

THE CHILD IN INTERNATIONAL REFUGEE LAW

Children are the victims of some of the most devastating examples of state-sanctioned and private human rights abuse. In increasing numbers, they are attempting to find international protection, and are forced to navigate complex administrative and legal processes that fail to take into account their distinct needs and vulnerabilities. The key challenges they face in establishing entitlement to refugee protection are their invisibility and the risk of incorrect assessment. Drawing on an extensive and original analysis of jurisprudence of leading common law jurisdictions, the book undertakes an assessment of the extent to which these challenges may be overcome by greater engagement between international refugee law and international law on the rights of the child. The result is the first comprehensive study on the manner in which these two mutually reinforcing legal regimes can interact to strengthen the protection of refugee children.

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THE CHILD IN INTERNATIONAL REFUGEE LAW

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*For my brother Luke,
and my best friend Mathew*

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PREFACE

Today, more than half of the world's refugees are children. In Europe alone, more than 25 per cent of arrivals by sea during the 2015–16 refugee crisis were children. Some survived the journey; far too many did not. Many of these children will spend the majority, if not all, of their childhood away from their home country. These figures are devastating, particularly given the reality that childhood is a wasting asset – there are no second chances.

I witnessed first-hand the devastating impact of forced displacement while conducting fieldwork in Uganda in 2010. Working with the Refugee Law Project in Kampala, I compiled the stories of 82 unaccompanied refugee children, predominantly from the Democratic Republic of the Congo. Many of the children had witnessed the murder of parents and siblings; many of the girls had been raped repeatedly; several were pregnant as a result of sexual abuse. All faced countless obstacles in their search for a better life. Although the stories of these children do not feature in the pages that follow, they have provided the drive and inspiration both for this book and for my broader work on issues confronting refugee children.

This book explores the relationship between international refugee law and international law on the rights of the child. It is fitting, then, to begin with the three individuals who introduced me to these areas of law: Michelle Foster, Jim Hathaway and John Tobin. I owe a great personal and intellectual debt to each of them. In my formative academic years they provided a constant source of challenge and encouragement. They are both my harshest critics and my greatest source of inspiration. Together they have shaped much of the thinking contained in this book.

This book started its life as a doctoral thesis, completed at the University of Cambridge in 2015. My doctoral supervisor, Guglielmo Verdirame, was an engaged, thoughtful and always patient sounding board for the ideas explored in the book. He has read and commented upon numerous drafts, and challenged me to stand back and approach issues from a fresh angle. My thesis was examined by Colin Harvey and Sarah Nouwen, who, in addition to facilitating a stimulating and enjoyable viva, provided detailed comments, which assisted in preparing the thesis for publication.

The funding for my doctoral research was provided by the W M Tapp Studentship in Law (Gonville and Caius College) and the Poynton Cambridge Australia Scholarship (Cambridge Australia Trust). My doctoral studies would not have been possible without the generous support that these scholarships provided. A special thanks to Pippa Rogerson for her support and guidance during my time at Gonville and Caius, and to Alison Hirst for dealing with my many and varied administrative queries.

More generally, I have received support and encouragement from an extraordinarily giving community of refugee and human rights academics and practitioners. I am particularly grateful to the following for their guidance at various stages of the project: Deborah Anker, Syd Bolton, Jonathan Bonnitcha, Jason Corral, Cathryn Costello, Catherine Dauvergne, Guy Goodwin-Gill, Rodger Haines, Barbara Harrell-Bond, Raza Husain, David Heaton, Catriona Jarvis, Jonathan Ketcheson, Stephen Kosmin, Tillman Löhr, Jane McAdam, Tony North, Katie O'Byrne, Kate Purcell, Cheryl Saunders, Marina Sharpe and Sarah Spencer. James Crawford and Zach Douglas provided generous feedback on my first-year doctoral paper. Special thanks are owed to David Heaton, Alexandra Whelan, Nick Petrie and Kara Connolly, who provided invaluable assistance in proofreading and indexing the manuscript.

One of the greatest challenges in researching this book was the identification and indexing of over 2,500 decisions involving refugee children. I am grateful to Tina Bridge, Catriona Jarvis and Sarah Marsden for their assistance in identifying cases from the Australian Refugee Review Tribunal, the United Kingdom Upper Tribunal and the Immigration and Refugee Board of Canada respectively. I am particularly grateful to the Princess Diana Trust for providing a generous grant to allow for the development of a web resource, which collates, in an indexed and readily searchable format, the case-law and primary material drawn upon throughout this book. The website – [Childref.com](#) – is due to be launched in 2017. I am grateful to Nathan Sampimon and his team at Inspire9 for their work in designing and developing the web resource.

During my doctoral research, I was fortunate enough to spend six months as a Hauser Visiting Doctoral Researcher at New York University School of Law under the supervision of Philip Alston. My time there provided a stimulating environment to develop and deepen my thinking, and I am grateful to Philip, and to Ryan Goodman, Joseph Weiler, Martin Guggenheim and the team at the Center for Human Rights and Global Justice for support and constructive feedback during my time in New York. In addition, I spent three months as a Research Associate at Makerere University, associated with the Refugee Law Project in Kampala. As noted above, this provided me with first-hand insight into the experiences of unaccompanied refugee children, and I am grateful to Chris Dolan for affording me the privilege of working with him and his team. More recently I have been appointed as a Research Associate at the Refugee Studies Centre at the University of Oxford. I am grateful to the RSC for providing me the opportunity to present a number of the ideas developed in this book, and look forward to continuing to work with the team at the Centre.

Since 2012, I have been practising as a barrister at Blackstone Chambers in London. A huge debt of thanks is owed to the team of staff and clerks in Chambers who have both supported this project and allowed me the time to complete it. Special thanks are owed to my colleagues, who have provided invaluable support, guidance and mentorship in my transition to practice: in particular, Shaheed Fatima, Mike Fordham, Kate Gallafent, Raza Husain, Brian Kennelly and Dinah Rose.

It has been a privilege to work with the team at Cambridge University Press on this project, and I am honoured to have been selected as the inaugural publication in the new *Cambridge Asylum and Migration Studies* series, edited by Jim Hathaway. I am grateful to Finola O'Sullivan for her confidence in the project, and to Puviarassy Kalieperumal, David Morris and Rebecca Roberts for their editorial assistance, and Helen Cooper and James Diggins for their copy-editing and indexing support.

P R E F A C E

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My deepest gratitude is owed to my family and friends. My friends in London, Melbourne and New York have provided unconditional friendship and support. My mum, dad, brothers and grandparents have provided a constant source of love, friendship and encouragement. And my best friend and husband Derek, who, although he has yet to read a word of the manuscript (despite a wedding vow that he would do so), has provided support in more ways than I can possibly capture in words.

The book is dedicated to my brother Luke and to my best friend Mathew.

J.M.P.
Temple, London
December 2017

SERIES EDITOR'S PREFACE

It is fitting that we launch the Cambridge Asylum and Migration Studies series with this ground-breaking analysis of the challenges faced by children seeking protection as refugees.

Children are today the majority of the world's refugees. Globally, the number of child refugees has increased from 41% of the refugee population in 2009 to 51% in 2015. The upward trajectory in states with formal asylum procedures is even more stark, with nearly three times as many children making protection claims in 2015 as in 2014.

When these children arrive, they too often encounter a protection apparatus that is oriented to adults. Many refugee children are simply invisible during the asylum procedure – assumed to be no more than an appendage of their parent, with little or no attention paid to their independent needs and rights. And even when their own claims are scrutinized – in particular when children arrive unaccompanied – the standards against which their entitlement to protection is evaluated often fail to take account of their particular vulnerabilities as children.

Jason Pobjoy's important book provides a legally compelling and creative answer to the twin challenges of invisibility and adult-centrism. Drawing on a fusion of progressive understandings of refugee law and relevant international human rights law – in particular, as codified in the Convention on the Rights of the Child – Pobjoy maps out a principled and practical approach to ensuring that children receive the protection they need and deserve.

First, Pobjoy makes the case for a legal imperative to reconceive procedural guarantees to do justice by children. Second, he addresses the three most pressing substantive challenges of navigating the refugee assessment process – showing a “well-founded fear,” demonstrating that the risk rises to the level of “being persecuted,” and linking the risk to a protected form of status. This part is the heart of the book – drawing on an entirely original and painstaking analysis of some 2500 refugee status decisions from leading jurisdictions. Third, Pobjoy argues convincingly that there is a duty to protect children that goes beyond refugee law, born of both the free-standing *non-refoulement* obligation and best interests of the child principle set by the Convention on the Rights of the Child.

Despite the clear logic of reading the Convention on the Rights of the Child and the Refugee Convention together when assessing the protection claims of children, Jason Pobjoy finds that fewer than 5% of the asylum decisions he analyzed did so. This is a shockingly low number. It should serve as a wake-up call to scholars, policymakers, advocates, and adjudicators – all of whom will be much better prepared to protect at-risk children after engaging with Jason Pobjoy's thoughtful and compelling *The Child in International Refugee Law*.

James C. Hathaway
Editor, Cambridge Asylum and Migration Studies

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