children.

Although earlier accords had addressed the particular protection needs of children, the CRC – adopted by the UN General Assembly in 1989 and entering into force in 1990 – was the first international instrument to articulate the full set of rights applicable to children. The CRC was also the first international instrument to recognise children as individual rights-bearers, ‘active in the construction and determination of their own social lives’. In promoting a construction of children as ‘social actors and active holders of their own rights’, the CRC represents a radical shift away from the conception of a child as a passive dependent tethered to a parent, evident in the earlier, largely protectionist instruments, which focused attention on a child’s need to be cared for. This attitudinal shift is

E/AC.32/L.16 (1950).


The declaration constitutes an ‘agreement relating to the treaty made by all the parties in connection with the conclusion of the treaty’: VCLT, art 31(2).


See supra n 19. UDHR, art 25(2). ICCPR, art 24(1). See also HRC, GC17.


‘Underlying this change in focus is the rejection of perceptions of children as partly formed human beings and their acceptance in international law as individuals who are capable of being as rational as adults’: G Van Bueren, The International Law on the Rights of the Child (1998) 137. ‘The [CRC] recognizes the child as a subject of rights, and the nearly universal ratification of this international instrument by States parties emphasizes the status of the child, which is clearly expressed in article 12: UNCRC, GC12, [18]. This commitment was reaffirmed at the 27th special session of the UN General Assembly: A World Fit for Children, A/RES/S-27/2 (2002). This is not the place to trace the evolution of child rights nor to defend
most clearly illustrated by the inclusion in the CRC of traditional civil and political rights – freedom of expression,\(^\text{41}\) freedom of religion\(^\text{42}\) and freedom of association and assembly\(^\text{43}\) – absent in both the 1924 Declaration and the Declaration of the Rights of the Child.\(^\text{44}\) The CRC also gives children a voice, containing an express provision affording a child the right to participate, and have her views respected, in all matters that affect her.\(^\text{45}\)

The CRC applies to ‘each child within [a state party’s] jurisdiction’ and prohibits any discrimination ‘irrespective of the child’s or his or her parent’s or legal guardian’s . . . birth or other status’.\(^\text{46}\) The rights contained in the CRC thus apply to all children in the jurisdiction of a state party, including refugees, asylum seekers and refused asylum seekers, and these subcategories of children are entitled to benefit from the provisions of the CRC to the same extent as a citizen child.\(^\text{47}\) The point has been emphasised by the UNCRC: ‘[t]he principle of non-discrimination, in all its facets, applies in respect to all dealings with unaccompanied and separated children. In particular, it prohibits any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being a refugee, asylum seeker or migrant’.\(^\text{48}\)

The obligations enshrined in the CRC can be categorised in the following way. First, the treaty reaffirms many of the core principles contained in the UDHR, the ICCPR and the ICESCR, and applies these principles directly to children. In contrast to the ICCPR and the ICESCR, the CRC is unique in that it covers the full spectrum of civil, political, economic, social and cultural rights in a single instrument. Second, the CRC strengthens the nature of a state’s obligations to children, such that in some circumstances children will be eligible for greater protection than adults. Most significantly, the CRC does not permit derogation from any of its provisions at any time, including wartime situations.\(^\text{49}\) And in contrast to the ICESCR, the CRC does not allow developing states to limit the extent to which economic rights would be guaranteed to non-nationals.\(^\text{50}\) Third, the CRC introduces a number of rights specifically tailored to children. This includes the right for a child to participate in any decision involving them,\(^\text{51}\) and a requirement that the best interests of the


\(^{41}\) Art 13. \(^{42}\) Art 14. \(^{43}\) Art 15.

\(^{44}\) Declaration of the Rights of the Child, UNGA Res 1386 (XIV) (1959). \(^{45}\) Art 12. \(^{46}\) Art 2(1).

\(^{47}\) ‘Article 2 emphasises that all the rights in the Convention on the Rights of the Child must apply to all children in the State, including visitors, refugees, children or migrant workers and those in the State illegally’; UNICEF, Implementation Handbook for the Convention on the Rights of the Child (3rd ed, 2007) 23. See also CRC art 22, which provides that states shall take appropriate measures to ensure that a refugee child, or child seeking refugee status, ‘shall . . . receive appropriate protection and humanitarian assistance in the enjoyment of applicant rights set forth in [the CRC]’.

\(^{48}\) UNCRC, GC6, [18]. \(^{49}\) Contra ICCPR, art 4. \(^{50}\) Contra ICESCR, art 2(3). \(^{51}\) CRC, art 12.
child be a primary consideration in any actions involving children.\textsuperscript{52} There are also express provisions on the abduction and trafficking of children,\textsuperscript{53} the role of parents, guardians and the state in the upbringing and development of children,\textsuperscript{54} harmful traditional practices,\textsuperscript{55} the right to engage in play and recreational activities,\textsuperscript{56} child labour,\textsuperscript{57} sexual exploitation\textsuperscript{58} and the recruitment of children into armed forces.\textsuperscript{59}

Throughout the drafting of the CRC there was acknowledgement of the specific protection needs of refugee children.\textsuperscript{60} Although the first draft contained no express provision relating to refugee children, in 1981 the delegate for Denmark submitted a proposal to introduce a provision dealing specifically with protection and assistance to refugee children.\textsuperscript{61} The proposal was generally well received, resulting in the inclusion of what is now art 22(1):

> States parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

Article 22(2) requires that, where a refugee child has no family members, ‘the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment’.\textsuperscript{62}

Article 22 remains the only provision in any international human rights treaty that deals expressly with the situation of refugee children and children seeking refugee status.\textsuperscript{63} The provision transposes the international community’s long-standing recognition that refugee children require special protection into a treaty-based mechanism to guarantee that protection. Far from simply guaranteeing beneficiaries of art 22 the enjoyment of applicable rights on a non-discriminatory basis – which is in any event mandated by the balance of the CRC – art 22 provides a rights-plus framework that requires states to take appropriate measures to ensure that a refugee child or child seeking refugee status receive the appropriate level of protection and humanitarian assistance. This framework requires states to take into account any additional protection and humanitarian assistance that a refugee child or child seeking refugee status may, on account of their distinct vulnerabilities and

\textsuperscript{52} Ibid., art 3.  \textsuperscript{53} Ibid., arts 11, 35.  \textsuperscript{54} Ibid., arts 7, 19–21.  \textsuperscript{55} Ibid., art 24(3).  \textsuperscript{56} Ibid., art 30.  \textsuperscript{57} Ibid., art 32.  \textsuperscript{58} Ibid., art 34.  \textsuperscript{59} Ibid., art 38.  
\textsuperscript{61} This may have been prompted by the Women’s International Democratic Federation’s proposal that the CRC contain articles ‘on the protection of the children of migrant workers and of the children of refugees’: Written Statement Submitted by the Women’s International Democratic Federation, E/CN.4/NGO/244 (1979) 4.  
\textsuperscript{62} See also arts 20–21.  
developmental needs, require in order to effectively enjoy the rights guaranteed under the CRC and other international human rights instruments.

Although significant in introducing a rights-plus framework for refugee children and children seeking refugee status, art 22, at least on its face, provides no substantive guidance in relation to the assessment of whether or not, and on what basis, a child qualifies for refugee status. There were suggestions from a number of delegates that the provision be amended to contain a definition of the refugee child; however, these delegates appear to have been in the minority. Van Bueren has suggested that a view was taken that any expansion of the refugee definition within the CRC would have required a corresponding amendment to the 1951 Convention and 1967 Protocol, which was ‘something for which states had not demonstrated any enthusiasm’.

The CRC has since been complemented by three Optional Protocols: the OPAC, the OPSC and, most recently, the OPCP.

1.2 The Refugee Child – Signs of Alignment

There is no single instrument in international law that sets out the full range of obligations that a state owes in respect of a refugee child. Although the mandate of the Refugee Convention extends to children, the Convention definition makes no express reference to or concession for refugee children. And while the CRC contains a provision guaranteeing ‘appropriate protection and humanitarian assistance’ to refugee children, it offers limited guidance on the assessment of a child’s refugee status. In circumstances where neither the Convention nor the CRC independently provide an ‘adequate or satisfactory basis’ for the protection of refugee children, there is clear merit in exploring the relationship between the two legal regimes and what this relationship might mean in the context of determining the refugee status of children.

This section examines the manner in which the international community – principally in the form of guidance from the UNCRC and UNHCR – has treated the relationship between international refugee law and international law on the rights of the child. Although not binding on states as a matter of treaty interpretation, this guidance has appropriately been

64 This point is made in Japan’s statement after the adoption of the CRC: ‘the delegation of Japan 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’: Report of the Working Group on a Draft Convention on the Rights of the Child, E/CN.4/1989/48 (1989), [722]. The Netherlands made a declaration expressly providing that its government ‘understands the term “refugee” in [art 22(1)] as having the same meaning as in article 1 of the [Refugee Convention]’: 1855 UNTS 420, 421 (Netherlands). Notwithstanding this view, there is a compelling argument that the duty to ensure that a child seeking refugee status receives ‘appropriate protection’ compels a state to give consideration to the circumstances of the intended beneficiary of protection and, hence, the relationship between the Convention definition and the rights protected under the CRC. See Chapter 4, text accompanying n 166.


69 In circumstances where these policy documents are produced without the engagement or agreement of all states party to the Convention or CRC, they cannot properly be characterised as ‘subsequent agreement
recognised as having clear persuasive value and in the refugee context is often afforded considerable deference.\textsuperscript{70} Indeed, given that the production of the guidance falls within the scope of the respective bodies’ supervisory functions, there is an argument that a state could be required to explain treatment of child refugees that does not conform to the standards set by the two bodies.\textsuperscript{72}

The most authoritative source of UNHCR guidance is found in the Conclusions on the International Protection of Refugees adopted by the agency’s governing body, the UNHCR ExCom. The non-binding resolutions of the ExCom are particularly significant in that they reflect the consensus of representations from more than half of the signatories to the Convention.

The UNHCR ExCom first turned its attention to the situation of child refugees in 1986, noting that ‘the situation of refugee children . . . required special consideration’ and calling on the High Commissioner to report regularly to the ExCom on the ‘needs of refugee children, and on existing and proposed programmes for their benefit’.\textsuperscript{73} Following that session, UNHCR established a Working Group on Refugee Children at Risk and in 1987 published its first Note on Refugee Children. The opening paragraph of that note states: \textsuperscript{74}

Refugee children comprise approximately one-half of the world’s refugee population, and as such benefit from general efforts on behalf of all refugees with respect to international protection, material assistance and durable solutions. Children, however, have special needs which must be identified and met. While refugee children have always been a major concern of UNHCR, they have received increasing attention in recent years. This is due both to the substantial number of children in the various large-scale refugee situations in different parts of the world and to the complexity of the problems to which their presence give[s] rise, as well as to the wider international attention now given to children in general and refugee children in particular.

The same year the ExCom published its first Conclusion specific to refugee children.\textsuperscript{75} In that Conclusion, the ExCom noted the ‘special needs and vulnerability’\textsuperscript{76} of children within the broader refugee population and recognised that the situation in which children live ‘often gives rise to special protection and assistance problems as well as to problems in the area of durable solutions’.\textsuperscript{77} The ExCom stressed that ‘all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by

\begin{itemize}
\item between the parties’ under VCLT, art 31(3)(a); J C Hathaway and M Foster, The Law of Refugee Status (2nd ed, 2014) 10.
\item See, e.g., R (SG and others) v Secretary of State for Work and Pensions [2015] 1 WLR 1449, [105] (Lord Carnwath) (describing GC14 as ‘the most authoritative guidance now available on the effect of article 3.1 [of the CRC]’).
\item For UNHCR, see Statute of the Office of the United Nations High Commissioner for Refugees, GA Res 428 (V), Annex, A/1775 (1950). Article 35(1) of the Refugee Convention further provides that '[t]he Contracting States undertake to co-operate with the [UNHCR] . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention'. The importance of ensuring ‘closer cooperation between States Parties and UNHCR’ was affirmed by states in the Declaration of States Parties to the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, HCR/MMSP/2001/09 (2001), [9]. For the UNCRC, see CRC, arts 43–5.
\item UNHCR ExCom, General, No 41 (XXXVII) (1986), [(m)].\textsuperscript{74} \textit{Ibid.}, [1].
\item UNHCR ExCom, Refugee Children, No 47 (XXXVIII) (1987).\textsuperscript{75} \textit{Ibid.}, [(a)]. \textit{Ibid.}, [(b)].
\end{itemize}
the principle of family unity\textsuperscript{78} and reaffirmed the need to promote expanded cooperation between UNHCR and other relevant organisations, including through the development of ‘legal and social standards.’\textsuperscript{79} Finally, the ExCom called upon the High Commission to develop, in consultation with these organisations, ‘guidelines to promote cooperation between UNHCR and these organizations to improve the international protection, physical security, well-being and normal psychosocial development of refugee children.’\textsuperscript{80}

The UNHCR Working Group convened a consultation on refugee children in March 1988, and in August 1988 issued the first edition of its \textit{Guidelines on Refugee Children}.\textsuperscript{81} The \textit{Guidelines} identify the major issues affecting refugee children and provide guidance on how UNHCR will ensure that the special protection needs of refugee children are met.\textsuperscript{82} In 1989 the UNHCR ExCom issued a second Conclusion on refugee children, reaffirming and expanding on the need for particular attention to be paid to the special protection needs of refugee children.\textsuperscript{83}

After the adoption of the \textit{CRC}, UNHCR began to promote the \textit{CRC} as the appropriate framework for conceptualising the special protection needs of refugee children. Crisp has suggested that that agency’s policies on refugee children ‘owe a self-evident intellectual debt’ to the \textit{CRC}.\textsuperscript{84} This intellectual debt is evident in the UNHCR 1993 \textit{Policy} published in August 1993,\textsuperscript{85} which expressly notes that the \textit{CRC}\textsuperscript{86} ‘provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including those who are of concern to UNHCR. Moreover, as a United Nations convention, it constitutes a normative frame of reference for UNHCR’s action.’ The 1993 \textit{Policy} was welcomed by the ExCom, which stressed the ‘importance of the [\textit{CRC}] as a normative framework for action to protect and care for children of [UNHCR’s] concern.’\textsuperscript{87} In its 1997 Conclusion on refugee children the ExCom reaffirmed ‘the fundamental importance of the

\textsuperscript{78} Ibid., [(d)]. \textsuperscript{79} Ibid., [(s)]. \textsuperscript{80} Ibid., [(u)]. \textsuperscript{81} UNHCR, \textit{Guidelines on Refugee Children} (1988).

\textsuperscript{82} J Crisp, ‘Meeting the Needs and Realizing the Rights of Refugee Children and Adolescents: From Policy to Practice’ (1996) 15(3) \textit{Refugee Survey Quarterly} 1, 12.

\textsuperscript{83} UNHCR ExCom, \textit{Refugee Children}, No 59 (XL) (1989).

\textsuperscript{84} ‘Indeed, the UNHCR policy can legitimately be described as an attempt to operationalize the \textit{CRC} in situations of human displacement. While only states can be parties to the \textit{CRC}, UNHCR applies the Convention to all aspects of its work with refugee children and considers itself to be accountable for the implementation of \textit{CRC} standards’: Crisp (1996) supra n 82, 12.

\textsuperscript{85} ‘Although many of the components of this policy can be found in UNHCR’s Guidelines on Refugee Children [which predated the \textit{CRC}] or derive from the [\textit{CRC}], their assimilation into the global policy of the Office reflects a new level of priority that the High Commissioner has come to meeting the specific protection and assistance needs of refugee children’: UNHCR ExCom, \textit{UNHCR Policy on Refugee Children}, EC/SCP/82 (1993), [6].

\textsuperscript{86} UNHCR, 1993 \textit{Policy}, supra n 85, [17]. The UNHCR 1993 \textit{Policy} was followed by a revised set of operational guidelines on refugee children in 1994: UNHCR, 1994 \textit{Guidelines}, supra n 12. The 1994 \textit{Guidelines} were intended to combine ‘the concept of “children’s rights” with UNHCR’s ongoing efforts to protect and assist refugee children’ (at 14). In its introductory remarks, UNHCR refers to the two ancestral branches of the \textit{Guidelines} (at 13): ‘This book of Guidelines has its ancestors. On one side of the family tree is the human rights branch, which includes the most recent forebear, the [\textit{CRC}]. On the other side is the UNHCR branch’. The introduction goes on to state (at 18–20): ‘UNHCR [applies] the \textit{CRC} to its own work by using the rights as guiding principles . . . At the beginning of each chapter of these \textit{Guidelines}, the rights in the \textit{CRC} are stated as UNHCR’s standards . . . For the well-being of refugee children, UNHCR advocates the observance of \textit{CRC} standards by all States, international agencies and non-governmental organizations.’ See also UNHCR, \textit{Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum} (1997).

\textsuperscript{87} UNHCR ExCom, \textit{General}, No 71 (XLIV) (1993), [(w)].
[CRC] to the legal framework for the protection of child and adolescent refugees and for promoting their best interests\textsuperscript{88} and called upon UNHCR to ‘continue to integrate fully the rights of the child into its policies and programmes.’\textsuperscript{89} In its most recent Conclusion on refugee children the ExCom emphasised the need for a\textsuperscript{90} rights-based approach, which recognizes children as \textit{active subjects of rights}, and according to which all interventions are consistent with States’ obligations under relevant international law, including, as applicable, international refugee law, international human rights law and international humanitarian law, and acknowledgment that the CRC provides an important legal and normative framework for the protection of children.

The Conclusion recommends the development of ‘child and gender-sensitive national asylum procedures’,\textsuperscript{91} including consideration of ‘an age and gender-sensitive application of the 1951 Convention through the recognition of child-specific manifestations and forms of persecution, including under-age recruitment, child trafficking and female genital mutilation.’\textsuperscript{92}

The Conclusions of the UNHCR ExCom are complemented by UNHCR’s \textit{Handbook}, which was produced at the behest of – although never formally adopted by – the ExCom.\textsuperscript{93} The \textit{Handbook} was intended to provide a comprehensive analysis of the interpretation of the definition of a refugee and has traditionally been afforded a high degree of deference by domestic decision-makers.\textsuperscript{94} Although the \textit{Handbook} contains a number of references to children, given that it predates the CRC by a decade it is unsurprisingly silent on the relationship between the \textit{Convention} and the CRC. Some guidance, however, can be gleaned from the more recent \textit{Guidelines on International Protection}, which UNHCR’s Department of International Protection began publishing in 2003 to complement the standards set in the \textit{Handbook}.\textsuperscript{95} Although these \textit{Guidelines} are not formally adopted by the ExCom – and are therefore unlikely to be treated to the same degree of deference as the state-generated Conclusions – they nonetheless represent persuasive guidance on the interpretation of the \textit{Convention}.\textsuperscript{96}

Of particular salience to this project, UNHCR has issued the 2009 \textit{Guidelines} which address the application of arts 1A(2) and 1F of the \textit{Convention} to child asylum claims. The 2009 \textit{Guidelines} emphasise that the substantive and procedural aspects of the assessment of a child’s application for refugee status should be informed by the CRC. The 2009 \textit{Guidelines} provide ‘substantive and procedural guidance on carrying out refugee status

\textsuperscript{88} UNHCR ExCom, \textit{Conclusion on Refugee Children and Adolescents}, No 84 (XLVIII) (1997).

\textsuperscript{89} Ibid., [(c)].

\textsuperscript{90} UNHCR ExCom, \textit{Conclusion on Children at Risk}, No 107 (LVIII) (2007), [(b)(x)] (emphasis added). See also UNHCR ExCom, \textit{Conclusion on Women and Girls at Risk}, No 105 (LVII) (2006).

\textsuperscript{91} UNHCR ExCom, \textit{Conclusion on Children at Risk}, No 107 (LVIII) (2007), [(g)(viii)].

\textsuperscript{92} Ibid., [(g)(viii)].

\textsuperscript{93} UNHCR ExCom, \textit{Determination of Refugee Status}, No 8 (XVIII) (1977), [(g)].


determination in a child-sensitive manner’,\textsuperscript{97} including guidance on the interpretation of the definitional elements of arts 1A(2) and 1F of the \textit{Convention}. This includes the assessment of the ‘well-founded fear of being persecuted’ standard,\textsuperscript{98} the relevant agents of persecution,\textsuperscript{99} the \textit{Convention} grounds (‘race and nationality or ethnicity’,\textsuperscript{100} ‘religion’,\textsuperscript{101} ‘political opinion’,\textsuperscript{102} ‘membership of a particular social group’),\textsuperscript{103} the issue of internal flight alternatives\textsuperscript{104} and the application of the exclusion provisions to children.\textsuperscript{105} The 2009 \textit{Guidelines} also provide guidance on a number of evidentiary and procedural issues.\textsuperscript{106}

The \textit{UNCRC} has also issued a General Comment specifically addressing the treatment of unaccompanied and separated children outside their country of origin.\textsuperscript{107} The General Comment seeks to ‘provide clear guidance to States on the obligations deriving from the \textit{UNCRC} with regard to this particular vulnerable group of children’.\textsuperscript{108} In the context of status determination, the General Comment provides that states must adopt a ‘[c]hild-sensitive assessment of protection needs, taking into account persecution of a child-specific nature’.\textsuperscript{109}

When assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationship between, \textit{international human rights and refugee law}, including positions developed by \textit{UNHCR} in exercising its supervisory functions under the 1951 Refugee Convention. In particular, the refugee definition in that Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such child-specific forms of manifestations of persecution as well as gender-based violence in national refugee status determination procedures.

The General Comment provides that the rights of a refugee child are not limited to those provided under the \textit{Convention}, but instead extend to ‘all human rights granted to children in the territory or subject to the jurisdiction of the State’.\textsuperscript{110} In circumstances where a child does not satisfy art 1A(2) of the \textit{Convention}, the General Comment provides that that child ‘shall benefit from available forms of complementary protection to the extent determined by their protection needs’.

The above discussion evinces clear endorsement, at an institutional level, of greater alignment between international refugee law and international law on the rights of the child. \textit{UNHCR’s} 2009 \textit{Guidelines} and \textit{UNCRC’s GC6} are particularly significant in that they move beyond the mere articulation of general principles in support of alignment and provide guidance on the manner in which the \textit{CRC} might be substantively relevant in the refugee determination context.

\begin{thebibliography}{11}
\item \textsuperscript{97} \textit{UNHCR}, 2009 \textit{Guidelines}, [1].
\item \textsuperscript{98} \textit{Ibid.}, [10]–[36].
\item \textsuperscript{99} \textit{Ibid.}, [37]–[39].
\item \textsuperscript{100} \textit{Ibid.}, [41].
\item \textsuperscript{101} \textit{Ibid.}, [42]–[44].
\item \textsuperscript{102} \textit{Ibid.}, [45]–[47].
\item \textsuperscript{103} \textit{Ibid.}, [48]–[52].
\item \textsuperscript{104} \textit{Ibid.}, [53]–[57].
\item \textsuperscript{105} \textit{Ibid.}, [58]–[64].
\item \textsuperscript{106} \textit{Ibid.}, [65]–[77].
\item \textsuperscript{107} \textit{UNCRC, GC6}. \textsuperscript{108} \textit{Ibid.}, [4].
\item \textsuperscript{109} \textit{Ibid.}, [74] (emphasis added).
\item \textsuperscript{110} \textit{Ibid.}, [76].
\item \textsuperscript{111} \textit{Ibid.}, [77]–[78]. See also \textit{UNCRC, 2012 Discussion Day Report}, ‘emphasising the primacy of the \textit{[UNCRC]} in addressing the rights of the child in the context of international migration’ (at [12]) and ‘[t]he need for clear guidance and frameworks that ensured Convention-compliant treatment of a child at all stages of the asylum-seeking procedure’ (at [47]).
\end{thebibliography}
1.3 A Child-Rights Framework

The proposition that both the Refugee Convention and the CRC are relevant when determining the status of a refugee child is not new. The argument for greater interaction between the two regimes has for some time been advanced by scholars and advocates and, as the above discussion demonstrates, by the UNHCR and the UNCRC. The relationship between the two regimes has also been recognised in domestic guidelines and policy documents.

Notwithstanding this clear in-principle support, decision-makers have been reluctant to engage with the CRC and associated jurisprudence when considering the status of refugee children. A review of more than 2,500 national decisions involving children seeking international protection since the adoption of the CRC revealed that the treaty was applied explicitly in a very limited number of cases. There are certainly exceptions and, as the analysis that follows will demonstrate, embryonic signs of domestic refugee jurisprudence that draws on the CRC’s normative framework in assessing a child’s refugee status. But these cases remain the exception rather than the norm.

There are at least three ways in which the CRC may be relevant when considering the status of a refugee child. First, the CRC may provide procedural guarantees not otherwise provided under international refugee law. Second, the CRC may be invoked as an interpretative aid to inform the interpretation of the Refugee Convention. Third, the CRC may give rise to an independent source of status outside the international refugee protection regime. These three modes of interaction provide a child-rights framework for assessing the status of an at-risk child.

1.3.1 The CRC as a Procedural Guarantee

There are a number of scenarios in which a child’s refugee claim may come before a decision-maker. If the child is accompanied, her claim will generally be subsumed within the application of the ‘head of the family’. If the parent or guardian receives refugee status, it is common practice for any dependent children to automatically receive derivative refugee status. But the converse is also true: if the parent or guardian is denied refugee status, the

---


113 Canadian, UK and Australian government guidelines all refer to the relevance of the CRC in refugee status determination. Even the United States – one of the two states that has not ratified the CRC – has issued guidance noting the significance of the obligations in the CRC in determining a child refugee’s status: INS, Guidelines, 2.
child will similarly be denied protection. This is notwithstanding the fact that the child might have an independent, and potentially conflicting, claim for refugee protection. If a child is unaccompanied or separated, there is a greater chance that her claim will be independently assessed, although in a limited range of circumstances states have suggested that an unaccompanied child lacks the capacity to claim refugee status independently.

The *Refugee Convention* is silent on the procedures that a state should implement in designing a domestic system of refugee status determination. In contrast, the *CRC* contains a number of provisions that may be relevant to the determination process, including the principle that a child has a right to right to express views freely and to be heard in any judicial or administrative proceedings affecting her. In promoting a construction of the child as an independent social actor, the *CRC* provides a solid legal basis for developing a participatory framework to ensure that children are not rendered invisible in domestic asylum processes.

### 1.3.2 The CRC as an Interpretative Aid

International law, and in particular international human rights law, has grown exponentially over the past 60 years. Many of the relatively nascent precepts contained within the *Refugee Convention* have since been re-articulated, re-contextualised and in many cases expanded in a comprehensive suite of international human rights treaties. There is widespread acceptance, both at an international and a domestic level, that the open-textured provisions of the *Convention* definition should be interpreted taking into account this broader international human rights framework. In these circumstances there is a clear, principled basis for drawing on the *CRC* – the most authoritative articulation of the obligations that a state owes to a child – as an aid to inform the interpretation of the *Convention* definition in claims involving children.

The alignment of international refugee law with international human rights law is generally attributed to the work of James Hathaway, who in *The Law of Refugee Status* advanced a vision of refugee law linked to the emerging corpus of international human rights law. Although Hathaway advocates this vision in a more general sense, the link

---

114 CRC, art 12.

115 The link between international human rights law and the interpretation of the *Refugee Convention* has been endorsed by senior courts in the common law world, increasingly by decision-makers in the civil law world, by UNHCR, and by the majority of refugee scholars. For an excellent, comprehensive discussion on the extent of this endorsement, see Foster (2007) *supra* n 71, 27–35. For examples of case-law see, e.g., *Canada (A-G) v Ward* [1993] 2 SCR 689; *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629, 653 (Lord Hoffmann); *Horvath v SSHD* [2001] 1 AC 489, 495 (Lord Hope for the majority), 512 (Lord Clyde); *Seqe v SSHD* [2003] 1 WLR 856, [6]–[7] (Lord Bingham); *R v Special Adjudicator; Ex parte Ullah* [2004] 2 AC 323, 355 (Lord Steyn); *Fornah v SSHD* [2007] 1 AC 412, [10] (Lord Bingham); *HH (Iran) v SSHD* [2011] 1 AC 596, [13] (Lord Hope); *RT (Zimbabwe) v SSHD* [2013] 1 AC 152, [29]–[31]; *MIMA v Khawar* (2002) 210 CLR 1, [111] (Kirby J); *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1, [108]–[111]; *Stenaj v Gonzalez*, 227 Fed Appx 429 (6th Cir, 2007).


has been most readily embraced by domestic courts in the context of the ‘being persecuted’ inquiry. Hathaway considers that the phrase ‘being persecuted’ should be understood as the ‘sustained or systemic violation of basic human rights demonstrative of a failure of state protection’,[118] identifying the rights enumerated in the UDHR and subsequently translated into the ICCPR and ICESCR as the appropriate reference points for the range of circumstances where the action or inaction of a state will constitute persecutory harm. More recently Hathaway has acknowledged that other widely ratified treaties may be relevant in defining what might be appropriately recognised as persecutory harm.[119] Treaties that may be relevant include the CRC, OPSC, OPCP, CERD and CEDAW. Hathaway considers that the specialised treaties have the capacity to act as valuable interpretive aids to decision-makers when applying the Convention definition.[120]

There are a number of principled benefits that flow from interpreting the Convention definition by reference to authoritative international human rights standards including the CRC.[121] First, it promotes objective and consistent decision-making.[122] In circumstances where the Convention is applied to thousands of individual refugee claims every day,[123] across more than 150 jurisdictions and without any overarching supervision, the issue of consistent interpretation is invariably raised. The general proposition that an international treaty should be accorded the ‘same meaning by all who are party to it’[124] is largely uncontroversial. The need for international uniformity is particularly evident in the context of the Convention, a treaty which by its very design is intended to facilitate a minimum level of protection to a refugee regardless of the state party in which they seek refuge. Notwithstanding practical difficulties,[125] the desirability of uniformity in the interpretation of the Convention has found favour in superior domestic courts, particularly within the


This discussion derives in part from Hathaway and Pobjoy (2012) supra n 117, 382–4.


In 2014, more than 1.66 million individual applications for asylum or refugee status were submitted to states or UNHCR in 157 countries or territories: UNHCR, Global Trends 2014 (2015) 27. In 2015 this figure increased to 2.45 million individual applications in 174 countries or territories: UNHCR, Global Trends 2015 (2016) 37.


‘[W]e may never know, or in some cases, we may not know for a time, which autointerpretation was correct . . . This is, for better or worse, the situation resulting from the organizational insufficiency of international law’: L Gross, ‘States as Organs of International Law and the Problem of Autointerpretation’ in G A Lipsky (ed), Law and Politics in the World Community: Essays on Hans
common law world. The framework of international human rights law, particularly the core international human rights treaties, provides a principled and objective anchor to assist decision-makers in the task of ascertaining the international meaning of the key definitional elements of the Convention, and thus promotes transparent and predictable decision-making.

Second, reliance on internationally agreed human rights treaties promotes an interpretation of the Convention that is sensitive to the reality that states can only be bound by what they themselves have agreed to. Apart from anything else, interpreting the Convention by reference to the same extrinsic standards agreed to by states is ‘strategically wise’. Decision-makers are likely to be more comfortable grounding an interpretation of the Convention definition in standards to which states themselves have agreed. Consider for instance the case of a 15-year-old girl claiming refugee status on the basis that she will be subjected to FGC if returned to her country of origin. In circumstances where FGC has been widely condemned as a violation of international human rights law, it would be incongruous for a government that claims to act consistently with its obligations under international human rights law to assert that the practice of FGC does not constitute persecutory harm for the purposes of the Convention definition.

Finally, recourse to internationally agreed standards enables the Convention definition to evolve in a contextually sensitive way. By embracing the interconnection between international refugee law and the increasingly sophisticated body of international human rights law, decision-makers are provided with an external point of reference that allows for the progressive development of international refugee law through the medium of the Convention. This in turn allows the Convention to respond to circumstances that may not have been apparent to its drafters. For example, the recognition of the relationship between the Convention and the broader framework of international human rights law has been critical in advancing claims involving gender-related persecution, persecution related to sexual orientation, and social and economic deprivation. So too, international human rights law, in particular the CRC, now has a vital role to play in advancing the protection of refugee children.

1.3.3 The CRC as an Independent Source of Status

The CRC may also give rise to an independent source of protection outside the international refugee protection regime. It is generally accepted that the CRC contains a complementary source of protection via the principle of non-refoulement implicit in, at the very minimum, arts 6 and 37. In that regard, the UNCRC has underlined that a state shall not return a child to her country of origin where there are ‘substantial grounds for believing that there is a real risk of irreparable harm to the child’. The UNCRC has not provided an exhaustive definition of irreparable harm but has indicated that it includes, though is ‘by no means
limited to’, those harms contemplated under arts 6 and 37 of the CRC.\textsuperscript{131} The Committee goes on to suggest that underage military recruitment and participation in armed conflict ‘entails a high risk of irreparable harm involving fundamental human rights, including the right to life’.\textsuperscript{132} Accordingly, the Committee takes the view that the obligations in art 38 of the CRC, along with arts 3 and 4 of the OPAC, ‘entail extraterritorial effects’ and that ‘States [are obliged 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’.\textsuperscript{133}

Article 3 of the CRC, which specifies that the best interests of the child shall be a primary consideration in all actions concerning her, provides a critical additional safeguard for children seeking international protection. Article 3(1) mandates not only that decision-makers consider the best interests of the child but, more specifically, that those interests are a primary consideration in any actions concerning the child. The obligation under art 3 attaches to all children falling within a state’s jurisdiction,\textsuperscript{134} and a state cannot limit the application of the provision on the basis of a child’s citizenship or immigration status. Although it is now generally accepted that art 3 is relevant to children seeking international protection, this recognition has tended to focus on the influence of the obligation on the procedural guarantees afforded to at-risk children and the treatment of children during and subsequent to any status determination process. But while art 3 is plainly relevant to the procedures and treatment afforded children seeking international protection, the best interests principle may also be engaged as an independent basis for protection outside the traditional refugee protection regime. In particular, an assessment of the best interests of the child may preclude the return of a child to her home country notwithstanding the fact that the child is not eligible for protection under the Convention or the more traditional non-refoulement obligations noted above.

\section*{1.4 A Systemic Approach to Interpreting the Refugee Convention}

A number of arguments can be called upon to promote greater recourse to the CRC and its associated jurisprudence in claims involving refugee children. As outlined above, the CRC provides a comprehensive, state-generated framework of rules of undisputed legal authority. This authority is underscored by the treaty’s near-universal ratification. In addition, the CRC is complemented by a sophisticated and fast-evolving body of international jurisprudence, principally in the form of General Comments, Concluding Observations and Discussion Days. Notwithstanding this normative appeal, there is clear value in outlining a legal basis to justify reliance on the CRC in refugee claims involving children. As the England and Wales Court of Appeal has cautioned, ‘[h]owever wide the canvas facing the judge’s brush, the image he makes has to be firmly based on some conception of objective principle which is recognised as a legitimate source of law’.\textsuperscript{135}

The legal basis for invoking the CRC as a procedural guarantee (the first mode of interaction) or an independent source of status (the third mode of interaction) is straightforward. In both contexts the CRC is being relied on as a direct source of obligation. Hence, in the absence of any reservation limiting the application of the CRC to non-citizen children,\textsuperscript{136} the rule of \textit{pacta sunt servanda} applies and the obligations contained in the

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{131}] Ibid., [27].
\item[\textsuperscript{132}] Ibid., [28].
\item[\textsuperscript{133}] Ibid., [28].
\item[\textsuperscript{134}] CRC, art 2(1).
\item[\textsuperscript{135}] Sepet v SSHD [2001] EWCA Civ 681, [66].
\item[\textsuperscript{136}] See supra n 10.
\end{enumerate}
\end{footnotesize}
CRC must be performed in good faith.\textsuperscript{137} There is no suggestion that the Convention operates as a form of \textit{lex specialis} that has the effect of excluding from refugee children the benefit of the simultaneously applicable framework of the CRC. Indeed, such an argument is expressly forbidden by the Convention, which provides that ‘[n]othing in [the] Convention shall . . . impair any rights and benefits granted by a Contracting State to refugees apart from this Convention’.\textsuperscript{138} A review of the drafting history of the Convention makes clear that art 5 applies to pre-existing rights as well as to any rights that might accrue in the future.\textsuperscript{139}

The legal basis for invoking the CRC as an interpretative tool to inform the interpretation of the Convention (the second mode of interaction) is more involved. The discussion above outlines a number of normative bases that support this integrative approach. A further, principled basis can be located in the international rules of treaty interpretation, which provide a critical source of support for greater interaction between international refugee law and international law on the rights of the child and, in particular, for drawing on the CRC as an interpretative aid when interpreting the open-textured provisions of the Convention.

The \textit{VCLT} provides the authoritative set of rules to guide the interpretation of treaties (the ‘Vienna rules’). The ICJ has pronounced that the Vienna rules constitute customary international law and therefore apply to the interpretation of any treaty, irrespective of whether the states parties involved are parties to the \textit{VCLT}.\textsuperscript{140} This is significant as the \textit{VCLT} does not apply retroactively,\textsuperscript{141} and both the 1951 \textit{Convention} and the 1967 \textit{Protocol} predate it. The applicability of the Vienna rules is widely accepted in international courts and tribunals\textsuperscript{142} and has received widespread endorsement at a national level. The discussion that follows considers how the Vienna rules might be used to promote what is termed here a \textit{systemic approach} to interpreting the Convention.\textsuperscript{143}

\textbf{1.4.1 The Interpretation of an International Treaty in Domestic Fora}

Before turning to the Vienna rules, it is necessary to outline why the discussion is grounded in international rules of treaty interpretation rather than domestic rules of statutory interpretation. In circumstances where many jurisdictions have codified the Convention definition in a domestic statutory instrument, it is certainly arguable that the latter is more appropriate. Indeed, these domestic principles may in certain jurisdictions provide a more straightforward route for invoking the CRC.

\textsuperscript{137} \textit{VCLT}, arts 26–7. \textsuperscript{138} Art 5. \textsuperscript{139} Hathaway (2005) supra n 96, 110. \textsuperscript{140} Territorial Dispute (Libyan Arab Jamahiriya/Chad) (Judgment) [1994] ICJ Rep 6, 21. \textsuperscript{141} \textit{VCLT}, art 4. \textsuperscript{142} R Gardiner, \textit{Treaty Interpretation} (2nd edn, 2015) 13–20. \textsuperscript{143} The terminology adopted here derives from M Koskenniemi, ILC, \textit{Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission}, A/CN.4/L.682 (2006), [57]. See \textit{infra} text accompanying n 172–187. The approach outlined here has been influenced by Hathaway’s ‘interactive understanding’ of treaty interpretation set out in Hathaway (2005) supra n 96, 48–74. However, the inquiry here is narrower, focusing specifically on the elements of the \textit{VCLT} that have the capacity to support an interpretation of the \textit{Refugee Convention} that promotes its systemic integration into the broader international human rights framework. In contrast, Hathaway seeks to outline a more general theory of treaty interpretation. As a result of this book’s more tailored inquiry, greater emphasis is placed here on the interpretative rule codified in art 31(3)(c) of the \textit{VCLT}. 

Downloaded from https://www.cambridge.org/core; IP address: 54.70.40.11, on 25 Aug 2019 at 12:47:17, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781316798430.004
There are three principal reasons why this chapter focuses on the Vienna rules rather than principles of domestic statutory interpretation. First, the Vienna rules are specifically tailored to the interpretation of international treaties and therefore provide the appropriate analytical framework wherever domestic legislation incorporates an international treaty. The application of domestic principles of statutory interpretation may produce a different result than that which would follow the application of the Vienna rules which, by requiring a decision-maker to take into account the treaty’s object and purpose, ensures that human rights treaties are not given a narrow or restricted interpretation.\(^\text{144}\) Second, an interpretation grounded in the Vienna rules is more likely to lead to uniformity in the interpretation of the Convention.\(^\text{145}\) By contrast, there is a danger that relying on domestic principles of statutory interpretation – which vary from state to state – may give rise to conflicting interpretations and the corresponding risk of fragmentation. Third, the approach adopted in this chapter is consistent with that of senior courts, particularly in the common law world, where there has been increased engagement with the Vienna rules in national courts, coupled with a recognition that in interpreting the Convention ‘the rules applicable to the interpretation of treaties must be applied to the transposed text and rules generally applicable to the interpretation of domestic statutes give way.’\(^\text{146}\)

### 1.4.2 A General ‘Rule’ of Treaty Interpretation

Article 31 of the VCLT codifies what is often referred to as the general ‘rule’ of treaty interpretation. Article 31(1) requires a decision-maker to interpret a treaty ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Article 31(2) sets out the permissible sources that

\(^{144}\) ‘Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel . . . It follows that one is more likely to arrive at the true construction of article 1A (2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach’: Adan v SSHD [1999] 1 AC 293, 305. See also Applicant A v MIEA (1997) 190 CLR 225, 255 (McHugh J); Gardiner (2015) supra n 142, 51–4.

\(^{145}\) See supra text accompanying n 121–7.

\(^{146}\) Applicant A v MIEA (1997) 190 CLR 225, 230–1. In the United Kingdom see, e.g., R (ST) v SSHD [2012] 2 AC 135, [30] (‘[The Refugee Convention] must be interpreted as an international instrument, not a domestic statute’); R v Asfaw [2008] 1 AC 1061, [125] (‘The starting point for the interpretation of an international treaty such as the Geneva Convention is the [VCLT]’); Januzi v SSHD [2006] 2 AC 426, [4] (‘[The Refugee Convention] must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the [VCLT]’); R v SSHD; Ex parte Adan [2001] 2 AC 477, 513–15 (observing that ‘a treaty should be interpreted “unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general application”’, citing James Buchanan & Co Ltd v Babco Forwarding and Shipping (UK) Ltd [1978] AC 141); R v SSHD; Ex parte Adan [1999] 3 WLR 1274, 1295 (‘[The VCLT’s] provisions imply that every treaty falling within its scope has to be interpreted in accordance with objective canons of construction’); Sepet v SSHD [2003] 1 WLR 856, [6]–[7] (Lord Bingham) (‘In interpreting the [Refugee Convention] the House must respect articles 31 and 32 of the [VCLT]’); Fornah v SSHD [2007] 1 AC 412, [10] (‘Since the Convention is an international instrument which no supra-national court has the ultimate authority to interpret, the construction put upon it by other states, while not determinative . . . is of importance, and in cases of doubt articles 31–33 of the [VCLT] may be invoked to aid the process of interpretation’).
may comprise the context of a treaty, centred on material relating to the conclusion of the treaty. Article 31(3) is forward-focused, and requires that an understanding of the treaty’s context be supplemented by a number of extrinsic sources, including subsequent interpretative agreement between the parties, subsequent practice in the application of the treaty relevant to its interpretation, and any relevant rules of international law applicable in the relations between the parties to the treaty.

The use of the singular noun, ‘General rule of interpretation’, suggests that the article comprises a single holistic ‘rule’ of interpretation.\(^\text{147}\) As Aust explains, ‘the three paragraphs represent a logical progression, nothing more. One naturally begins with the text, followed by the context, and then other matters, in particular subsequent material’.\(^\text{148}\) The adoption of a ‘single, closely integrated rule’\(^\text{149}\) underscores the need to look beyond a literal construction of the text and to consider the terms of the treaty in light of their object and purpose, in their context and taking into account subsequent extrinsic sources.\(^\text{150}\) This rejection of strict literalism has found favour in domestic refugee jurisprudence, where senior courts have repeatedly emphasised the importance of interpreting the Convention in a manner ‘which makes sense in the light of the Convention as a whole’, while at the same time respecting the expressed intention of the parties.\(^\text{151}\)

The discussion that follows considers the extent to which the constituent elements of art 31 support a systemic approach to interpreting the Convention.\(^\text{152}\) At the outset it is important to acknowledge that treaty interpretation is an inexact science.\(^\text{153}\) Although framed as a ‘rule’, the general rule codified in art 31 is not intended to act as a straitjacket limiting other interpretative devices that may assist a decision-maker in ascertaining the meaning of a treaty provision.\(^\text{154}\) In this sense, the Vienna rules are perhaps

---

\(^\text{147}\) This was the ILC’s explicit intention: ILC, ‘Reports of the Commission to the General Assembly’ [1966] (2) Yearbook of the International Law Commission 169, 219–20.


\(^\text{149}\) ILC, 1966 Reports, supra n 147, 220.

\(^\text{150}\) As the ILC noted in its Commentaries on the Draft Articles: ‘the application of the means of interpretation in the article would be a single combined operation. All the various elements as they were present in any given case would be thrown in the crucible and their interaction would give the legally relevant interpretation’: ILC, 1966 Reports, supra n 147, 219–20.


\(^\text{152}\) The following discussion focuses on the requirement to interpret a provision ‘in light of its object and purpose’ (art 31(1)), taking into account ‘any relevant rules of international law applicable in the relations between the parties’ (art 31(3)(c)), on the basis that these elements most strongly support a systemic approach to interpreting the Convention. For reasons noted at supra n 69, the obligation to take into account ‘[a]ny subsequent agreement between the parties’ (art 31(3)(a)) is of limited utility in the Convention context. As to ‘subsequent practice’ (art 31(3)(b)), although the book draws strongly on national case-law (see Introduction, ‘Methodology and Research Design’), this domestic practice lacks the consensus required to ‘establish[] the agreement of the parties’ about the Convention’s interpretation.


more appropriately characterised as guidelines or principles.\footnote{155 See, e.g., Gardiner (2015) supra n 142, 38–41.} As Tobin observes, ‘the VCLT’s general rule may frame the interpretative process, but it is ultimately unable to resolve the question of how to choose a meaning from the text of a treaty from among the inevitable range of potential meanings’.\footnote{156 Tobin (2010) supra n 154, 3 (emphasis in original).} But while it is important to acknowledge the limits of the VCLT, it is nonetheless clear that the interpretative principles codified in art 31 provide an objective and principled source of guidance for decision-makers and, insofar as that guidance promotes an interpretation of the Convention that takes into account the broader international human rights framework, art 31 provides a persuasive source of support for a \textit{systemic approach} to interpreting the Convention.

1.4.3 A Human Rights Object and Purpose

The object and purpose of the Refugee Convention might be used in two complementary ways to support recourse to the broader framework of international human rights law when interpreting the Convention definition. First, the widely,\footnote{157 For an excellent discussion see Foster (2007) supra n 71, 40–9. See, e.g., R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629, 639.} although not universally,\footnote{158 Foster (2007) supra n 71, 44–5.} held view that the Convention has a human rights object and purpose might be used to support an interpretation of the Convention that imports the human rights standards subsequently agreed by states. As UNHCR has explained,\footnote{159 UNHCR, \textit{Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees} (2001), [4]–[5].} the aim of the drafters [was] to incorporate human rights values in the identification and treatment of refugees, thereby providing helpful guidance for the interpretation, in harmony with the Vienna Treaty Convention, of the provisions of the 1951 Convention . . . Human rights principles, not least because of this background, should inform the interpretation of the definition of who is owed [refugee] protection.

As a matter of principle, the argument finds support in the preamble to the 1951 Convention, which makes express reference to the UDHR and affirms the principle that ‘human beings shall enjoy fundamental rights and freedoms without discrimination’ and observes a need to ‘assure refugees the widest possible exercise of these fundamental rights and freedoms’.\footnote{160 1951 Convention, Preamble paras 1–2. See also the Preamble to the 1967 Protocol. Recourse to the Preamble finds further support in the requirement, in VCLT, art 31(1), to interpret the terms of the treaty ‘in their context’. Article 31(2) includes in ‘context’ a treaty’s ‘text including its \textit{preamble and annexes}’ (emphasis added).} Further support can be taken from the text and drafting history of art 5 of the Convention, which signals that the drafters envisaged that the Convention – at the time one of only two international human rights treaties – would one day need to be reconciled with subsequent international human rights accords.\footnote{161 See Hathaway (2005) supra n, 96, 100.}

The humanitarian object and purpose of the Convention has been repeatedly relied on by senior appellate courts to justify recourse to the wider remit of international human rights law to interpret the definitional elements of the Convention. In \textit{Canada (Attorney General) v Ward}, the Supreme Court of Canada drew on the Convention’s underlying ‘commitment
to the assurance of basic human rights without discrimination\textsuperscript{162} to conclude that ‘[t]he meaning assigned to a “particular social group” in the [\textit{Convention}] should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis of the international refugee protection initiative’.\textsuperscript{163}

In \textit{Pushpanathan v Canada (MCI)} the same court held that ‘[t]he overarching and clear human rights object and purpose [of the \textit{Convention}] is the background against which interpretation of individual provisions must take place’.\textsuperscript{164} Senior courts in the United Kingdom have made similar observations. In \textit{Fornah v SSHD}, the House of Lords noted that it is well established that the \textit{Convention} ‘must be interpreted in accordance with its broad humanitarian objective and having regard to the principles, expressed in the preamble, that human beings should enjoy fundamental rights and freedoms without discrimination’.\textsuperscript{165} More recently, in \textit{HJ (Iran) v SSHD}, the UK Supreme Court drew attention to the reference to the \textit{UDHR} in the preamble to the \textit{Convention}, noting that ‘[t]he guarantees in the Universal Declaration are fundamental to a proper understanding of the \textit{Convention}’.\textsuperscript{166}

The language of object and purpose has also been construed to embody a principle of ‘effectiveness’.\textsuperscript{167} Hathaway has developed this idea in the context of the \textit{Convention}, arguing that ‘the obligation to interpret the text of a treaty in the light of its object and purpose should be conceived as incorporating the overarching duty to interpret a treaty in a way that ensures its effectiveness’.\textsuperscript{168} He takes the view that in order to be effective a treaty must be interpreted in a way that reconciles it with its ‘contemporary international legal context’.\textsuperscript{169} Hathaway’s argument finds support in decisions of senior courts, which, although not always tied to an explication of the Vienna rules, have underlined the need to treat the \textit{Convention} as a living instrument to ensure its continued effective application.

\textsuperscript{162} \textit{Canada (Attorney General) v Ward} [1993] 2 SCR 689, 733.

\textsuperscript{163} \textit{Ibid.}, 739. This approach was subsequently approved by the House of Lords in \textit{R v Immigration Appeal Tribunal; Ex parte Shah} [1999] 2 AC 629, 651 (Lord Hoffmann): ‘In my opinion, the concept of discrimination in matters affecting fundamental rights and freedoms is central to an understanding of the \textit{Convention}. . . . The obvious examples, based on the experiences of the persecutions in Europe which would have been in the minds of the delegates in 1951, were race, religion, nationality and political opinion. But the inclusion of “particular social group” recognised that there might be different criteria for discrimination, in \textit{parie materiae} with discrimination on other grounds, which would be equally offensive to human rights . . . In choosing to use the general term “particular social group” rather than an enumeration of specific social groups, the framers of the \textit{Convention} were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the \textit{Convention}.’

\textsuperscript{164} \textit{Pushpanathan v Canada (MCI)} [1998] 1 SCR 982, 1024. \textsuperscript{165} \textit{Fornah v SSHD} [2007] 1 AC 412, [10]. \textsuperscript{166} \textit{HJ (Iran) v SSHD} [2011] 1 AC 596, [14]. See also \textit{RT (Zimbabwe)} [2013] 1 AC 152, [29]–[31].

\textsuperscript{167} Although the ILC did not expressly include a principle of ‘effective interpretation’ in the \textit{VCLT}, it indicated that regard to a treaty’s effects was relevant to the ‘object and purpose’ inquiry. ‘When a treaty is open to two interpretations one of which does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted’: ILC, 1966 \textit{Reports}, \textit{supra} n 147, 219. See generally \textit{Waibel} (2010) \textit{supra} n 153, 581–3; E Bjorge, \textit{The Evolutionary Interpretation of Treaties} (2014) 8–9.

\textsuperscript{168} Hathaway (2005) \textit{supra} n 96, 62.

\textsuperscript{169} Hathaway (2005) \textit{supra} n 96, 64; see also at 67–8: ‘[A]n interpretative approach that synthesizes foundational insights from analysis of the historical normative legal context and practical landscape within which treaty duties are now to be implemented is the most objective and legally credible means of identifying how best to make the treaty effective. It is an approach fully in line with the basic obligation of \textit{pacta sunt servanda}, since it honors the original goals which prompted elaboration of the treaty even as it refuses to allow those commitments to atrophy through passage of time.’
For example, in *R v Immigration Appeal Tribunal; Ex parte Shah*, the England and Wales High Court cautioned that ‘unless [the *Convention*] is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism’.\(^{170}\) Similarly, in *R v SSHD; Ex parte Adan* the House of Lords considered it clear that, as ‘the signatory states intended that the Convention should afford continuing protection for refugees in the changing circumstances of the present and future world[,] … the Convention has to be read as a living instrument’.\(^{171}\)

### 1.4.4 The CRC as a Relevant Rule of International Law

A systemic approach to interpreting the *Convention* is premised on the principle that international treaties are to be interpreted ‘by reference to their normative environment (“system”)’.\(^{172}\) As the ILC has noted:\(^{173}\)

> The rationale for such a principle is understandable. All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any intrinsic priority amongst the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.

This principle of ‘systemic integration’ finds its clearest exposition in art 31(3)(c) of the *VCLT*,\(^ {174}\) which sets out the circumstances in which external rules of international law must be taken into account in interpreting the text of a treaty. The provision requires a decision-maker to take into account, together with context, ‘any relevant rules of international law applicable in the relations between the parties’. It has been suggested that art 31(3)(c) provides the ‘master key’ to the house of international law.\(^ {175}\) Indeed, as both McLachlan and Sands have observed, in some instances it may provide the only key.\(^ {176}\)

Despite its potential scope as an interpretative mechanism,\(^ {177}\) until recently the provision was rarely invoked by decision-makers at an international or domestic level, either in the refugee context or in international law more generally.\(^ {178}\) Relative to the other elements of

---

\(^{170}\) *R v Immigration Appeal Tribunal; Ex parte Shah* [1997] Imm AR 145, 152, approved by the House of Lords in *Sepet v SSHD* [2003] 1 WLR 856, [6].

\(^{171}\) *R v SSHD; Ex parte Adan* [2001] 2 AC 477, 500.


\(^{174}\) The ILC has noted the ‘systemic nature of international law has received clearest formal expression in [art 31(3)(c)]: *Ibid.*, [420].

\(^{175}\) The analogy can be attributed to Xue Hanquin, Ambassador of China to the Netherlands and member of the ILC: see C McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279, 281, citing Xue Hanquin.


\(^{177}\) Sands (1998) supra n 176, 85, notes that art 31(3)(c) ‘appears to the only tool available under international law to construct a general international law by reconciling norms arising in treaty and custom across different subject matter areas’.

\(^{178}\) Foster (2007) supra n 71, 52.
The provision has also attracted very little academic attention. One commentator remarked that the instruction in art 31(3)(c) appeared for a long time to be a ‘dead letter’;\(^{179}\) another described the provision as ‘languished in ... obscurity’.\(^ {180}\) This did not mean that decision-makers were not referring to the wider remit of international law when interpreting at treaty;\(^ {181}\) there was, however, a reluctance to operationalise such recourse by reference to art 31(3)(c). This general reluctance might be attributed to at least two interdependent factors. The first derives from the laconic nature of the provision itself. A member of the IJC, in considering the principle of contemporaneity in the application of environmental norms, noted that ‘[t]he provision in [art 31(3)(c)] ... scarcely covers this aspect with the degree of clarity requisite to so important a matter’.\(^ {182}\) The second relates to the availability of other interpretative mechanisms that might yield the same result.\(^ {183}\) For instance, in the context of the Convention, the requirement to interpret a treaty in light of its object and purpose, discussed above, is often relied on to legitimise recourse to international human rights instruments. Neither of these explanations necessarily renders art 31(3)(c) a dead letter. They do, however, demonstrate the need for a more detailed consideration of how art 31(3)(c) might apply in a given context and the extent to which the provision might benefit from judicial or legislative development.\(^ {184}\)

More recently there has been greater judicial engagement with art 31(3)(c), suggesting that the provision ‘has a capacity to become applicable in a greater variety of circumstances than its origins would suggest’.\(^ {185}\) The provision has also been the subject of a thorough analysis by the ILC as part of its wider work on the fragmentation of international law,\(^ {186}\) and more sustained academic engagement, particularly within the context of broader debates surrounding ‘systemic integration’.\(^ {187}\)

In the refugee context, academic attention on art 31(3)(c) has been more limited. The one exception is Foster, who has undertaken a detailed examination of the application of art 31, the provision has also been the subject of a thorough analysis by the ILC as part of its wider work on the fragmentation of international law,\(^ {186}\) and more sustained academic engagement, particularly within the context of broader debates surrounding ‘systemic integration’.\(^ {187}\)

\(^{179}\) Gardiner (2015) supra n 142, 304.

\(^{180}\) McLachlan (2005) supra n 175, 279.

\(^{181}\) Ibid., 280.


\(^{184}\) See generally Sands (1998) supra n 176, who considers (at 102) how art 31(3)(c) might ‘be developed into an operationally useful tool’.


31(3)(c) to a decision-maker’s consideration of the interpretation of the Refugee Convention. In support of a broader argument promoting the alignment of the Convention with developments in economic and social rights, Foster argues that art 31(3)(c) provides the ‘clear[est] justification’ for interpreting the Convention in a manner ‘consistent with international human rights law’. The argument advanced by Foster has clear merit, speaking with particular force when viewed in the context of the broader goals of ‘systemic integration’. Although art 31(3)(c) requires a decision-maker to establish that a rule of international law is relevant to the treaty being interpreted, it is not necessary to explicitly link the rule, for example, with the object and purpose of the treaty. So in the refugee context, while art 31(1) has previously been used to justify recourse to international human rights law in the interpretation of the Convention, art 31(3)(c) might be used to support reliance on a wider province of international law – for example, international humanitarian law.

Article 31(3)(c) forms part of the holistic ‘general rule of interpretation’ – it is neither a ‘discretionary add-on’ nor a supplementary means of interpretation. As French has noted, ‘whatever flexibility and discretion the rules themselves may provide, ignoring them is not part of this.’ The failure of practitioners to raise the provision in legal argument, and the corresponding lack of judicial engagement with art 31(3)(c), is in many ways a symptom of the lack of awareness of the obligatory character of art 31(3)(c). This is not to understate the deficiencies of the provision and, in particular, the limited guidance as to when and how it is to be applied. However, the issue then is ‘not whether the rule found in Article 31(3)(c) exists’, but, rather, how the rule can be operationalised. With this in mind, the discussion that follows considers four specific issues concerning the scope and application of art 31(3)(c). Although some of the discussion is necessarily general, at its core the discussion is grounded in a consideration of the manner in which art 31(3)(c) might be used to promote greater interaction between international refugee law and international law on the rights of the child.

1.4.4.1 ‘Take into Account’
International law provides no general definition of the phrase ‘take into account’. Sands suggests that the phrase reflects a stronger interpretative obligation than ‘take into consideration’ and a weaker obligation than ‘apply’, and that the burden should ‘be on the party opposing the interpretation compatible with the customary rule to explain why it should not be applied’. This approach is broadly consistent with domestic principles of statutory interpretation, which will assume that the legislature has adopted laws consistent with

---

188 Foster (2007) supra n 71, 52.
189 There are, however, other limiting elements, such as the requirement that the rule is ‘applicable between the parties’. See infra text accompanying n 208–19.
190 Which may be relevant, for example, to Convention, art 1F.
191 French (2005) supra n 176, 301. Article 31(3) provides: ‘There shall be taken into account’ (emphasis added).
192 Contra art 32 of the VCLT. French (2005) supra n 176, 301.
193 McLachlan (2005) supra n 175, 281 (emphasis added).
195 Sands (1998) supra n 176, 104. Although Sands’ argument is made in the context of the relationship between the primary treaty and customary international law, it speaks with equal force to other ‘rules of international law’.

---
It is important to underline, however, that the requirement 'to take into account' is an interpretative obligation, rather than a duty to apply the relevant rule of international law. As Orakhelashvili observes, 'the purpose of interpreting by reference to "relevant rules" is, normally, not to defer the provisions being interpreted to the scope and effect of those "relevant rules", but to clarify the content of the former by referring to the later'. In other words, art 31(3)(c) codifies an interpretative obligation, rather than a duty to achieve a particular result.

1.4.4 2 'Rules of International Law'
The second issue can be dealt with briefly, in part because of the limited remit of the argument advanced in this chapter. The key question here is whether an international treaty is a 'rule of international law' for the purposes of art 31(3)(c). A logical reference point is art 38(1) of the Statute of the International Court of Justice, which serves as a catalogue of the sources of international law: international treaties, international custom, general principles of law and, as subsidiary sources, judicial decisions and academic commentary. This interpretation is consistent with the approach adopted by the ILC. That art 31(3)(c) is sufficiently broad to capture international treaties has also been confirmed by the WTO Panel in the Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products decision.

1.4.4 3 'Relevant' Rules of International Law
The third parameter requires that a rule of international law be relevant to the treaty being interpreted. This instruction has two dimensions. The first relates to the question of intertemporal law – in the context of the Convention, are decision-makers restricted to a consideration of international rules in existence at the time of the conclusion of the Convention or able to look to those in force at the moment the interpretative exercise is taking place? The answer depends on the nature of the particular treaty being interpreted and, specifically, whether the treaty in question evinces an intention to allow for an evolutionary approach to interpretation. Adopting this interpretation, art 31(3)(c) may on its face appear more restrictive than the approach laid down by the ICJ in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion).

199 This book articulates a legal basis for recourse to an extrinsic international treaty, and does not consider the extent to which art 31(3)(c) might allow recourse to customary international law and/or 'soft law' in interpreting the Convention.
203 'An international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation': Legal Consequences for States of the Continued
However, as Gardiner has observed, that decision was itself circumscribed by the provisions of the treaty in question and influenced by the fact that the relevant concepts being interpreted ‘were not static, but were by definition evolutionary’. 204 Here we find ourselves in a similar position. The discussion in Section 1.3 provided support for the proposition that the Convention was drafted in a sufficiently ambiguous manner to allow it to evolve to meet the ‘changing circumstances of the present and future world’. 205 Hence, the Convention evinces an intention to allow for an evolutionary interpretation, and in the context of art 31(3)(c) a decision-maker will therefore be required to look beyond the rules in force at the time of the conclusion of the Convention and to take into account subsequent developments in international law. As recognised by Lauterpacht and Bethlehem: 206

the law on human rights which has emerged since the conclusion of the 1951 Convention is an essential part of the framework of the legal system that must, by reference to the ICJ’s observations in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) case, be taken into account for the purposes of interpretation.

The second dimension relates to the content of the relevant ‘rules of international law’. It is clear that not every treaty in force at any moment in time will be relevant to the interpretation of the Convention. As Foster has noted, there is a need for caution in accepting without reservation the relevance of a treaty from one area of international law to the interpretation of a treaty from another area. 207 Here, however, we find a clear parallel between international refugee law and international law on the rights of the child. It seems that one would have little difficulty in establishing that the CRC, OPAC and OPSC are appropriate tools of reference for interpreting provisions of the Convention, particularly where the latter is applied to children seeking international protection.

1.4.4.4 Relevant Rules of International Law ‘Applicable in the Relations Between the Parties’

Article 31(3)(c) is limited to rules of international law that are ‘applicable in the relations between the parties’. In the context of international treaties, the provision raises the following rather intractable problem: is it necessary that all of the parties to the treaty being interpreted are also party to the second treaty being relied upon as a ‘rule of international law’? This of course raises an issue for the Convention given that, if such co-existence were required, no other international treaty would satisfy the requisite threshold. In the context of children seeking international protection, the failure of the United States

---


205 R v SSHD; Ex parte Adan [1999] 3 WLR 1274, 1296.


207 Foster (2007) supra n 71, 57.
to ratify the CRC would limit the capacity of art 31(3)(c) to function as a legal basis for comparative treaty interpretation.

Three dominant approaches to the phrase ‘applicable in the relations between the parties’ have emerged from judicial and academic analysis; however, the ‘correct’ interpretation of the phrase remains unclear.

The first and narrowest approach is that adopted by the WTO Panel in the Panel Reports, European Communities – Measures Affecting the Approval and Marketing of Biotech Products decision, which requires co-extensive membership between the two relevant treaties. As noted above, this interpretation would severely curtail the scope of art 31(3)(c) in the context of multilateral treaties. As the ILC Study Group has recognised, ‘[t]his would have the ironic effect that the more the membership of a multilateral treaty . . . expanded, the more those treaties would be cut off from the rest of international law’. As a matter of practice, this would result in ‘the isolation of multilateral agreements as “islands” permitting no references inter se in their application . . . This would seem contrary to the legislative ethos behind most . . . multilateral treaty-making and, presumably . . . the intent of most treaty-makers.’

A second approach has been to interpret ‘between the parties’ to mean the states that are party to the dispute, thereby ‘permit[ing] reference to another treaty provided that the parties in dispute are also parties to that other treaty’. This approach is consistent with the objectives of art 31(3)(c) to integrate a treaty into the wider system of international law. Although this approach will allow a greater range of treaties to be taken into account, it also creates the possibility of divergent interpretations dependent on which states parties are parties to a dispute. For example, a decision-maker in Australia would, where relevant, be required to take into account the provisions of the CRC when interpreting a definitional element of the Convention, whereas a decision-maker in the United States would not. This in turn creates the possibility of conflicting interpretations, which, as discussed above, is undesirable in an international refugee protection regime.

A third approach is to take into account those rules that ‘can be said to be at least implicitly accepted or tolerated . . . in the sense that [the rule] can reasonably be considered to express the common intentions or understandings of all members as to the meaning of the . . . term concerned’. This approach may provide a sensible compromise between the two more extreme positions. It is reflected, at least in part, in the final, slightly ambiguous guidance offered by the ILC.

Article 31(3)(c) also requires the interpreter to consider other treaty-based rules so as to arrive at a consistent meaning. Such other rules are of particular relevance where parties

---

210 Ibid.
211 Ibid., [472] (emphasis in original).
212 Gardiner (2015) supra n 142, 312.
213 The difficulties are particularly acute in the refugee context: Foster (2007) supra n 71, 56.
214 See supra Section 1.3.
215 J Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’ (2001) 95 American Journal of International Law 535, 576 (emphasis added). See also Pauwelyn (2003) supra n 187. Although not expressed in these terms, this approach is consistent with Hathaway’s reference to the International Bill of Rights as a tool for ascertaining the meaning of ‘being persecuted’ and is also consistent with his later concession that other treaties that have gained the acceptance of a ‘super-majority of parties’ to the Refugee Convention might be instructive for its interpretation: see Hathaway (1998) supra n 117.
to the treaty under interpretation are also parties to the other treaty, where the treaty rule has passed into or expresses customary international law or where they provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.

In the context of the Convention and the CRC it is arguable that the signature of the CRC by the United States may be sufficient to constitute interpretative agreement for the purposes of art 31(3)(c), thereby legitimising recourse to the CRC as a relevant rule of international law when interpreting the terms of the Convention.218

Conclusions

International law has long played an important role in securing special protection for refugee children. As Simmons has argued, international law provides a ‘rights based framework to supplement the protective framework that has a much longer history in many societies’ and a ‘lever to give . . . would-be advocates influence over policies likely to have an important impact on the well-being of those who are not able to organize and speak for themselves’.219 Within the international human rights legal framework, the CRC provides the most comprehensive and exacting set of standards on the treatment of children, including refugee children. Rather than simply asserting a need for greater interaction between international refugee law and international law on the rights of the child, this chapter has attempted to map out the substantive contours of the relationship between the Convention and the CRC and to anchor that relationship in the international rules of treaty interpretation. The chapter outlined three modes of interaction where the CRC might be engaged in the refugee status determination process: the CRC as a procedural guarantee, the CRC as an interpretative aid and the CRC as an independent source of status. These three modes of interaction – together, a child-rights framework for assessing the status of refugee child – provide the foundation for the five chapters that follow.

217 This position finds some support in art 18 of the VCLT, which provides that a state ‘is obliged to refrain from acts which would defeat the object and purpose of a treaty’ when it has signed (but not ratified) that treaty. The United States has also, in official refugee manuals, accepted that aspects of the CRC may be drawn upon in interpreting the Refugee Convention: see, e.g., INS, Guidelines, 2 (‘[b]ecause the United States has signed but not ratified the CRC, its provisions, as noted above, provide guidance only and are not binding on adjudicators. Having signed the CRC, however, the United States is obliged under international treaty law to refrain from acts which would defeat the object and purpose of the Convention’); USCIS Asylum Division, ‘Asylum Officer Basic Training Course: Guidelines for Children’s Asylum Claims’ (21 March 2009) 8–9. The US government has also relied on the provisions of the CRC in cases involving child refugees: see, e.g., United States Attorney, ‘Brief’, filed in Gonzalez v Reno (24 April 2000), discussed in Chapter 2, text accompanying n 101–113. The United States has ratified the OPSC and OPAC.

218 A similar argument might be advanced in respect of the International Bill of Rights. See also Foster (2007) supra n 71, 56–7.