

INTRODUCTION

It is a sad and chilling reality that children today remain the victims of some of the most devastating examples of state-sanctioned and private human rights abuse.¹ Infanticide, involuntary military recruitment, ritual sacrifice, child labour, surgical mutilation, child prostitution, and domestic abuse represent just some of the ways that children are maltreated in contemporary societies.² Millions of children around the world find themselves caught up in armed conflict, not only as civilian bystanders, but as specific targets and, in some instances, active participants.³ Children are also often the first to suffer the less brutal but equally crippling effects of poverty, with more than one billion children deprived of one or more of the services essential to a child's survival and development.⁴ In many of these cases, the child has become a victim purely by reason of her status as a child and the heightened vulnerabilities that flow from her more limited capacity for self-protection.

While the maltreatment of children cannot be regarded as a new phenomenon, children are increasingly attempting to remove themselves from the debilitating environments in which circumstances have placed them. Significant numbers of children are travelling thousands, sometimes tens of thousands of miles – often accompanied by family, sometimes not – in search of protection.⁵ In leaving their home and their country of origin these children are triggering an often-silent appeal for substitute protection of their human rights. Sometimes that appeal is answered. In other cases, children are confronted with fresh

¹ '[A] child means every human being below the age of eighteen years unless, under the law applicable to a child, majority is attained earlier': CRC, art 1.

² See, e.g., UNICEF, *The State of the World's Children* (2015); UNICEF, *Annual Report on Child Protection* (2014); UNICEF, *Hidden in Plain Sight: A Statistical Analysis of Violence against Children* (2014).

³ 'This is a space devoid of the most basic human values; a space in which children are slaughtered, raped and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink': G Machel, *Impact of Armed Conflict on Children*, A/51/306 (1996), [3].

⁴ UNICEF, *The State of the World's Children 2014 in Numbers: Every Child Counts* (2014); UNICEF, *Progress for Children: Beyond Averages, Learning from the MDGs* (2015); UNICEF (2015) *supra* n 2.

⁵ According to UNHCR data, in 2015 children below 18 years constituted 51% of the refugee population, up from 41% in 2009 and the same as in 2014. In 2015, some 98,400 asylum applications were lodged by unaccompanied or separated children in 78 countries, the highest number on record since UNHCR started collecting data in 2006, and almost three times the number of applications in 2014 (34,300); UNHCR, *Global Trends 2015* (2016) 3, 8. In the context of the 2015–16 refugee crisis in Europe, approximately 27% of arrivals into Europe by sea were children (based on arrivals since 1 January 2016): see <http://data.unhcr.org/mediterranean/regional.php> (accessed 21 November 2016).

obstacles in their attempt to navigate domestic administrative and legal processes that fail to take into account their particular needs or vulnerabilities.⁶

Although a child may face difficulties at each stage of the asylum-seeking process, the oversight in protection is particularly striking at the qualification stage – the assessment of whether or not a child qualifies for protection as a refugee under the *Refugee Convention*.⁷ The determination of refugee status lies at the heart of the asylum process, signifying a state's recognition of the legitimacy of an individual's claim to international protection.⁸ But while there is a vast and mature body of literature addressing issues faced by refugee children generally, often with an emphasis on unaccompanied and separated children,⁹ there has been relatively limited engagement with the legal challenges that a child may face in qualifying for international protection.¹⁰ This is beginning to change, with scholarship focused on these

⁶ 'The protection needs of children remain a paramount concern, but have not always been sufficiently prioritised. We are worried that many asylum systems are not 'child friendly', take no account of the special circumstances of child applicants, and legitimate the automatic repatriation of children, without resort to established protections, such as best interests of the child determinations': E Feller, Assistant High Commissioner – Protection, UNHCR, 'Rule of Law 60 Years On' (Statement, 61st Session of the UNHCR ExCom, 6 October 2010) 3. The challenges faced by children in the migration context have been the subject of increased attention in the international arena in recent years. See, e.g., Human Rights Council, *Study of the Office of the United Nations High Commissioner for Human Rights on Challenges and Best Practices in the Implementation of the International Framework for the Protection of the Rights of the Child in the Context of Migration*, A/HRC/15/29 (2010); J Bustamante, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/64/213 (2009), [85], [97]; J Bustamante, *Report of the Special Rapporteur on the Human Rights of Migrants*, A/HRC/11/7 (2009), [57], [123]; UNCRC, '2012 Day of General Discussion: The Rights of All Children in the Context of International Migration' (Background Paper, August 2012); UNCRC, *2012 Discussion Day Report*. At a domestic level see, e.g., Joint Committee on Human Rights, *Human Rights of Unaccompanied Migrant Children and Young People in the UK*, House of Lords Paper No 9, House of Commons Paper No 196, Session 2013–14 (2013).

⁷ Art 1. Although this book is principally concerned with protection under the *Refugee Convention*, Chapter 6 considers the wider independent protection obligations under international human rights law.

⁸ C Harvey, 'Is Humanity Enough? Refugees, Asylum Seekers and the Rights Regime' in S Juss and C Harvey (eds), *Contemporary Issues in Refugee Law* (2013) 68, 69–76. The declaratory nature of refugee status means, however, that status as a refugee under international law is not dependent on a domestic determination of refugee status: see *Handbook*, [28]; *R (ST) v SSHD* [2010] 1 WLR 2858, [31]–[32].

⁹ As to terminology, the phrase 'refugee child' is adopted throughout the book to refer to children who qualify for protection as a refugee pursuant to the *Refugee Convention*. The phrases 'at-risk child' and 'child seeking international protection' are adopted to refer to a child who is seeking protection either as a refugee, or pursuant to a state's broader international human rights obligations. The book adopts UNHCR's definition of 'unaccompanied child' and 'separated child': an 'unaccompanied child' is a child who is separated from both parents and other relatives, and is not being cared for by an adult who is responsible for doing so, by law or custom; a 'separated child' is a child who is separated from both parents, or from a primary caregiver, but not necessarily from other relatives: UNHCR, *UNHCR Guidelines on Determining the Best Interests of the Child* (2008) 8.

¹⁰ There are exceptions, in particular the seminal work of Jacqueline Bhabha and Mary Crock on unaccompanied and separated refugee children: see especially J Bhabha and M Crock, *Seeking Asylum Alone: A Comparative Study* (2007). Michelle Foster has considered the status of child refugees as part of her broader work on refugee claims based on social and economic deprivation (M Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (2007) 206–12, 329–39), and Jane McAdam has considered the relevance of complementary standards to the status of at-risk children as part of her broader work on complementary protection (J McAdam, *Complementary Protection in International Refugee Law* (2007) 173–96). See also C Smyth, *European Asylum Law and the Rights of the Child* (2014); D Anker, N Kelly, J Willshire Carrera and S Ardalan, 'Mejilla-Romero: A New Era for Child Asylum', 12–09 *Immigration Briefings* (September 2012) 1; T Lühr, *Die kinderspezifische Auslegung des völkerrechtlichen Flüchtlingsbegriffs* (2009).

challenges emerging at a rapid rate.¹¹ What remains missing is a comprehensive, comparative review of the procedural and substantive obstacles that a child – whether unaccompanied, separated or accompanied – may encounter in establishing refugee status, and a consideration of the manner in which these challenges might be resolved.

The Child Refugee: Overlooked and Incorrectly Assessed

The *Refugee Convention* is the primary instrument governing refugee status under international law. The core of the refugee definition, contained in art 1A(2), provides that a refugee is a person who has a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’. A person will thus be a refugee, and entitled to the protections afforded under the *Convention*, only if there is a genuine risk of the applicant ‘being persecuted’ that is causally connected to one of the five enumerated forms of civil or political status. The art 1A(2) definition makes no specific reference to or provision for children, although it is clear that the *Convention* applies to all individuals regardless of age.¹² It has been suggested that the absence of any child-specific provision has allowed the *Convention* to be interpreted through an ‘adult-focused lens’,¹³ resulting in the development of an age-insensitive jurisprudence where ‘the adult asylum seeker [is] the norm’.¹⁴

UNHCR – the lead agency responsible for supervising the application of the *Convention* – has recently apprised that the *Convention* definition has ‘traditionally been interpreted in light of adult experiences’ and that, as a result, many refugee claims made by children have been ‘assessed incorrectly or overlooked altogether’.¹⁵ UNHCR’s diagnosis identifies the two core challenges that children face in establishing that they are entitled to refugee status. First, *invisibility*: a failure to consider a child as a refugee in her own right. Second, *incorrect assessment*: in cases where a child’s claim is assessed independently, a failure to interpret the *Convention* in a manner that takes into account the fact that the applicant is in fact a child. Both challenges may have debilitating consequences for a child: most significantly, an incorrect determination of refugee status and the attendant risk that she will be returned to a risk of being persecuted in her country of origin.

Turning first to the challenge of invisibility, a review of state practice indicates that children are often overlooked in domestic asylum processes.¹⁶ This is particularly acute where a child is accompanied, in which case her claim will generally be subsumed within the application of another family member. In the majority of cases, a child’s status is treated as derivative: if a child’s parent or guardian receives refugee status, the child’s status will automatically follow. But the converse is also true: where the family member’s claim is denied, the child will similarly be denied protection. This is problematic where a child faces an independent risk of persecutory harm. A child has a greater chance of having her claim

¹¹ This emerging body of scholarship is drawn upon throughout this book.

¹² Human Rights Council (2010) *supra* n 6, [12] (‘[a]lthough there is no specific mention of child refugees in [the *Refugee Convention*], its provisions . . . apply equally to the situation of children’); UNHCR, *Handbook*, [213] (‘[t]he same definition of a refugee applies to all individuals, regardless of their age’).

¹³ M Crock, *Seeking Asylum Alone: Australia* (2006) 244.

¹⁴ M Crock, ‘Lonely Refugee: Judicial Responses to Separated Children Seeking Refugee Protection in Australia’ (2005) 22(2) *Law in Context* 120, 157.

¹⁵ UNHCR, 2009 *Guidelines*, [1]. ¹⁶ See Chapter 2.

individually assessed where she is unaccompanied or separated, although states have, in a limited range of circumstances, suggested that unaccompanied children lack the capacity to claim refugee status.

But even where a child's claim is individually assessed, she will then be required to navigate a jurisprudence that has, for the most part, failed to engage with the *Convention* from the perspective of a child. Article 1A(2) of the *Convention* comprises a set of discrete definitional requirements, each of which gives rise to a series of distinct doctrinal challenges when applied to children. In what circumstances is it reasonable to require a child to articulate a fear of being persecuted? To what extent must a decision-maker take into account the age of a child in determining whether the 'being persecuted' threshold has been satisfied? Are there child-specific forms of harm that may amount to persecutory harm? In what circumstances can a child secure protection where the agent of persecution is a family member rather than the state? To what extent is an applicant's status as a child relevant to determining whether a child is a member of a 'particular social group'? A distinct set of evidential issues will also be triggered when considering a child's refugee claim, particularly when assessing a child's credibility.

This book considers the extent to which the *Convention* is capable of responding to each of these challenges and the phenomenon of the involuntary movement of children more generally. A number of commentators have suggested that the *Convention* is not up to the task and that the reach of the instrument is curtailed by its historical context, favouring the (largely adult) political dissidents of the Cold War era. This has given rise to calls for an amendment to the refugee definition or the negotiation of a new treaty specifically addressing the movement of child refugees.¹⁷ While it is certainly true that the *Convention* was strategically drafted to respond to a particular political climate,¹⁸ these concerns fail to appreciate the proven resilience and malleability of the *Convention*. Over the past 60 years the *Convention* has established itself as a 'living instrument',¹⁹ capable, through organic evolution and progressive interpretation, of accommodating claims not envisaged, and certainly not expressly addressed, by its drafters. This is evident in the context of refugee claims based on gender²⁰ and sexuality-related persecution,²¹ where we have witnessed the development of a fast-evolving jurisprudence underlining the need to interpret the *Convention* in a gender- and sexuality-sensitive way. Indeed, although more nascent, we

¹⁷ See, e.g., C Gates, 'Working toward a Global Discourse on Children's Rights: The Problem of Unaccompanied Children and the International Response to Their Plight' (1999) 7 *Indiana Journal of Global Legal Studies* 299, 332.

¹⁸ J C Hathaway, 'A Reconsideration of the Underlying Premise of Refugee Law' (1990) 31(1) *Harvard International Law Journal* 129, 148.

¹⁹ *Sepet v SSHD* [2003] 1 WLR 856, [6].

²⁰ See, e.g., D Anker 'Boundaries in the Field of Human Rights: Refugee Law, Gender and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133; C Dauvergne and J Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *The Modern Law Review* 57; A Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010' (2010) 29(2) *Refugee Survey Quarterly* 21.

²¹ See, e.g., J C Hathaway and J Pobjoy, 'Queer Cases Make Bad Law' (2012) 44 *New York University Journal of International Law and Politics* 315; R Goodman, 'The Incorporation of International Human Rights Standards into Sexual Orientation Asylum Claims: Cases of Involuntary "Medical" Intervention' (1995) 105 *Yale Law Journal* 255; J Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13(2) *International Journal of Human Rights* 391.

are beginning to see the development of a similar jurisprudence in cases involving children. As the analysis that follows will demonstrate, although this jurisprudence is recent, and certainly underdeveloped, decision-makers are beginning to pay attention to the manner in which the *Convention* definition might be interpreted where the refugee applicant is a child. The relevance of these developments should not be underestimated, as they reflect a willingness on the part of decision-makers to test the authentic scope of the *Convention* definition in its application to refugee children.

The absence of any express reference to children in the *Convention* definition should be no impediment to a child seeking recognition as a refugee. The *Convention* applies to all refugees, irrespective of age, so there is, in principle, no reason for the child refugee to remain *invisible*. And we have seen that there is scope – evident in case-law concerning gender and sexuality – for the interpretation of the *Convention* definition to evolve to respond to contemporary challenges; so there is, again, at least in principle, no reason for a child's claim to be *incorrectly assessed* from an adult-centred perspective. Against this background, how, then, does one go about dismantling the related challenges of *invisibility* and *incorrect assessment* in the context of child refugee claims? How does one ensure that the *Convention* is interpreted and applied 'with the image of the child front and centre in the mind of the decision-maker'?²²

A Child-Rights Framework

The hypothesis advanced in this book is that progressive developments in the interpretation of the *Refugee Convention*, coupled with a greater understanding of the relationship between international refugee law and international law on the rights of the child, enable the *Convention* to respond in a sophisticated and principled way to refugee claims brought by children.²³ This will require a creative alignment between refugee law and the fast-evolving body of international law on the rights of the child. Although by no means the only solution to the challenges produced by the involuntary movement of children,²⁴ the argument developed in this book focuses on the invocation of authoritative standards of international law as a means of advancing the interests and protection of refugee children.²⁵

²² Crock (2006) *supra* n 13, 170.

²³ Foster advanced a similar hypothesis in her monograph, which considered the capacity of the *Convention* to respond to claims based on the deprivation of economic and social rights – specifically, that contemporary developments in the interpretation of the *Convention*, in conjunction with developments in international human rights law and theory, would 'enable the Convention to respond in a more sophisticated manner to the claims of persons fleeing economic and social deprivation': Foster (2007) *supra* n 10, 20–1.

²⁴ It might be suggested, for example, that rather than a unified solution underscored by international law, one should 'let a thousand flowers bloom'; that a diverse range of legal, institutional and policy-oriented remedies – for example, campaigns to shift public attitudes, enhanced training for decision-makers, ad hoc protection options outside the *Convention* – might be developed in different domestic jurisdictions to ensure that any solution is appropriately tailored to meet a variety of protection needs. Ultimately, in fashioning the 'perfect' solution, there is a clear need for empirical research in the social sciences field, to gain a greater understanding of *why* it is that children are *overlooked* and *incorrectly assessed* in the context of child refugee claims. Such an exercise is beyond the scope of this book.

²⁵ See J C Hathaway, *The Rights of Refugees under International Law* (2005) 6–7, advancing a similar proposition in the context of refugee protection generally. See more generally B A Simmons, *Mobilizing for Human Rights* (2009).

The *Refugee Convention*, drafted in the years immediately following the Second World War, has grown up within, and now constitutes part of, a much broader international human rights regime. Within that regime, the *CRC* provides the most comprehensive articulation of the minimum obligations that a state owes to a child, both generally and within the asylum context.²⁶ The *CRC* is widely recognised as a ‘critical milestone in the legal protection of children’,²⁷ its authority underscored by its near-universal ratification.²⁸ The *CRC* gives children a ‘seat at the international law table’,²⁹ promoting a broader construction of the child as an individual rights-bearer, with distinct needs and distinct problems. This represents a fundamental shift away from the notion of a child as a passive dependent, instead codifying a vision of a child as an independent bearer of a unique, tailored set of human rights. While the *Convention* remains the ‘cornerstone of the international refugee protection regime’,³⁰ the *CRC* provides a critical moral and legal benchmark for the treatment of refugee children; a ‘model of the achievable’.³¹ As Goodwin-Gill has argued, the *CRC* provides an ‘international set of rules, cogently and coherently supporting the work of those who would bring effective protection to refugee children’.³²

In the chapters that follow I explore three contexts – or ‘modes of interaction’ – where the *CRC* might be engaged to assist in determining the status of an at-risk child.³³ First, the *CRC* might be invoked as a *procedural guarantee* to inform the refugee determination process. The *Convention* is silent on the procedures that a state should implement in designing a domestic system of refugee status determination. In contrast, the *CRC* comprises a number of provisions that may inform the determination process, including the principle that a child has a right to express views freely and to be heard in any judicial or administrative proceedings affecting her. Second, the *CRC* might be drawn upon as an *interpretative*

²⁶ The rights contained in the *CRC* apply to *all* children (art 1), without discrimination of *any* kind (art 2).

²⁷ 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, 405.

²⁸ The *CRC* is the most widely ratified human rights treaty in the world. The United States is the only UN member state that has not ratified the *CRC*, although it has signed it. In *R (SG and others) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449, Lord Kerr endorsed UNICEF’s description of the *CRC* as ‘the most complete statement of children’s rights ever produced and . . . the most widely-ratified international human rights Treaty in history’ (at [256]).

²⁹ M Freeman, ‘The Human Rights of Children’ (2010) 63 *Current Legal Problems* 1, 20.

³⁰ UNHCR ExCom, *Conclusions on the Provision of International Protection Including through Complementary Forms of Protection*, No 103 (LVI) (2005) Preamble para 1.

³¹ Goodwin-Gill (1995) *supra* n 27, 410. See also J Tobin, ‘Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children’ (2009) 33 *Melbourne University Law Review* 579, 584 (‘the considerable thought that went into [the *CRC*’s] formulation and its almost universal ratification among states provides a compelling reason to consider the vision of children’s rights that it offers’); UNCRC, ‘2012 Day of General Discussion’ (2012) *supra* n 6, 11 (‘[T]he *CRC* provides both a comprehensive catalogue of civil, political, social, economic and cultural rights, and clear principles regarding their application to all children, regardless of migration status. Thus, as a legally-binding instrument with virtually universal ratification, the *CRC*, as the most relevant international child rights instrument, has the potential to play a key role in the protection of children’s rights in the context of migration’).

³² Goodwin-Gill (1995) *supra* n 27, 416. See J Bhabha and W Young, ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines’ (1999) 11 *International Journal of Refugee Law* 84, 94: ‘The [*CRC*] provides a new child-centred perspective on questions of rights and establishes a near universal set of internationally endorsed and validated standards and aspirations for children’.

³³ See generally J Pobjoy, ‘A Child Rights Framework for Assessing the Status of Refugee Children’ in S Juss and C Harvey (eds), *Contemporary Issues in Refugee Law* (2013) 91.

aid to inform the interpretation of the *Convention* definition. 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 *Convention* have now been re-articulated, re-contextualised and in some cases expanded in a comprehensive suite of international human rights treaties. It is now widely accepted that the *Convention* definition should be interpreted taking into account this broader international human rights framework, including the *CRC*. Third, the *CRC* might give rise to an *independent source of status* outside the international refugee protection regime. It is accepted that the *CRC* comprises a complementary source of protection via the principle of *non-refoulement* implicit in, at the very minimum, arts 6 and 37. There is also an argument that the ‘best interests’ principle, enshrined within art 3 of the *CRC*, may give rise to an independent source of international protection. These three modes of interaction provide an illustration of the potential role that the *CRC*, alongside the *Convention*, might play in facilitating a more child-centred approach to the status determination process. In practical terms, the three modes provide a platform for the development of a child-rights framework for determining the status of an at-risk child.

The proposition that there should be greater interaction between international refugee law and international law on the rights of the child is by no means novel. The argument has for some time been advanced by leading scholars and advocates. UNHCR and the UNCRC have also promoted the relationship between the two regimes. In its 1993 *Policy on Refugee Children*, UNHCR referred to the *CRC* as providing a ‘comprehensive framework for the responsibilities of its States Parties to all children within their borders’.³⁴ In 1994 UNHCR revised its earlier guidelines on refugee children in order to combine ‘the concept of “children’s rights” with UNHCR’s ongoing efforts to protect and assist refugee children’.³⁵ The UNCHR ExCom has also repeatedly underlined the relationship between the *Refugee Convention* and the *CRC* in its formal Conclusions. In its most recent Conclusion on refugee children, the Committee stressed the need for³⁶

[a] rights-based approach, which recognizes children as *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.

Of more recent vintage, in 2009 UNHCR issued the 2009 *Guidelines*, which provide ‘substantive and procedural guidance on carrying out refugee status determination in a child-sensitive manner’³⁷ and emphasise that the substantive and procedural aspects of a child’s application of refugee status should be informed by the *CRC*.³⁸ The UNCRC has also acknowledged the relevance of the *CRC* in the refugee status determination process.

³⁴ UNHCR ExCom, *UNHCR Policy on Refugee Children*, EC/SCP/82 (1993), [17].

³⁵ UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994) 14. The opening remarks to these *Guidelines* (at 13) state: ‘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 1989 Convention on the Rights of the Child. On the other side is the UNHCR branch.’

³⁶ UNHCR ExCom, *Conclusion on Children at Risk*, No 107 (LVIII) (2007), [(b)(x)] (emphasis added).

³⁷ UNHCR, 2009 *Guidelines*, [1]. ³⁸ *Ibid.*, [1].

In its *GC6*, the Committee underlined that states must adopt a '[c]hild-sensitive assessment of protection needs, taking into account persecution of a child-specific nature'.³⁹

The relationship between the *Refugee Convention* and the *CRC* has also been recognised by states at a domestic level, with guidelines in Canada, the United Kingdom, Australia and New Zealand all referring to the relevance of the *CRC* in the refugee determination process. Even the United States – one of the two states *not* to have ratified the *CRC* – has issued guidance acknowledging the significance of obligations contained in the *CRC* in determining the status of a child refugee.⁴⁰

But notwithstanding this clear international and domestic support for greater interaction between the *CRC* and the *Refugee Convention*, decision-makers have been reluctant to engage with the *CRC* and its associated jurisprudence when considering the status of refugee children. A review of more than 2,500 domestic decisions involving children since the adoption of the *CRC* revealed that the treaty was mentioned in less than 5 per cent of decisions.⁴¹ There are certainly exceptions and, as noted above, there are nascent signs of a domestic refugee jurisprudence that does, in fact, engage with the framework provided in the *CRC*. But these cases are few and far between.

There may be a number of explanations for the apparent disinclination to draw on the *CRC*'s legal framework in assessing a child's refugee status. One possibility is the limited guidance on the precise role that the *CRC* might play in the refugee status determination process. Although the international community has strongly promoted greater engagement between the two international legal regimes, there have been limited attempts to outline what this relationship might mean in practical terms. What procedural guarantees does the *CRC* provide in the context of the refugee determination process? How might the obligations enshrined in the *CRC* impact on a decision-maker's interpretation of the *Convention*'s definitional requirements? And in what, if any, circumstances will the *CRC* provide a complementary or independent source of international protection? Each of these questions has, to varying degrees, been addressed in the growing body of scholarship and UNHCR and UNCRC guidance; however, the contours of the relationship between the two regimes are far from fully mapped. Throughout the book, I draw on the existing body of scholarship and institutional guidance, complemented by a comprehensive review of national refugee jurisprudence, to present a more detailed picture and encourage a deepened understanding of the relationship between the two international legal regimes.

Methodology and Research Design

This book represents an attempt to better understand the relationship between international refugee law and international law on the rights of the child, and what that relationship means in the context of determining the status of refugee children. In particular, I seek to

³⁹ UNCRC, *GC6*, 21.

⁴⁰ 'Many of the components of international policy regarding children also derive from the [*CRC*]. Adopted by the United Nations in November 1989, the *CRC* codifies standards for the rights of all children, including those who are refugees. Article 3(1) of the *CRC* provides that the "best interests of the child" should be the primary consideration in decisions involving children. Because 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*': INS, *Guidelines*, 2.

⁴¹ See *infra* text accompanying n 52.

outline the authentic reach of the two international legal regimes and consider how a synthesis of the two regimes might be used to provide a ‘child-rights framework’ for the status determination process. In doing so, I test the capacity of the two regimes – individually and collectively – to respond to the particular needs and vulnerabilities of refugee children. This exercise is firmly anchored in existing international legal obligations; it is not driven by an idealistic aspiration grounded in policy considerations, nor is it a call for the creation of more international law. The book represents an attempt to make better use of, and to more creatively align, the authoritative international legal standards already in place.

Although the analysis is anchored in extant international legal obligation, it draws extensively on domestic refugee case-law in order to illustrate the actual and potential scope of the two legal regimes and, in particular, the authentic scope of the *Refugee Convention* definition. The reason for this is straightforward. In contrast to virtually every other UN human rights treaty, the *Convention* provides for no supervisory body to monitor compliance or to develop authoritative legal standards to guide states in determining the scope the legal obligations contained within it.⁴² Rather, the task of interpreting the *Convention* has fallen almost exclusively on the shoulders of the 148 signatories to the *Convention* and/or the *Protocol*. In large part the task has fallen on national administrative agencies, courts and tribunals, particularly those in jurisdictions with the requisite infrastructure to adjudicate disputes concerning the scope of the *Convention*. In these circumstances, a review of domestic jurisprudence is critical to providing an applied understanding of the interpretation of the *Convention*.⁴³ A review of the accumulated thinking of national tribunals and courts is also particularly important in circumstances where decision-makers are increasingly referring to the reasoning adopted by their colleagues in other jurisdictions. Through this ‘transnational judicial conversation’⁴⁴ we are beginning to see the emergence of a truly international refugee law jurisprudence aimed at promoting a common understanding of the *Convention*.⁴⁵

⁴² Article 38 of the *Convention* provides that a dispute between states parties relating to its interpretation or application may be referred to the ICJ; however, this provision has never been invoked.

⁴³ ‘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’: *Fornah v SSHD* [2007] 1 AC 412, [10] (Lord Bingham). See also art 38(1)(d) of the *Statute of the International Court of Justice*, which recognises ‘judicial decisions’ as ‘subsidiary means for the determination of rules of law’.

⁴⁴ A Slaughter, ‘A Typology of Transjudicial Communication’ (1994) 29 *University of Richmond Law Review* 99.

⁴⁵ See J C Hathaway, ‘A Forum for the Transnational Development of Refugee Law: The IARLJ’s Advanced Refugee Law Workshop’ (2003) 15 *International Journal of Refugee Law* 418, 419; E Benvenisti, ‘Reclaiming Democracy: The Strategic Use of Foreign and International Law by National Courts’ (2008) 102(2) *American Journal of International Law* 241, 264–7; M Kirby, ‘Transnational Judicial Dialogue, the Internationalisation of Law and Australian Judges’ (2008) 9 *Melbourne Journal of International Law* 171, 180–1. Superior courts in the United Kingdom have for some time been open to the citation of comparative case-law in the interpretation of the *Convention*: see G S Goodwin-Gill, ‘The Search for the One, True Meaning’ in G S Goodwin-Gill and H Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (2010) 204. The use of comparative material in this context has also received an imprimatur in Australian, Canadian and New Zealand courts: see generally Kirby (2008) *supra*. Even within the United States, there is some consensus – even amongst the staunchest opponents of the use of comparative material in constitutional law cases – supporting reference to foreign case-law in the interpretation of international treaties generally and the *Convention* specifically. Scalia J wrote in dissent in *Olympic Airways v Husain*, 540 US 644, 658 (2004): ‘[The] decision stands out for its failure to give any serious

There are two limitations to the scope of the analysis that follows. First, this is a study on refugee *status* and the procedural and substantive challenges that a child may face in establishing entitlement to that status. There is, in particular, no detailed consideration of refugee *rights* and the interplay between the framework of rights set out in arts 3 to 34 of the *Refugee Convention* and the framework of child-specific rights set out in the *CRC*. It is hoped, however, that the central argument developed in the book – that greater interaction between the two legal regimes has the capacity to enhance the protection afforded to refugee children – will have relevance and application well beyond the issue of qualification for refugee status.

Second, although intended to have a broader reach, this book is principally a study on the status of children arriving in the industrialised world. In circumstances where the global south hosts 86 per cent of the world's refugees,⁴⁶ this is a significant shortcoming. It reflects, however, the reality that recognition of refugee status is generally less of an issue for those arriving in the global south.⁴⁷ In these poorer countries the key challenge for children is their treatment subsequent to the recognition of status, with millions of children languishing in refugee camps or denied access to even the most basic services in urban settings.⁴⁸ Although the *CRC* will certainly be relevant to the plight of these children, these issues are beyond the more limited scope of this book.

Against this background, the first chapter traces the development of international law relating first to refugees and then to children. This largely expository exercise introduces the reader to the key international instruments operating within the respective regimes and illustrates the extent to which the fields of international refugee law and international law on the rights of the child have spoken to or disregarded each other over the past century. In circumstances where neither the *Convention* nor the *CRC* set out the full range of obligations owed by a state to a refugee child, the chapter suggests that there is a convincing argument for reimagining the relationship between the two regimes. The chapter reintroduces the three 'modes of interaction' where the *CRC* might be engaged to assist in assessing the status of an

consideration to how the courts of our treaty partners have resolved the legal issues before us ... The Court's new abstemiousness with regard to foreign law is not without consequence: Within the past year, appellate courts in both England and Australia have rendered decisions squarely at odds with today's holding. Because the Court offers no convincing explanation why these cases should not be followed, I respectfully dissent.' See also *Air France v Saks*, 470 US 392 (1985) (citations omitted): 'we "find the opinions of our sister signatories to be entitled to considerable weight."' In the refugee context, see *N-A-M v Holder*, 587 F 3d 1052, 1061 (10th Cir, 2009): 'We can also benefit from reference to international law, as it reveals how other tribunals have interpreted the exact same text. Although citing foreign law is at times controversial, the broad consensus, even among opponents of its use in constitutional law cases, supports its use when determining how other signatories on a treaty interpret that treaty.'

⁴⁶ UNHCR (2016) *supra* n 5, 2.

⁴⁷ This is a consequence of the fact that the majority of refugees in the developing world are granted status through the practice of *prima facie* refugee status determination (essentially, a grant of status on a group basis): see M Albert, 'Governance and *Prima Facie* Refugee Status Determination: Clarifying the Boundaries of Temporary Protection, Group Determination, and Mass Influx' (2010) 29(1) *Refugee Survey Quarterly* 61. As Hathaway notes, '[f]or reasons born of both pragmatism and principle, poorer countries – which host the overwhelming majority of the world's refugees – have rarely contested the eligibility for those arriving at their borders': Hathaway (2005) *supra* n 25, 3.

⁴⁸ See G Verdirame and J Pobjoy, 'The End of Refugee Camps?' in S Juss (ed), *Ashgate Research Companion on Migration Theory and Policy* (2013) 91; B Harrell-Bond, 'Are Refugee Camps Good for Children?' (Working Paper No 29, New Issues in Refugee Research, UNHCR, August 2000).