



**Interplay between child rights and refugee law: An Analysis from the perspective of
UNCRC**

STUTI AGARWAL

ABSTRACT

Childhood is considered as a period of growth and maturation where intervention is required to ensure protection from harm. The Convention on the Rights of the Child (hereinafter CRC) was adopted by the General Assembly of the United Nations (hereinafter UN) nearly forty years after the adoption of Refugee Convention and the fact that Refugee Convention was adopted at a time when there was no CRC and international child rights were emerging, poses a challenge to children's rights, refugee discourses and indeed, children refugee determination. According to the United Nations High Commissioner for Refugees (hereinafter UNHCR), there are 70.8 million refugees worldwide, out of which 25.9 million refugees are children. It is evident from the current statistics that children are a highly visible group within the refugee law and the refugee disclosure; the increasing number of child refugees seeking asylum and their protection is a matter of grave concern that needs to be addressed. The primary challenge in dealing with child claims for protection is the dominant discourse on child agency, which places the child in a position secondary to that of adults – as objects of law. In other words, children are seen as an object of protection from the third party (parent or another adult) rather than independent beings with a role to play in their own future outcomes. Adult refugees are often considered to have experienced a violation of civil or political rights whereas children are seen as unable to exercise their civil or political rights. This conceptualization of violation of rights needs to be addressed. This paper aims to analyse the scope of interpretation of the definition of a refugee under the Refugee Convention to include children's rights as well. This will be done taking into consideration the working of UNCRC for protection of children against different forms of persecution which shall also be an important part of this research. This paper aims to establish the connection between the Refugee Convention and the UNCRC for the overall protection of children in terms of their application for refugee status and their protection against all forms of persecution.

Keywords: Child, Children's Rights, CRC, Persecution, Refugee Convention



INTRODUCTION

Across the globe, nearly 50 million children have been uprooted and have been forced to flee from the brutal conditions in their country of origin.¹ The devastating conditions in the country of origin inculcate the fear of persecution in children and hence compel them to flee from these conditions. According to the UNHCR, also known as the United Nations Refugee Agency, children may experience or fear to experience persecution on the basis of trafficking, female genital mutilation, forced military recruitment, forced marriage, child pornography, sexual orientation, domestic violence, among other forms of persecution.² The UNHCR declared such forms of persecution as child-specific. However, children may be under the threat to experience persecution for belonging to a particular social group, practising a particular religion or expressing a political opinion which may be critical to that of the State.

The Refugee Convention of 1951 lays down the foundation for the development of international refugee law. Article 1 A (2) which states the details of those who may qualify as refugees does not explicitly mention children, and the provisions also do not include or exclude children from the rights accruing to them.³ However, it is pertinent to note that laws regarding children refugees have evolved since 1951. The guidance of UNHCR, the suggestions of Committee on the Rights of the Child, CRC, the national laws, regional laws and jurisprudence have led to the expansion in the interpretation of the provisions of the Refugee Convention to review on the circumstances of children.⁴

Children in the discussions would mean people under the age of 18 years. Article 1 of the CRC states that *'for the purposes of the present Convention, a child means every human being below the age of 18 years unless the law applicable to the child, the majority is attained earlier.'*⁵

Childhood is considered to be a period of development, where children develop to become productive adults. Children, by their very nature are considered to be vulnerable and require protection as well as assistance to exercise their political, social and economic rights.⁶ The preamble

¹ SAMANTHA ARNOLD, CHILDREN'S RIGHTS AND REFUGEE LAW CONCEPTUALIZING CHILDREN WITHIN THE REFUGEE CONVENTION, New York, NY: Routledge.

² *Id.*

³ Convention Relating to the Status of Refugees art. 1(2) A, July.28, 1951, 189 U.N.T.S. 150.

⁴ SAMANTHA ARNOLD, CHILDREN'S RIGHTS AND REFUGEE LAW CONCEPTUALIZING CHILDREN WITHIN THE REFUGEE CONVENTION, New York, NY: Routledge.

⁵ Convention on the Rights of the Child art. 1, Nov.20, 1989, 1577 U.N.T.S.3.

⁶ *supra* note 4.



of the CRC states that '*child should be fully prepared to live an individual life in the society*'. Every child has the right to survival and development, according to the Article 6 of CRC.⁷

John Locke, in *Some Thoughts Concerning Education*, stated the necessity of good nutrition for children to fully engage in education. He considered education to be the pathway of development to become virtuous adults. He recognised the fact that children have the ability to reason and question from a young age and merely required assistance and guidance to achieve the adult level of reasoning. Hence, children were considered as individual human beings capable of exercising their rights and agency. Locke emphasised on the importance of education and stated that the process of becoming productive adults included health. The Committee on the Rights of Child in the Comment No.5 stated that Right to Health and Right to Education is enshrined in Article 6 of CRC, Right to Survival and Development. It encompasses the holistic development of the child and takes into consideration a child's mental, physical and psychological well-being.⁸

Rousseau, in his philosophy, stated that children are innocent creatures and need protection from the corrupt world. He argued that the youth, innocence and vulnerability required protection. He predominantly focused on the innocence of the children.⁹

The refugee children are considered as minority due to two categorisations: the child in relation to the majority adult group and refugee in relation to the majority of the human race who are not considered as refugees. It is pertinent to note that minority is a group which is discriminated against and is not appropriately identified, and equal rights are not granted to them.

A CONTRAST BETWEEN BEGINNING OF REFUGEE LAW AND MODERN REFUGEE LAW UNDER THE UNITED NATIONS: A CHILD RIGHTS APPROACH

The expansion in international law in respect of human rights and freedom led to the enactment of one single Convention on refugee protection, as developments, both during and after the world wars were leading to not only violation of rights but also mass displacement of people in the context of Cold War¹⁰. Both, human rights and refugee law was developed after massive destruction experienced by people in their home countries and those who were forced to flee from

⁷ Convention on the Rights of the Child 1989 art. 6, Nov.20, 1989, 1577 U.N.T.S.3.

⁸JOHN LOCKE , SOME THOUGHTS CONCERNING EDUCATION, (1981).

⁹ *supra* note 4.

¹⁰ *supra* note 4.



these brutal conditions and were left displaced; protection of children was also at stake, which led to the establishment of United Nations International Children's Emergency Fund (hereinafter UNICEF).

Even prior to World War I and World War II, people suffered massive displacement followed by the fall of vast empires of Europe and Asia. During these periods, the States were negotiated, rendering a large majority of people homeless and State-less; these people could have access to rights in the countries they founded themselves, and they were left with becoming foreigners in their own home. During this time, the states distinguished the rights of their citizens and non-citizens, thus creating a systematic barrier to immigration. The States redefined their borders, and the refugee law began with correspondence of the development of Modern States.¹¹

It is noteworthy to mention that drafters of the Refugee Convention did not include the rights of children into the refugee convention; however, the rights of the children were developing before and after the enactment of the Refugee Convention. In fact, the international child rights movement gained momentum after the World War I, continued till the World War II and beyond. The movement reflected that children were brutally affected by the situations of war and required protection from starvation and violence.¹²

The movement led to the enactment of the Declaration of the Rights of the Child, 1924 under the assistance of International Labour Organization (hereinafter ILO), which was revisited in 1959 and published under the auspices of UN. Unfortunately, none of the documents recognised the children's right to seek refuge but acknowledged that children needed protection from hardships such as conflict and war.

However, there have been examples which clearly show that children have specifically benefitted from international protection from initiatives such as *'Kindertransport'* (Children's transport).¹³ This is amongst the most well-known developments of the refugee law, which happened between the period of 1938 and 1940. This was an initiative taken by the private refugee organisations with the prior approval of the Government which waived the requirement to present visas and passports. The British Government's initiative allowed children to enter Great Britain from Germany on temporary visa basis. Such examples highlighted that children were a matter of concern both,

¹¹ JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW (3rd ed. 1998).

¹² *Id.*

¹³ ANTHONY GRENVILLE, 'THE KINDERTRANSPORT: AN INTRODUCTION', (In *Kindertransport to Britain 1939/39*).



before and after the enactment of World War II, but they were never considered within the ambit of mainstream refugees.

The UNHCR succeeded International Refugee Organization (hereinafter IRO) in the year 1950 after the dissolution of League of Nations. The refugee convention aimed to incorporate lessons learnt from post-World War II.¹⁴

The Refugee convention defined a refugee as:

- a) A person who is outside of his/her own country.
- b) He/she is unable to seek protection in their country of origin.
- c) He/she has a well-founded fear of being persecuted.¹⁵

The Refugee Convention does not explicitly mention children in this regard; the authors of this paper have tried to answer the debatable question whether the Refugee Convention is capable of accommodating children's rights through analysis in the further parts of the paper.

PERSECUTION: A CHILD RIGHTS PERSPECTIVE

The term persecution has not been defined in the Refugee Convention; it has been left to the discretion of the courts to interpret the same. There is no universally accepted definition of the term persecution; however, attempts have been made to formulate the same.

In 1953, Vernant described persecution as '*severe sanctions and measures of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights*'.¹⁶ There was a suggestion in 1953, that, grave violations of human rights could be the barometer for persecution. Hathaway described persecution as '*sustained or systematic violations of a basic human rights demonstrative of failure of state protection*.'¹⁷

In 2012, *the Court of Justice of the European Union Advocate General in Germany v. Y and Z* defined persecution as, denial of the most basic human rights on the basis of race, caste, colour or creed.

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It is important to note that children were not explicitly mentioned in any key literature available on the refugee law; however, interpretations with regard to circumstances of children can be drawn on the same.

¹⁴*supra* note 1

¹⁵ Convention relating to the Status of Refugees 1951 art. 1 A, July.28, 1951, 189 U.N.T.S. 150.

¹⁶ JACQUES VERNANT, THE REFUGEE IN THE POST-WAR WORLD (YUP 1953).

¹⁷ JAMES HATHAWAY, THE LAW OF REFUGEE STATUS (Butterworth's 1991).

¹⁸ UN High Commissioner for Refugees (UNHCR), UNHCR *Mater Glossary of Terms*, June 2006.



Children are considered to be vulnerable and innocent and require protection. Children flee from their country of origin due to the same reasons as that of adults such as war or armed conflict. However, there are some threats of persecution which are children specific such as female genital mutilation, forced military recruitment, domestic violence, child labour, gender-based violence, child prostitution and pornography.

Bhabha and Young categorised child refugee claims into three main forms:

- a) Situations which amount to persecution for both, children and adult asylum seekers.
- b) A Situation where only child-specific persecution takes place and only children are victims of it.
- c) A situation which, when applied, would amount to persecution, only in case of children, and not adults.¹⁹

It is pertinent to take into account that threshold for the severity of harm inflicted on children is much lower than that of adults. Bhabha has noted that children should be considered victims of persecution, although they have suffered less harm. UNHCR has contended that children are more sensitive to harm, when they are inflicted on their relatives or loved ones; even witnessing the act of persecution may make them victims, even if the act was not aimed at them.

PERSECUTION IN UNITED NATIONS HIGH COMMISSIONER FOR REFUGEE GUIDANCE

As noted above, that UNHCR has admitted the fact that persecution experienced by adults may differ from that of children. The situations that may amount to persecution in case of children may not be in the case of adults.

According to the guidelines of UNHCR, persecution, in case of children, would be grave human rights violations which may pose a threat to life or freedom as well as other kinds of harm or situations which are intolerable, assessed in regards to age, feelings, opinion or psychological framework of the applicant. Discrimination may also amount to persecution in some situations and may lead to prejudicial situations. In order to ensure the best interests of the child, these situations must be assessed from a child's perspective.²⁰ The Committee emphasised that in order

¹⁹ JACQUELINE BHABHA & WENDY YOUNG, NOT ADULTS IN MINIATURE: UNACCOMPANIED CHILD ASYLUM SEEKERS AND THE NEW U.S GUIDELINES (1999), 11 (1) International Journal for Refugee Law 104.

²⁰ UNHCR, Guidelines on International Protection No.8: Child Asylum Claims Articles 1 (A) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Dec.22, 2009, HCR/GIP/09/08.



to interpret persecution in the ambit of Refugee convention, the State must note the differences of experiences and manifestations of persecution in case of children. The Committee listed a number of examples like underage recruitment in the army, child pornography, forced labour and other forms of persecution.

In AA (unattended children) Afghanistan, for example, the UK Upper Tribunal granted the status of refugee to a 14-year-old child applicant as he was under the threat of persecution. The Tribunal contended that the child belongs to a particular social group and is associated with its political opinion.²¹

CHILDREN WHO ARE NOT ENTITLED TO BE DESIGNATED AS REFUGEES

Refugee convention does not apply to three categories of persons:

- a) According to Article 1D of the Refugee Convention, that persons who already receive protection under the United Nations Relief and Works Agency for Palestine are excluded from the provisions contained in the Refugee Convention.²²
- b) According to Article 1 E, persons who are eligible to avail protection in another jurisdiction other than that of their country of origin where they are already a resident are excluded from the provisions contained in the Refugee Convention.²³
- c) According to Article 1 F, persons who are believed to have committed a war crime or crime against peace or humanity or have committed a serious non-political crime prior to applying for protection or have found to be guilty of acts committed to contrary to the principles of UN are excluded from the provisions contained in the Refugee Convention.²⁴

The exclusions stated above are applicable in the case of children in particular, where they have attained an age of criminal responsibility and have the mental capacity to understand the consequences of their actions. These exclusions have a link to child's agency and participation rights. The assessment of a child's mental capacity is an important attribute.

²¹ AA (unattended children) Afghanistan CG (2012) UKUT 00016 (IAC).

²² Convention Relating to the Status of Refugees 1951 art. 1 D, July.28, 1951, 189 U.N.T.S. 150.

²³ Convention Relating to the Status of Refugees 1951 art. 1E, July.28, 1951, 189 U.N.T.S. 150.

²⁴ Convention relating to the Status of Refugees art. 1 F, July.28, 1951, 189 U.N.T.S. 150.



AGENTS OF PERSECUTION

The agents of persecution are primarily conceived from that of the States – they are considered to be either agents of State or agents acting on behalf of the State or the State itself²⁵; however, it should be taken into consideration that under The Refugee Convention, the agents of persecution could be individuals with no affiliation from the states.

The child is entitled to prove that he/she has experienced or threatened to have experienced persecution at the hands of the agents of the State or individuals.²⁶ The applicant is also required to prove that he/she tried to seek protection from the Government, unless seeking protection would put the applicant under risk. The applicant must be able to demonstrate that the State was unwilling to intervene on behalf of the persecuted.²⁷

The ability of the child to seek protection may also depend on the parent's ability to intervene on behalf of the child.²⁸ There may be cases where a child's own home may be the locus of persecution. Some of the examples where parents act as perpetrators are domestic violence; in case of poor economic conditions of the family, the child is pushed into forced labour, female genital mutilation.²⁹ In any of such case, the family acts as a barrier for seeking protection. These situations mainly arise in countries, where states refuse to interfere in the matters of the family. The dilemma is central to the debate where child is considered as right-holders.

PROVISION RIGHTS AND REFUGEE LAW

Childhood is often indicated as the period of development and is described as a period where a human being is categorised as an adult in becoming. Children are seen as right holders, but they need assistance from adults to exercise their rights. Provision Rights are considered as those rights which are facilitated to children by adults or State. These rights include health, an adequate standard of living, education, all the other rights as referred to, in the refugee law. Right to family unity is also an important part of the Provision Right. Family is considered to be the protector of children and their rights. It plays a key role in the development of the child; a healthy family environment helps the child to transform into a productive adult in future.

²⁵ Convention relating to the Status of Refugees art. 1 A (2), July.28, 1951, 189 U.N.T.S. 150.

²⁶ JACQUELINE BHABHA, CHILD MIGRATION AND HUMAN RIGHTS IN A GLOBAL AGE, (2014).

²⁷ Convention relating to the Status of Refugees 1951 art. 1A (2), July.28, 1951, 189 U.N.T.S. 150.

²⁸ *supra* note 11.

²⁹ UNHCR, Guidelines on International Protection No.8: Child Asylum Claims Articles 1 (A) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Dec.22, 2009, HCR/GIP/09/08.



These rights are mainly encompassed in Article 6, which provides for the right to development and survival.³⁰ The provision mainly embodies social and economic rights – an area which is less developed with respect to children’s rights.

HEALTH

The UNICEF classified Right to Health as the one which is associated with the Right to Survival and Development, contained in the Article 6 of the CRC. Article 24 of the CRC and Article 12.2 (A) of the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) encompasses the child’s Right to Health in law.

Article 24.1 of the CRC states that every child has the right to highest attainable standard of health and is entitled to receive treatment in case of illness and rehabilitation of health. The Article also states that the states shall strive to ensure that such protection and services are provided to children.³¹

Article 24.2 of the CRC requires the States to take measures to combat infant mortality rate, reduce the spread of diseases and malnutrition and work towards the abolition of traditional practices, prejudicial to health.³²

Article 23 of the CRC provides that children require special care, and the States shall ensure that children with disabilities enjoy a decent lifestyle and live in conditions, which ensure dignity.³³

Article 25 of the CRC states that all children are entitled to have the highest attainable standard of health; however, this right mainly highlights that special care should be given to mother and child.³⁴

Right to Health is applied in the Refugee Law, as in many cases, the child is discriminated against, in availing health services. Such instances arise when children are prohibited from accessing medical treatment on the basis of race, caste, religion, creed or colour; the child may also be subjected to female genital mutilation.

An example of child-specific persecution, as identified by the Guidelines of the UNHRC, is female genital mutilation. Such a practice, which is prejudicial to the health of the child, hinders the highest attainable standard of living.³⁵

³⁰ Convention on the Rights of the Child 1989 art. 6, Nov.20, 1989, 1577 U.N.T.S.3.

³¹ Convention on the Rights of the Child 1989 art. 24.1, Nov.20, 1989, 1577 U.N.T.S.3.

³² Convention on the Rights of the Child 1989 art. 24.2, Nov.20, 1989, 1577 U.N.T.S.3.

³³ Convention on the Rights of the Child 1989 art. 23.1, Nov.20, 1989, 1577 U.N.T.S.3.

³⁴ Convention on the Rights of the Child 1989 art. 25, Nov.20, 1989, 1577 U.N.T.S.3.

³⁵ UNHCR, Guidelines on International Protection No.8: Child Asylum Claims Articles 1 (A) and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, Dec.22, 2009, HCR/GIP/09/08.



In 2011, the Australian Refugee Review Tribunal granted two female applicants from Uganda, the status of Refugees on the well-founded fear that they might experience female genital mutilation if they are returned back. In this case, RRT Case No. 1101038, the Tribunal described the group as 'female members of the Sabinu tribe'. Right to highest attainable health was heavily emphasised in this case, and the Tribunal mentioned that female genital mutilation exposes a woman to severe health hazards like excessive bleeding, birth complications and exposure to illness.³⁶

ADEQUATE STANDARD OF LIVING

An adequate standard of living is a core element to child's holistic development.

Article 26 of the CRC states that the States should take steps to ensure that every child benefits from social security and social insurance.³⁷

Article 27 of the CRC states that children are entitled to an adequate standard of living for their mental, physical, moral, spiritual and social development.³⁸

The CRC has stated that the states should ensure that parents of a child are equipped enough to provide an sufficient standard of living. Hence, the child's standard of living may be relative to that of parents. This right raises a question, not only about the division of responsibilities between States and parents, but also the fact that different standards of living might apply to children depending upon the country in which the child is born and its prevailing economic conditions.

This right is applicable in refugee law as some children may be discriminated against and may not be able to access basic services, or without the grant of protection, would not be able to obtain national identity or social support.

In the case of *Cheung v. Canada*, it was held that if a child is born in contravention of the one-child policy of China, he/she would qualify as a refugee.³⁹ It was held by The Canadian Federal Court of Appeal that, if the minor child, Karen lee was sent back to China, she would experience severe discrimination. The child's human rights would be violated, which would include denial of medical treatment in case of illness, denial of education, educational opportunities and she would also experience deprivation of food. The child was described as '*black market person*' who was denied ordinary rights of Chinese children. The court held that she was a member of the particular social

³⁶ RRT Case No 1101038, Australia: Refugee Review Tribunal.

³⁷ Convention on the Rights of the Child art. 26, Nov.20, 1989, 1577 U.N.T.S.3.

³⁸ Convention on the Rights of the Child art. 27, Nov.20, 1989, 1577 U.N.T.S.3.

³⁹ *Cheung v Canada*, (1993) 2 FC 314, Canada: Federal Court of Appeal.



group, which is the second child group of China, the members of which have already experienced certain deprivation and if she would be sent back, she may be subject to further persecution.⁴⁰

EDUCATION

Education is observed to be the fundamental right of every child. Right to Education is strongly emphasised as this right helps to break the vicious cycles of poverty and unemployment. It is assumed that if a child is educated, the threat of persecution reduces.

Article 26 of the Universal Declaration of Human Rights (hereinafter UDHR) states that 'everyone' has the right to elementary education, and it is the obligation of the State to provide the same. Although it does not explicitly mention children, it is implied that elementary education relates to children.⁴¹

Article 13 of the ICESR states that every child has the Right to Education as education⁴² strengthens human personality and inculcates a sense of responsibility. It helps to strengthen the respect for fundamental freedom and human rights.⁴³

Article 29 of the CRC declares that it is the State's responsibility to ensure that education is aimed at the child's development to the fullest potential.⁴⁴

Article 31 of the CRC emphasises a child's right to play, rest, leisure, recreation, artistic and cultural activities. This right ensures a child's holistic development.⁴⁵

The CRC and the Refugee convention has predominately focused on Right to Education. It establishes that refugee parents should share the responsibility to ensure that children receive primary education, and there should be no discrimination in this regard.

The case of *Brown v. Board of Education*⁴⁶ highlighted the link between development and education. This case highlighted four important aspects:

- a) Denial of the right to education has effects on accessing other rights.
- b) It said that the definition of persecution related to the breach of civil liberties, the breach must be 'systematic and pervasive.'

⁴⁰ *Id.*

⁴¹ Universal Declaration of Human Rights art.26, Dec.8 1948, G.A Res. 217A (III).

⁴²International Covenant on Economic, Social and Cultural Rights art. 13.3, Dec.16, 1966, 993 U.N.T.S.3.

⁴³ International Covenant on Economic, Social and Cultural Rights art. 13.1, Dec.16, 1966, 993 U.N.T.S.3.

⁴⁴ Convention on the Rights of the Child art. 29.1, Nov.20, 1989, 1577 U.N.T.S.3.

⁴⁵ Convention on the Rights of the Child art. 31, Nov.20, 1989, 1577 U.N.T.S.3.

⁴⁶*Brown v Board of Education of Topeka* 347 US 483 (1954).



- c) It emphasised on the Right to Education as embedded in CRC, even though it did not rely on anything more than an 'international agreement.'
- d) It made a direct link with development.⁴⁷

This case is a classic example where the child right's approach could be applicable. Child rights approach would consider the right to education and development as a part of the persecution barometer. Despite its positive contribution, the judgement was overturned when it was referred to the Supreme Court. This showed reluctance to set this as precedent in Ireland. However, this case showed the willingness to engage education with respect to persecution.

PROTECTION RIGHTS AND REFUGEE

Children are considered to be vulnerable and innocent. Hence, they require protection from exploitation. Protection Rights are those rights, which protect the children from harm, abuse or neglect.⁴⁸ These rights aim to affect a child's mental, physical, spiritual, moral and social development. Infringement of Protection Rights hinders the holistic development of a child.

Protection Rights include labour and other forms of exploitation including prostitution, pornography, child trafficking, forced military recruitment and child marriage.

FORCED LABOUR

Children are sometimes forced into labour due to poverty or something that perpetuates the vicious cycle of labour. Majority of child labourers are found in developing countries, where the livelihood of the family might depend upon the income earned by the child.

Labour exploitation leads to the infringement of the basic rights of the child; for example, the child might be denied the Right to Education or the holistic development of the child might be hindered. The concerns of Labour exploitation has led to the intervention of various international conventions such as CRC, ICESCR, International Covenant on Civil and Political Rights (hereinafter ICCPR), ILO.⁴⁹

⁴⁷ *Id.*

⁴⁸ General Comment No 5 (2003): General measures of implementation on the Convention on the Rights of the Child, Nov.27, 2003, CRC/GC/2003/5.

⁴⁹ 18 YOSHIE NOGUCHI, 20 YEARS OF THE CONVENTION ON THE RIGHTS OF THE CHILD AND INTERNATIONAL ACTION AGAINST CHILD LABOUR (2010) 18, THE INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS, (vol.18, ed.4,2010).



Article 8 of the ICCPR prohibits slavery, compulsory labour and servitude. It should be noted that the term children has not been explicitly mentioned.⁵⁰

Article 10 of the ICESCR states that children and young people should be protected from social and economic exploitation; their employment in the work could pose a threat to their life and freedom and shall be punishable by law. The Article emphasised on the holistic development of the child; it also mentioned that the age limit should be fixed by the State, below which, any paid employment of the child shall be punishable by law.⁵¹

Article 32.1 of the CRC states that every child should be protected from economic exploitation and from performing any work which might prove to be hazardous or hinder with the child's Right to Education or be harmful to the child's mental, physical, psychological, spiritual and social development. It mentions that it is the State's responsibility to implement measures to provide a minimum age for employment, regulation for hours of work and conditions for employment.⁵²

The objective of Worst Forms of Child Labour Convention (hereinafter WFCLC) required the ratifying States to eliminate worst forms of child labour for all persons under the age of 18 years which included child trafficking, pornography, prostitution, military conscription, use of children to produce harmful drugs or work which, by nature, is likely to harm safety, health and morals of the children.⁵³

Article 19 of the WFCLC states that the States should take all the legal, administrative, educational and social measures to protect the children from all mental or physical violence, maltreatment, negligence including sexual abuse, while in the care of parents or local guardian or any other person in whose care the child was.⁵⁴

In *Gomez- Guzman v. Holder*, the US Court of Appeal upheld the decision of the Board of Immigration Appeals (hereinafter BIA) in respect of an applicant who sought asylum on the basis that he belonged to a particular social group. The applicant was a fourteen-year-old boy who contended that his stepfather would force him into a work which was hazardous; further, he stated that he had no time to play or leisure time as he was also forced to do household work. The applicant argued that once his stepfather had beaten him so severely that he could not breathe or

⁵⁰ International Covenant on Civil and Political Rights 1966 art. 8, Dec.16, 1966, 999 U.N.T.S. 171.

⁵¹ International Covenant on Economic Social and Cultural Rights art.10, Dec. 16, 1966, 993 U.N.T.S. 3.

⁵² Convention on the Rights of the Child art. 32, Nov.20, 1989, 1577 U.N.T.S.3.

⁵³ International Labour Organization, Worst Forms of Child Labour Convention art. 1, June.17, 1999, C182.

⁵⁴ International Labour Organization, Worst Forms of Child Labour Convention art. 19, June.17, 1999, C182.



go to work the next day. Thus, the child claimed asylum. The court held that the form of persecution was not so severe to warrant asylum.⁵⁵

INVOLVEMENT IN ILLICIT TRADES

Illicit activities such as drug trade are established concerns which involve children to a large extent. Involvement of children in such activities is done by way of recruitment or joining gangs. A large number of children end up joining gangs due to prolonged civil war or social or economic deprivation. The gang leaders coerce the child or entice them by offering them protection or material goods. Persecution in such context might arise when the child refuses to join a gang or decides to leave a gang.⁵⁶

CRC lays down that it is the State's responsibility to ensure that children are protected from being involved in the drug trade and are kept away from the drug culture.

Article 11 of the CRC requires the States to combat illicit transfer of drugs and non-return of children aboard.⁵⁷

Article 33 of the Convention requires the States to implement measures to prevent children from using and producing illicit drugs.⁵⁸

FORCED MILITARY RECRUITMENT

Article 38 of the CRC states that it is the obligation of the State parties to ensure that children are not exploited in times of conflict. Article 38.1 reiterates the obligation in regard to international humanitarian law.⁵⁹

Article 38.2 requires the states to take measures to ensure that children below the age of 15 do not have an active role in times of conflict; this also includes that children should not be recruited under the age of 15 into national armed conflicts.⁶⁰

In the United States, the recruits must be 17 (those under the age of 18 require consent from the guardians)⁶¹. Countries like Israel and South Korea where participation in the military is mandatory

⁵⁵ Gomez – Guzman v. Holder , no 11-3006, 2012 WL 2161636.

⁵⁶ USAID, Central America and Mexico Gang Assessment Report (Bureau for Latin American and Caribbean Affairs Office of Regional Sustainable Development 2006).

⁵⁷ Convention on the Rights of the Child art. 11, Nov.20, 1989, 1577 U.N.T.S.3.

⁵⁸ Convention on the Rights of the Child art. 33, Nov.20, 1989, 1577 U.N.T.S.3.

⁵⁹ Convention on the Rights of the Child art. 38, Nov.20, 1989, 1577 U.N.T.S.3.

⁶⁰ Convention on the Rights of the Child art. 38, Nov.20, 1989, 1577 U.N.T.S.3.

⁶¹SAMANTHA ARNOLD, CHILDREN'S RIGHTS AND REFUGEE LAW CONCEPTUALIZING CHILDREN WITHIN THE REFUGEE CONVENTION, New York, NY: Routledge.



has the minimum age bar of 18 years (Israel reserves the right to call a 17-year-old for service depending on his/her health assessment).⁶²

CHILD MARRIAGE

Child marriage is considered a significant form of persecution. In 1979, The Convention on Elimination of all Forms of Discrimination (hereinafter CEDAW) was adopted which prohibited child marriage.

Article 16.2 of the Convention states that the marriage of a child shall have no legal effect and all necessary actions should be taken to specify the minimum age of marriage and also to make registration of marriage in an official registry, compulsorily.⁶³

However, there was no mention of child in CRC, but the Article 24 states that the States should work towards the abolition of traditional practices which might adversely affect the health of the child. Child marriage could be relevant in this regard.⁶⁴

TORTURE, VIOLENCE AND DEGRADING TREATMENT

Article 37 of the CRC states that children should be protected and not subjected to cruel, inhuman or degrading treatment or punishment; it further states that children should not be prisoned indefinitely for a crime committed under the age of 18 years. Article 37 emphasises on the fact that noting of prison or detention should only be the last resort; the Article also provides that wherever the child is imprisoned, he/she should be treated with dignity and humanity and should have access to legal assistance.⁶⁵

Article 37 contains the provisions that have been reflected within the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) which was adopted by the General Assembly in 1984.⁶⁶

⁶² *Id.*

⁶³ Convention on the Elimination of all Forms of Discrimination against Women art. 16.2, Dec.18, 1979, 1249 U.N.T.S. 13.

⁶⁴ Convention on the Rights of the Child art. 24, Nov.20, 1989, 1577 U.N.T.S.3.

⁶⁵ Convention on the Rights of the Child art. 37, Nov.20, 1989, 1577 U.N.T.S.3.

⁶⁶Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art.37, Dec.10, 1984, 1249 U.N.T.S 13.



Article 5 of the UDHR⁶⁷ and Article 7 of the ICCPR⁶⁸ states that no person shall be subjected to cruel, inhuman or degrading treatment. It is important to note that none of the articles mentions children, and thus, CRC plays an important role in such a context.

Article 38.4 of CRC places an obligation on the States to ensure the protection of the civilian population, including care of children affected during armed conflict.⁶⁹

Torture, inhuman or degrading treatment may be helpful in the interpretation of persecution in the context of mainstream refugee law. However, in the context of children, persecution may arise from domestic abuse, which may amount to torture.

The case of *GH v. Refugee Appeals Tribunals*⁷⁰ dealt with infant child and persecution, based on her status as an Ahmadi in Pakistan. The child witnessed her mother being tortured and harassed. The mother submitted the application stating that the child would be discriminated in school as well as community, based on the social status and could be subjected to torture.

In this case, the child was considered as an object of the law, the Right to Education and Right to Development was emphasised. Another principle that was disused, was the acts, which may not amount to persecution in case of an adult, but may constitute as persecution in case of a child, as children are more vulnerable to harm, violence and torture. Therefore, in order to ensure the best interests of the child, these harms should be analysed from a child's perspective.⁷¹

PARTICIPATION RIGHTS AND REFUGEE LAW

Children are individual entities and are considered to be holders of certain rights, including the right to self-determination. These rights also include, right to seek refuge in some other country; the child refugee in order to seek asylum needs to prove that he/she is under threat to suffer persecution for reasons of race, nationality, sex, colour, creed, membership of a particular social group or political opinion. They also need to prove that they are unwilling to get protection from the State in their country of origin.⁷²

⁶⁷ Universal Declaration of Human Rights art.5, Dec.8 1948, G.A Res. 217A (III).

⁶⁸ International Covenant on Civil and Political Rights 1966 art.7, Dec,16,1966, 999 U.N.T.S. 171.

⁶⁹ Convention on the Rights of the Child art. 38, Nov.20, 1989, 1577 U.N.T.S.3.

⁷⁰ *GH v RAT* (2015) IEHC.

⁷¹ *supra* note 11.

⁷² SAMANTHA ARNOLD, CHILDREN'S RIGHTS AND REFUGEE LAW CONCEPTUALIZING CHILDREN WITHIN THE REFUGEE CONVENTION, New York, NY: Routledge.



Participation rights encompass those rights where children exercise their right to express their views and opinions, and they can be both, civil and political. The most relevant rights in this regard are right to freedom of thought, belief and expression, the right to assemble peacefully, practice any religion and speak any language. These rights are also reiterated by CRC.⁷³

BELIEFS

It is not necessary for a child to actively participate or be an active participant at the risk of persecution, merely being perceived of holding a certain political opinion, belonging to a particular social group, or practising certain religion might amount to the act of persecution. It might be based on the beliefs of child's community, parents, ethnicity or social group.

UNHCR in *Guidelines on International Protection No.6 Religion Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the status of refugees* addressed the possibility that even parents can play an active role in the child's transgressions and beliefs. These guidelines stated that mandated religious education might come in conflict with the child's own belief and beliefs of the parent's.⁷⁴ UNHCR reiterated the fact that parents can make decisions to educate their children according to their own religious beliefs and values. At the same time, it is possible that the parents place their children at the risk of persecution because of their choice of getting the child educated according to their own beliefs which might be in conflict with the beliefs of the State.

It is extremely pertinent to note that the child's right to be free from any kind of religious persecution and the right to the parents to educate the child in respect of their own religious values may come in conflict.⁷⁵

FEMALE GENITAL MUTILATION

Female Genital mutilation is often carried out in the name of religion, belief or culture, although it is not limited to one culture or religion.⁷⁶ In the context of refugee law, advocating or eradicating female genital mutilation may relate to a particular opinion or belief which may be contradicting

⁷³ SARAH JOSEPH & MELISA CASTAN, *THE INTERNATIONAL COVENANT on CIVIL and POLITICAL RIGHTS- CASES, MATERIALS and COMMENTARY*, (3rd ed. 2013).

⁷⁴UNHCR in *Guidelines on International Protection No .6 Religion Based Refugee Claims under Article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, Apr.28, 2004, HCR/GIP/04/06.

⁷⁵ UN High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Apr,2019,HCR/1P/4/ENG/REV.4.

⁷⁶ COMFORT MOMOHED, *FEMALE GENITAL MUTILATION*, (1st ed. 2005).



to the majority belief or opinion which could be considered within the framework of a particular religion, culture or social group.

Female Genital Mutilation relates to all rights that are protection based.

Article 19⁷⁷ of CRC, in particular states about protection from all forms of violence.

POLITICAL OPINION

Children are considered to hold their own political opinions and have the right to express them freely. UNHCR, in their Handbook stated that children might suffer the threat of persecution on the grounds of holding political opinion; the handbook further stated that fear of persecution might arise when the political opinion or views are intolerable or against the beliefs of the authorities that are critical of accepting majority beliefs or opinions.⁷⁸

However, it might also be possible that the views are not expressed, but the strength of the applicant's conviction leads to the opinion becoming known. The Guidelines of the UNHRC recognises the fact that children are capable of holding particular political opinion, independent to that of adults for which they might be under the threat of being persecuted. Children might be considered as subjects of law in the matter of seeking protection, for holding political opinions.

Children might commonly play an active role in national movements⁷⁹ and protects; they might take part by distributing pamphlets, acting in courier services or taking part in demonstration.⁸⁰

For example, in France, some Muslim children protested against the prohibition of veils in schools. Similarly, the young labourers in India and Pakistan protested against the bad working conditions.⁸¹

In the UK, the Upper Tribunal in AA (unattended children) Afghanistan, found that the child applicant who left Afghanistan at the age of 14 years was recognised as a refugee due the fact that the child was under the threat of being persecuted. The child feared persecution by the Taliban for holding a particular political opinion as demonstrated by his actions in the Teacher's Day ceremony.⁸²

⁷⁷ Convention on the Rights of the Child art. 19, Nov.20, 1989, 1577 U.N.T.S.3.

⁷⁸ *supra* note 60.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 11 JACQUELINE BHABHA & WENDY YOUNG, NOT ADULTS IN MINIATURE: UNACCOMPANIED CHILD ASYLUM SEEKERS and the Us GUIDELINES, (1st ed. 1999).

⁸² AA (unattended children) Afghanistan CG (2012) UKUT 16 (IAC).



AN INDIRECT LINK BETWEEN CHILD RIGHTS AND REFUGEE LAW

The invisibility of children in refugee law and human rights law prior to the enactment of CRC establishes a contrast between child's rights and refugee law.

Out of all international treaties and declarations, only UDHR in Article 14 provides for the Right to Seek Asylum from protection in other countries.⁸³

Article 22 of the CRC deals with refugee protection in the following manner:

- a) It provides that states should implement appropriate measures to ensure that a child who is seeking refugee status or is considered as a refugee according to international or domestic law and procedures, irrespective of being accompanied or not, by parents or any other person should be treated with dignity and humanity; the child should receive assistance in accessing all the applicable rights, set forth in the said Convention or other international laws or humanitarian instruments to which the States are parties.
- b) Article 22 states that the member countries should provide for necessary assistance and cooperation in efforts taken by the United Nations and other intergovernmental or non-governmental organisations to trace the parents or other members of the family in order to reunite the child with his or her family. In an event, where the parents or any other persons could not be traced, the refugee child is entitled to the same protection as any other child, permanently or temporarily, deprived of his or her family environment, as is put forward in the Convention.⁸⁴

This Article sets forth, the rights of children pertaining to family, and other protection, social and economic rights of the children, who are seeking refugee status or are recognised as refugees. It can be assumed that, within this right, children have the Right to Seek Asylum, but it is not explicitly provided for. The CRC in this provision, like the Refugee Convention, focuses more on social and economic rights rather than the procedure for qualifying as refugees.

Article 22 states that those rights, which are generally applicable to children are also applicable to the children seeking refugee status or recognised as refugees. It neither provides for the right to seek refuge, nor does it provide that violation of a certain right that might amount to persecution.

⁸³ Universal Declaration of Human Rights art.14, Dec.8 1948, G.A Res. 217A (III).

⁸⁴ Convention on the Rights of the Child art. 22, Nov.20, 1989, 1577 U.N.T.S.3.



CONCLUSION

The rapid development of child rights movement and universally accepted legal norms, associated with childhood, no understanding of children existed in the literature available in refugee law prior to the enactment of CRC, children were in fact invisible in refugee arrangements. However, with the enactment of CRC, refugee law started to engage with the children's rights framework.

It is important to note that the case laws relating to child refugees are very limited in number. There are two established facts that deal with the availability of case law and both relate to the fact that children are vulnerable and are dependent on adults as well as require their assistance to exercise their rights. In the first instance, the child is assumed to be connected to the head of the household's application. Secondly, very few numbers of children are able to make their way into the global north and seek refuge, although they represent a large portion from Europe and North America, this number is continuously rising, but the proportion of separate child applications remains insignificant.

With CRC, the children are given protection and the right to be heard for their different problems and needs. The article has highlighted the importance of CRC. Although children have rights to participate and make informed decisions, it is generally seen that this right is generally exercised by adults on behalf of the children; these rights should not be exercised solely by adults, but children in partnership with adults.⁸⁵

CRC provides an important moral and legal benchmark for the treatment of children requiring international protection.

The relevance of CRC has been clearly stated in this article. Firstly, CRC acts as a strategic and systematic guarantee to incorporate safeguards into the refugee status identification process. Secondly, CRC acts as an aid to the children demanding for refugee status and who are suffering from various persecutions. And finally, the CRC gives rise to independent source of status outside the refugee protection regime which is traditional in nature.⁸⁶

The Refugee Convention is capable of accommodating children's right and should do the same as there are enough jurisprudence and literatures available, regarding the development of child rights.

REFERENCE: [HTTPS://LEXFORTI.COM/LEGAL-NEWS/](https://lexforti.com/legal-news/)

⁸⁵ SAMANTHA ARNOLD, CHILDREN'S RIGHTS AND REFUGEE LAW CONCEPTUALIZING CHILDREN WITHIN THE REFUGEE CONVENTION, New York, NY: Routedge.

⁸⁶ Jason M.Pobjoy, *A child rights framework for assessing the status of refugee children*, 91-138(2013)