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Title: 'To what extent has the Convention on the Rights of the Child acted as a lens for the refocus of refugee protection mechanisms, to affect improved protection measures and adherence to human rights standards for child refugees?'

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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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‘To what extent has the Convention on the Rights of the Child acted as a lens for the refocus of refugee protection mechanisms, to affect improved protection measures and adherence to human rights standards for child refugees?’

Abstract-

A child’s need of ‘special care and assistance’¹ is now recognised, not as a luxury of circumstance, or gift of charity but rather, as a fundamental right of all children. The Convention of the Rights of the Child² has received almost universal ratification at an unprecedented speed.³ However, despite this international show of commitment towards children, tangible reforms reflecting the State parties’ obligations to certain ‘at risk’ groups of children remains lacking.

While the Convention on the Rights of the Child has added impetus to important reforms of certain child related practices within member States, it is submitted that such action has been reliant on an existing or evolved political impetus. In relation to child refugees, however, not only does the political motivation appear to be lacking but increased protection of these children diametrically opposes larger considerations of immigration policy. In so far as this is the case, states are falling short of their legal obligations under both refugee and human rights law. There is a need therefore, to emphasise the legal obligations of the CRC while also pressing for a political evolution in the formation of immigration and refugee policies, whereby ‘the best interests of the child shall be a primary consideration’.⁴

It is the intention of this paper to examine the extent to which the CRC has acted, (and, has the potential to act), as a lens for the refocus of refugee

¹ Preamble of the Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with Article 49.

² Here after also referred to as the ‘CRC’

³ Only the United States of America and Somalia have yet to ratify the Convention on the Rights of the Child.

⁴ Article 3

protection to better include children. To this extent, the paper will discuss the integral relationship between human right and refugee law. It is suggested that the CRC has affected greater recognition of how fundamental human rights, protected within the CRC, have influenced the evolution of State interpretations of the Refugee Convention to enhance protection for children. It is not the aim of the discussion to evaluate different systems of human rights enforcement, but rather to focus on the impact of the CRC as it currently stands; examining whether the Convention has influenced protection for child refugees in specific scenarios.

Central to the position of the paper is the submission that the CRC has the potential to effect an urgent change in the perception of child refugees. It is hoped that a clearer understanding of the rights and needs of these children will provide an impetus for strengthened protection and the fulfilment of legal obligations. The impact of an over-arching ‘refugee identity’ for children is therefore discussed at the outset. One recognised success of the CRC has been the introduction of the child as an ‘active participant in the process of seeking flight’.⁵ As momentum behind the CRC gathers force, it is hoped that there will be a greater emphasis on the need for a child-focused asylum approach and acceptance of the legitimacy of children as refugees. Chapter one progresses with the argument that the CRC has the potential to re-centre operating interpretations of the refugee definition to one which better includes the reality of children.

It is argued throughout this paper that the dangers for child refugees are amplified when child specific policies fail to address their child-specific needs. There follows, in Chapter two, a specific examination of the practical effect of the CRC for children living within refugee camps and in Chapter three, a focus on separated children seeking asylum in destination countries. It is proposed that the CRC has acted as an important lens through which attention can be focused on the specific needs and rights of this highly marginalised group of children. Chapter four focuses in more detail on the immigration detention of separated

⁵ J Bhabha ‘Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers’ [2001] *European Journal of Migration and Law* 3: 283 – 314, at 311

children within destination countries and considers the impact of the CRC's standards on the implementation of this policy.

In conclusion, it is submitted that the CRC has undoubtedly influenced a re-conceptualisation of children's rights. The CRC has become a fundamental advocacy tool for proponents of child refugee rights and where standards have been advanced, forms the lynch pin of progressive frameworks. States and agencies have recognised the need to implement reform of immigration procedures and have gone some way to introduce standards to comply with their CRC obligations. Ensuring further protection for children will require commitment from the international community to prioritise interests of child refugees over political interests and agendas.

To this extent, the Convention on the Rights of the Child offers one lens through which to view the future of child refugee protection. Whether States will choose to live up to their obligations, or will close their eyes to the view remains to be seen.

Introduction.

Children⁶ account for nearly half of the world's refugee population.⁷ Over four and a half million child refugees are currently far from the protection of their homes, many separated from the protection of their families; a significant number under the age of 5 years old.⁸ Both the UNHCR and the Committee on the CRC repeatedly emphasise the importance of clear data on vulnerable groups of children and request collection measures to be taken by member States.⁹ Precise figures remain unavailable and the call for states to compile detailed data related to child refugees has gone unheeded. It is essential that precise figures and statistics related to child refugees are correlated in order to identify specific struggles, link up policies and address emerging trends in their situation.¹⁰ Identifying child specific issues presents an important stage in formulating child specific processes. It may be cynical to suggest that an awareness of such potential, delays states in implementing data collection measures. Unquestionably, states' failure in this regard illustrates the disenfranchisement of child refugees.

⁶ For the purposes of this paper 'a child' shall be taken to mean all persons under the age of eighteen unless otherwise specified.

⁷ UNHCR Statistics (2005) estimate the global population of refugees to amount to nine point two million individuals. This figure does not include the ten million Internally Displaced Persons (IDP's) or the four million Palestinian refugees whom fall within the responsibility of the United Nations Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA). While the issues affecting each of these groups are similar, for the purposes of this paper the term 'Refugee' will include only those persons outside the border of their home country and unless specified, this term will include genuine asylum seekers. '2004 Global Refugee Trends' UNHCR 2005 available at : <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=42b283744> (accessed on 10th April 2006)

⁸ UNHCR figures estimate that children account for 47 per cent of the global refugee population; 13 per cent of these children being below the age of 5 *ibid*.

⁹ 'Accurate statistics on unaccompanied children should be kept and updated periodically. These should be disseminated amongst relevant agencies and authorities in the interest of information-sharing and network-building.' 'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum.' February 1997. (Hereafter referred to as the '1997 Guidelines') at para 5.19; Concluding Observations of the Committee on the CRC in relation to the need for data collection, addressed to Austria, CRC/C/15/Add.251; Botswana, CRC/C/15/Add.242; Croatia, CRC/C/15/Add.243; Panama, CRC/C/15/Add.233

¹⁰ UNHCR Executive Committee (EXCOM) has placed emphasis on the importance of statistics for children as a specific group, and for information in general. From 1994 onwards they have operated a registration programme of refugees under their protection. There is increasingly more reliable data arising from this initiative but it is limited to areas of UNHCR involvement and therefore, mainly related to Africa and Asia. See further, EC/50/SC/CRP.10 High Commissioner's Programme 7 February 2000 Standing Committee, 17th meeting Statistics and Registration: A Progress Report, available at <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=3c99bae14> [accessed 18th March 2006].

From 1989 onwards, as states ratified the CRC, they have had their attention drawn to the issue of children's rights. In addition to the specific refugee protection under Article 22, child refugees are entitled to all rights under the CRC and State parties therefore have a duty to implement these obligations at all stages of the child's flight experience.

The recognition of the link between human rights and refugee protection has therefore become increasingly significant. The International legal system of refugee protection is based primarily on the United Nations Convention on the Status of Refugees 1951¹¹ and the 1967 Protocol Relating to the Status of Refugees.¹² Drafted after the Universal Declaration of Human Rights,¹³ the Refugee Convention specifically references the relevance of human rights within the preamble;

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have **affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination**, Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to **assure refugees the widest possible exercise of these fundamental rights and freedoms**.¹⁴

While recognition of the human rights paradigm in refugee law has taken place from the beginning, the interchange between the bodies of law has become increasingly and integrally linked. The increased use of international human rights law in refugee cases has been observed at the highest national levels.¹⁵

¹¹ Convention relating to the Status of Refugees, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. Entry into force: 22 April 1954, in accordance with article 43. Hereafter referred to interchangeably as the 'Refugee Convention' the 'Geneva Convention' and the '1951 Convention'.

¹² 1967 Protocol Relating to the Status of Refugees, Resolution 2198 (XXI) adopted by the United Nations General Assembly, entered into force 4 October 1967. Hereafter referred to as the '1967 Protocol'.

¹³ Universal Declaration of Human Rights adopted under General Assembly Resolution 217A, UN. GAOR, 3d Sess, Supp. No. 16, U.N. Doc. A/810 (1948) Hereafter referred to as 'UDHR'

¹⁴ Preamble to the Refugee Convention. (Emphasis added.)

¹⁵ D Anker 'Refugee Law, Gender, and the Human Rights Paradigm' [2002] 15 *Harvard Human Rights Journal* 133 at 136.

Anker suggests the ensuing cross reference between countries' jurisprudence has helped to,

‘...create a complex and rich body of “trans-nationalised” international lawThe human rights paradigm has been critical to these developments. Not only are states interpreting key criteria of the refugee definition in light of human rights principles, but international human rights law is providing the unifying theory binding different bodies of national jurisprudence.’¹⁶

In view of the narrow application of the Refugee Convention by its signatory States, international human rights law plays an increasingly important role in strengthening refugee protection.

Since the UDHR, international human rights protection has increased through the ratification of the ‘International Bill of Rights’; the International Covenant on Civil and Political Rights¹⁷ and the International Covenant on Economic, Social and Cultural Rights.¹⁸ These instruments have been further strengthened through core human rights Treaties which emphasise the rights of certain marginalised groups and through Optional Protocols relating to specific areas of concern.¹⁹ The Convention on the Rights of the Child provides such specialised focus on the rights of children, challenging traditional perceptions of ‘children’ and their role in society. Despite its potential for controversy, the CRC remains the most highly ratified human rights instrument.²⁰

The Convention on the Rights of the Child is the first international instrument to expressly reference the child specific aspects of the refugee

¹⁶ Ibid

¹⁷ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. [Hereafter referred to as ICCPR] As of 26th January 2006, 67 States were listed as Signatories and 155 as Parties: <http://www.ohchr.org/english/countries/ratification/4.htm>

¹⁸ Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27. [Hereafter referred to as ICESCR] As of 26th January 2006, 66 States were listed as Signatories and 152 as Parties: <http://www.ohchr.org/english/countries/ratification/3.htm>

¹⁹ A full list of United Nations Human Rights Laws are available at the website of the Office of the United Nations High Commissioner for Human Rights: <http://www.ohchr.org/english/law/index.htm>

²⁰ As of 26th January 2006, 140 States were listed as Signatories and 192 as Parties to the Convention: <http://www.ohchr.org/english/countries/ratification/11.htm>. Note, however, the high level of reservations entered against some controversial provisions of the Convention.

experience. The CRC applies to all children, without discrimination and covers all aspects of the child requirements for safe and fulfilled development. It has therefore been submitted that;

‘The complementary relationship between the two international instruments affords optimal protection for the refugee child; the 1951 Convention seeks to protect the rights of the child as a refugee, whilst the CRC serves to guard the child’s rights as a child.’²¹

However, given the current persisting reality for child refugees, it is difficult to concede that they receive ‘optimal protection’. Rather, the child specific needs of this endangered group of refugees are too often obscured by protectionist immigration policies. Reforms which have sprung from the ratification of the CRC in less controversial areas have not received the same level of acceptance within refugee and asylum processes. From the outset, Reservations and Declaration against the Convention indicated the reluctance of certain states to align their immigration policies to accord with the specific protection of children’s rights as refugees.²²

Yet the ‘fundamental importance’ of the CRC for child refugees has been identified by UNHCR which has expressly recognised the centrality of the CRC to all matters relating to child refugees; encompassing, ‘universal, cardinal principles of child care and protection.’²³ To this extent, the CRC is utilised as

²¹ C Bierwirth ‘The Protection of Refugee and Asylum-Seeking Children, the Convention on the Rights of the Child and the work of the Committee on the Rights of the Child’ 24 *Refugee Survey Quarterly* (2) 98 at 101.

²² Under International Law a reservation against a treaty must be compatible with the object and purpose of a treaty and the principle of *pacta sunt servanda*, enshrined under the Article 26 of the Vienna Convention on the Law of Treaties (Entry into force on 27 January 1980). For an example of a reservation in relation to Article 22 see the reservation of the United Kingdom; ‘(c) The United Kingdom reserves the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time.’ For an example of a Declaration in relation to Article 22 see Germany’s entry, ‘Nothing in the Convention may be interpreted as implying that unlawful entry by an alien into the territory of the Federal Republic of Germany or his unlawful stay there is permitted; nor may any provision be interpreted to mean that it restricts the right of the Federal Republic of Germany to pass laws and regulations concerning the entry of aliens and the conditions of their stay or to make a distinction between nationals and aliens.’ Full text of all Declarations and Reservations available at: <http://www.ohchr.org/english/countries/ratification/11.htm#reservations> [accessed 10th April 2006]

²³ 1997 Guidelines *ibid*, see also the Comment of the 1997 Executive Committee ‘Conclusion on Refugee Children and Adolescents - Recalling the fundamental importance of the Convention on the

the framework for all matters concerning children and forms the basis of important UNHCR guidelines: ‘Refugee Children - Guidelines on Protection and Care’²⁴ and the more recent ‘Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum’.²⁵ While these guidelines are not legally binding on State parties, they are of significant persuasive value in determination decisions, policy making and standard setting and further reflect the working principles of UNHCR.

Heralding the normative value of the CRC as its major success, however, provides little comfort for the children whose rights are violated on a daily basis. Nevertheless, such standards represent an essential advocacy tool and have influenced the development of best practice guidelines within individual States. The CRC has illuminated short comings in state practice and lights the way for future developments and policy,

‘[T]he CRC can be used as a model of the achievable, somewhat in the sense of a checklist: a review of its provisions expands the conception of protection, while encouraging focus on the possibilities for effective implementation in any situation of forced migration.’²⁶

The potential of the CRC to direct a child specific focus on refugee issues is therefore highly important. Furthermore, it is submitted that the CRC has the promise to go much further than the establishment of normative frameworks. The Executive Committee of UNHCR notes the principles of human rights which ought to inform and strengthen children’s refugee protection and the related protection obligation on states and recommendations for fulfilment.²⁷

Rights of the Child (CRC) to the legal framework for the protection of child and adolescent refugees and for promoting their best interests.’ available at: www.unhcr.org [accessed 10th April 2006]

²⁴ Hereafter referred to as ‘1994 Guidelines’

²⁵ Ibid.

²⁶ G Goodwin-Gill ‘Unaccompanied Refugee Minors; The Role and Place of International Law in the Pursuit of Durable Solutions’ [1995] *The International Journal of Children’s Rights* 3: 405 at 411

²⁷ ‘(i) the principle of the best interests of the child and the role of the family as the fundamental group of society concerned with the protection and well-being of children and adolescents; (ii) the fundamental right of children and adolescents to life, liberty, security of person, and freedom from torture and cruel, inhuman or degrading treatment or punishment; (iii) the right of children and adolescents to education, adequate food, and the highest attainable standard of health; (iv) the right of children affected by armed conflict to special protection and treatment, taking into account the particular vulnerability of child refugees to being forcibly exposed to the risks of injury, exploitation, and death in connection with armed conflict; (v) the right of children to protection from harmful traditional practices and from all other forms of exploitation.’ Op cit note 10.

Measures include, preventing the separation of families and implementing family reunification programmes, practical safeguards for the protection of children's physical integrity within refugee camps, addressing sexual exploitation of children, medical care provision, including rehabilitation and ensuring access to an education which preserves the right of the child to freedom of thought, conscience and religion.

As emphasized, however, while the standards of the CRC demand such implementation, measures are not currently adequate to safeguarding the children's rights. It is therefore suggested that the CRC should be utilised as a lens to re-focus of conceptions of children and their capabilities; recognising children's active role and legitimacy within the refugee context. The need for a new perspective on child refugee identity and their rights as children and as refugees is both timely and crucial.

To what extent does the CRC aid a refocus of issues of the identity of child refugees?

An unfortunate dichotomy operates with regard to child refugees whereby, despite facing, 'greater dangers to their safety and well being than the average child',²⁸ child refugees receive lesser protection.

The dearth of specific information relating to child refugees abets the submersion of their identity within the refugee context.²⁹ It is submitted that such disguise has enabled states to continue to treat child refugees in a manner diametrically opposed to accepted values related to the treatment of 'children'.³⁰

²⁸ Ibid 1994 Guidelines

²⁹ 'Trends in Unaccompanied and Separated children Seeking Asylum in Industrialized Countries, 2001 – 2003' July 2004 UNHCR. The report emphasises that, 'Some important asylum countries, including the United States, Canada, Australia, France and Italy...[could not be included in the report because data relating to children was]...not available, incomplete or not comparable enough to be included' at 5

³⁰ The disparity of treatment is emphasized in the fundamental respect of how childhood is defined, while 'A child', as defined by the CRC, means 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier', many states which comply with the age of eighteen years as the legal age of majority apply a lower age to child refugees. Germany, for example, considers unaccompanied and separated children to be under sixteen and Spain excludes seventeen and eighteen year olds from statistics on this group even though regulations state all children up to the age of eighteen should be included. (supra note 29)

Particular focus on children's issues is a recent force and undoubtedly one with a long journey ahead. It may seem weak therefore to argue for child refugees to be seen through a child specific lens, given that children continue to suffer from a legacy of disenfranchisement. Despite the rhetoric of children's rights, children remain excluded from developing policies which affect them, '...child protection is seen as the prerogative of concerned adults, with children viewed as objects of concern and not as protagonists or social actors.'³¹

That children are now recognised as individuals with rights remains an important stage in the process and the CRC continues to serve as a stimulus to refocus policies in order to give prioritised recognition to children's interests. To this extent, the fundamental principles of the CRC; the duty to consider the best interests of the child,³² the right of the child to participate,³³ along with the principle of non-discrimination,³⁴ remain highly relevant at all times.

In recognition of such values, Tolfree warns against framing child refugees within 'the language of vulnerability', perpetuating an identity which focuses on their 'hopelessness and helplessness' and precludes against acknowledging children's potential agency and participation.

Despite such important observance, children continue to require a champion in order to lobby for policy change on a global scale. Mary Robinson has called for those involved in children's advocacy to ensure policies are delivered with, 'a laser like focus on prioritizing the rights of children at every level.'³⁵ It is hoped that the important research of organisations working directly with children, which has recently focused on the importance of child refugees'

³¹ D Tolfree 'Child Protection and Participation in Refugee Emergencies' [2004] 23 *Refugee Survey Quarterly* NO.2 89 at p89.

³² Article 3

³³ Article 12

³⁴ Article 2

³⁵ M Robinson 'Harnessing Energies to Make Children's Rights a Reality' Paper presented at the Hon. Dr. Peter Nygh memorial Lecture at the 4th World Congress on Family Law and Children's Rights [20th March 2005] Cape Town South Africa. Available at: http://www.lawrights.asn.au/html/2005_papers.htm. [accessed 10th April 2006]

participation, will add an important dimension and impetus to such prioritization.³⁶

One example of the increased acceptance of children's legitimacy is reflected in their enhanced position within the sphere of poverty programming. Traditionally the needs of children have been subsumed within those of a wider group, with children left waiting to benefit from a slow flowing 'trickle down effect',

'While poverty has been in the mainstream of economic and social thinking for long, child poverty per se has not attracted much attention until recently, subsumed as it was under the general category of poverty of families, households or communities',³⁷

Such changing emphasis is reflected by the Millennium Development Goals, which represent, 'an unprecedented consensus on the centrality of children as a focus of development, as most of the goals, targets and indicators relate directly to children.'³⁸

Thus, in certain areas, the CRC has begun to act as a lens through which conceptions of children have been refocused. However, within the refugee community children's needs remain too often subsumed within those of dominant members, or excluded through state policy. The manipulation of children's issues in this context can perhaps be illustrated by the use of the terminology 'refugee children' by the UNHCR, perhaps to emphasise the legitimacy of UNHCR control over the group. However, such reference perpetuates the identification of this group as 'sub-children' in status. It is thus imperative that child refugees are included in all advances made relating to protection of 'children' and that their status, as children, is recognised as a priority.

³⁶ See further G Mann and D Tolfree 'Children's Participation in Research: Reflections from the Care and Protection of Separated Children in Emergencies Project' Save the Children International; R Brett 'Girl Soldiers: Denial of Rights and Responsibilities' [2004] 23 *Refugee Survey Quarterly* No. 2.

³⁷ N Ngokwey 'Children's Rights in the Central African Sub-Region' [2004] 12 *International Journal of Children's Rights* 183 at 203

³⁸ Ngokwey *Ibid* at 192

It is submitted that the detrimental effect of such homogenous grouping is evident in the exclusive effect in which the lack of child-specific protection within the Refugee Convention has resulted. While the protection of the Refugee Convention encompasses children, the failure of the provisions to address the child specific experience of refugee flight has had the indirect effect of excluding many children from its protection. Indeed, although the Refugee Convention does not specifically refer to any group, its terminology and focus implicitly centres on traditionally civil and political adult male concepts. The interpretation of the Refugee Convention within such a male sphere has been much criticized with relation to the exclusion of women refugees and likewise, through such interpretations, children are also isolated and their specific (potential) vulnerability overshadowed.³⁹

The slow development within refugee advocacy of a children's movement, compared with feminism, has been suggested as directly relevant to the gradual recognition of child refugee rights,

'It took another decade for an analogous movement challenging the adult-centred nature of asylum adjudication and procedure, and the invisibility of children seeking asylum, to emerge... the concept of the child as an independent agent, as an autonomous rights bearer capable of agency and self expression, was lacking.... The emergence of a conception of children's rights with the 1989 Convention on the Rights of the Child, paved the way for the emergence of a conception of child-specific persecution and of children as political actors in need of asylum in their own right.'⁴⁰

Implementing such rights, however, requires political acceptance and whereas child poverty remains an issue attracting wide sympathy, the same can not be said for child refugees. Thus, in violation of the CRC, child refugees are differentiated as a threat, are held in detention, separated from their families, exposed to risks of trafficking, sexual abuse and violence and denied access to welfare rights, including education and health care so essential to their fulfilled development.

³⁹ This issue is discussed at further length in chapter one.

⁴⁰ J Bhabha 'Demography and Rights: Women, Children and Access to Asylum' Vol. 16 *International Journal of Refugee Law* No.2 227 at 231

Chapter Two: To what extent has the Convention on the Rights of the Child acted as lens to effect the refocus of the refugee definition to better include children?

*‘In refugee discourse ‘protection’ is a term of art’*⁴¹

Under the Refugee Convention, a refugee is defined as any person who;

‘As a result of events *occurring before 1 January 1951*⁴² and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’⁴³

The context in which the Refugee Convention was drafted is reflected in its focus upon civil and political rights. The 1950’s conception of the refugee experience reflects concerns related to the Cold War and international security, with the Refugee Convention providing a means for political defectors to escape persecution from authoritarian states. Such emphasis, it has been suggested, illustrates a concern of State parties not to compromise their Sovereignty over immigration policies and the Convention’s protection is thus limited to politically expedient grounds. Flowing from such concerns, the definition of a ‘refugee’ has been strictly interpreted to focus on the public and political sphere of persecution; a traditionally adult and male paradigm.⁴⁴

Such interpretations inevitably isolate those groups of the refugee population who fall out side such interpretive confines. The Refugee Convention

⁴¹ Goodwin Gill op cit note 26 at 406.

⁴² The 1967 Protocol, Article 1 (2), removed this time bar; ‘For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “... the words”... “as a result of such events”, in article 1 A (2) were omitted.’ When referring to the ‘Refugee Definition’ within this paper it should be taken to mean the 1951 Refugee Convention Definition as amended by the 1967 Protocol.

⁴³ The Refugee Convention Article 1(2)

⁴⁴ What Bhabha refers to as ‘the male paradigm governing international refugee law.’ Supra note 40 at 228.

has received much criticism for failing refugees in the modern day.⁴⁵ States parties of the 1951 Convention apply the Refugee Definition to those who seek asylum within their borders, however, the interpretation of that definition varies between States with an unfortunate lack of universal application.⁴⁶ Following the principle of State Sovereignty, individual State parties insisted on the entitlement to apply their own interpretation of the Definition and have frequently done so with rigid constriction, demonstrating a determined adherence to adult centric concepts which exclude children.⁴⁷

While it is undisputed that the Refugee Definition applies to children *per se*, children face great difficulties placing themselves within the adult constructs upon which state interpretations rely. It has been suggested that the CRC missed the opportunity to expressly include children within the refugee definition. Rather, Article 22 of the CRC applies to a child refugee, ‘who is considered a refugee in accordance with applicable international or domestic law and procedures’,⁴⁸ and so does not directly impact on the interpretation of the refugee definition as implemented by individual states. It has been accepted that in this regard, Article 22 can not overcome one of, ‘the fundamental weaknesses of the general international legal protection of refugees...[the] outdated definition of refugee’.⁴⁹

⁴⁵ The Organization of African Unity, (now the African Union), has expanded the definition of a refugee to more suitably reflect the region’s refugee context. Article 1(2) of the Convention Governing the Specific Aspects of Refugee Problems in Africa extends the refugee definition under the Refugee Convention so that; ‘The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’. Likewise, Latin American States adopted the non-binding Cartagena Declaration on Refugees in 1984 also expanded the scope of the refugee definition to one more relevant to the regional context. Within the third conclusion it is stated; ‘Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’

⁴⁶ For example, the refusal of states to recognise the claims of individuals fleeing from civil conflict has the effect that such asylum seekers are seen as economic migrants and thus ineligible for asylum; their systematic torture, rape and deprivation notwithstanding.

⁴⁷ Germany and France refuse to acknowledge non-state administered persecution as coming within the refugee definition.

⁴⁸ Article 22

⁴⁹ G van Bueren *The International Law on the Rights of the Child* [1995] at 362.

Insistence on including a refugee definition within the CRC certainly offered one method of advancing refugee protection in State parties of the Refugee Convention. However, the reluctance of some State parties to the extension of their obligations to refugees, beyond those within the Refugee Convention, is evidenced in the number of reservations⁵⁰ and declarations⁵¹ made by States relating to this provision. Any expansion of the refugee definition within the CRC was therefore politically unrealistic. The Committee on the CRC have included requests that State parties remove such reservations within their Concluding Comments. It is suggested that the reservations and declarations illustrate the need for political impetus in order to affect state policy reform. For example, while the United Kingdom has stated the intention to heed the Committee's calls for the removal of the Reservation against Article 37 (c) of the CRC, the simultaneous calls related to Article 22 have met deaf ears.⁵²

⁵⁰ The Reservation of the United Kingdom (supra) has been highly criticised by Refugee and Human Rights advocacy organisations. Note the recent finding of the House of Parliament's Joint Committee on Human Rights which concluded the United Kingdom's Reservation against Article 22 'read literally would allow the Government to disapply the CRC rights so far as they relate to people who are subject to immigration control. In our view, that would be incompatible with the object and purposes of the CRC, and so would not constitute a valid reservation.' Seventeenth Report, The Nationality, Immigration and Asylum Bill at para.17 cited in JUSTICE (on behalf of the NGO Human Rights Forum) 'Review of the UK's Reservations to International Human Rights Treaty Obligations' available at: <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/interventions-dec-2002.pdf> [accessed on 10th April 2006]. In response the United Kingdom Government has stated its belief that without the reservation 'the interpretation of the UNCRC might come into conflict with the UK's own domestic legislation on immigration' arguing that '[w]e are satisfied that asylum-seeking children in the UK receive adequate care, protection and support.... We consider that, notwithstanding the reservation, there are sufficient checks and balances in place to ensure that such children receive an adequate level of protection and care while they are in the United Kingdom.' However, agreeing to keep the Reservation 'under review'. Joint Committee on Human Rights Government Responses to Reports from the Committee in the last Parliament, Eighth Report of Session 2005-06 (23 January 2006) Appendix 3 - 'Government Response to the Committee's Seventeenth Report of Session 2004-05, on The Review of International Human Rights Instruments', at Para. 27 - 32. Available at the website of the United Kingdom Parliament: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/104/104.pdf> [accessed 10th April 2006]

⁵¹ As a further example of a declaration, the Netherlands entered the following, 'With regard to article 22 of the Convention, the Government of the Kingdom of the Netherlands declares: a) that it understands the term "refugee" in paragraph 1 of this article as having the same meaning as in article 1 of the Convention relating to the Status of Refugees of 28 July 1951; and b) that it is of the opinion that the obligation imposed under the terms of this article does not prevent - the submission of a request for admission from being made subject to certain conditions, failure to meet such conditions resulting in inadmissibility; - the referral of a request for admission to a third State, in the event that such a State is considered to be primarily responsible for dealing with the request for asylum.' Full text of all declarations and reservations available at:

<http://www.ohchr.org/english/countries/ratification/11.htm#reservations> [accessed 10th April 2006].

⁵² 'Concluding observations: United Kingdom of Great Britain and Northern Ireland', 2002 CRC/C/15/Add.188; '[The Committee] in light of the Vienna Declaration and Programme of Action, recommends that the State party take all necessary measures to end the detention of children in the

Furthermore, in light of the fact that many State parties of the CRC have not also ratified the Refugee Convention⁵³ an insistence on the inclusion of a refugee definition may have resulted in their refusal to ratify the CRC. The current status quo has provided at least a measure of protection for children in states which have yet to accede to the Refugee Convention, with some observing that child refugees are potentially better protected than adult refugees in such cases. The wider ratification of the Refugee Convention remains an issue frequently addressed in the Concluding Comments of the Committee on the CRC, where they call for States not party to the Refugee Convention or the 1967 Protocol to make the necessary ratification.⁵⁴

Where states are party to both Conventions, the impact of the CRC remains significant in strengthening refugee protection, recognising that the '[h]uman rights dimension fills out the sense...by emphasizing the needs of specific groups, such as children who may otherwise be missed'.⁵⁵ Some academics have suggested that the absence of 'age' as a specified ground of persecution within the refugee definition has resulted in the 'marginalisation' of children from the protective scope of the Refugee Convention.⁵⁶ However, in relation to similar arguments calling for the inclusion of 'gender', Anker has rather advocated the use of human rights norms to 'mainstream' the interpretation of the current definition grounds, to better reflect the reality of

same facilities as adults and to withdraw its reservation to article 37 (c). The Committee also recommends that the State party reconsider its reservation to article 22 with a view to withdrawing it. [G]iven the State party's observation that this reservation is formally unnecessary because the State party's law is in accordance with article 22 of the Convention.' While the United Kingdom Government has recently stated 'We are also planning to review in the near future the UK's reservation against Article 37(c) of the UNCRC, on which the Committee has recommended withdrawal.' They do not mention a similar intention with regards to Article 22. Ibid at para 33.

⁵³ As of March 1st 2006 140 States had ratified both the 1951 Convention and the 1967 Protocol, with 146 States ratifying only the 1951 Convention. While the United States of America has ratified the 1967 Protocol, it has not party to either the Convention on the Rights of the Child or the 1951 Convention Relating to the Status of Refugees. <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63> [accessed 10th April 2006]

⁵⁴ For example in relation to Eritrea, under the special protection measures related to 'Children affected by armed conflict, including refugee and displaced children' the Committee recommends 'that the State party:(a) Ratify the 1951 Convention relating to the Status of Refugees and its 1967 Protocol and enact refugee legislation that adheres to international standards, in particular in the area of rights and obligations of asylum-seekers;' CRC/C/15/Add.204 at para 54.. See also Conclusions addressed to Bangladesh CRC/C/15/Add.221 at para. 68.

⁵⁵ Goodwin-Gill op cit note 26 at 406

⁵⁶ J Bhahba , A Edwards and E Feller among others.

women.⁵⁷ It is therefore suggested that in light of the normative framework offered by the wide ratification of the CRC, its provisions are essential in achieving a similar expansion in relation to children.

More specifically, at the administrative level of state practice, there has been an adoption of asylum procedures which, Bhabha argues, reflect the male centred institutional ideology of those administering asylum adjudication, '[who]...exclude women and children because they operate with an age and gender defined lens and the restrictive male centred notion of persecution'.⁵⁸ In turn, the resulting processes, 'take no account of gender or age-based specificities, thus procedural biases further disadvantage women and child applicants.'⁵⁹ It is further argued that the CRC has the potential to refocus such institutional ideologies and administrative processes and call for wider, child inclusive interpretations of the refugee definition.

Despite the significant criticism levelled at the drafting of the refugee definition, it is rather suggested that the exclusive interpretation applied by State parties has proved most limiting on the development of the Refugee Convention as a modern protection mechanism. Goodwin-Gill is one who defends the Refugee Convention's continued utility, emphasising that shortcomings relate to a political reluctance to expand the remits of protection, rather than, 'any real or apparent defect in the 1951 Convention', indeed he suggests that, '...the intrinsic challenge to the central principle of refugee definition...is masked by a debate about the 'appropriateness' of the 1951 Convention as a basis for national, regional and international responses to forced migration.'⁶⁰

Thus, it has so far been the policy of State parties to restrict the flow of refugees.

Refugees are entitled to certain rights under the Refugee Convention. However, the operation of the refugee definition has been used as a barrier to assistance, so as to subjugate refugee status to a process of determination. It is

⁵⁷ Anker op cit note 15 at 139

⁵⁸ Bhabha op cit note 40 at 228

⁵⁹ Bhabha ibid at 229

⁶⁰ G Goodwin- Gill 'Editorial' *Int J Ref Law* Vol.13 No 1 / 2 at 5.

suggested that states have clung to a narrow and exclusive interpretation of the Refugee Convention as a means of limiting the flow of refugees to whom they would otherwise be obligated to assist.

When refugees reach the shores or borders of a state in which they claim refuge, they are categorised as ‘asylum seekers’ and required to proceed through an asylum adjudication process in which their claims are evaluated in line with the Refugee Convention definition, as applied by that particular state. The impact of refugee processing procedures is of enormous importance to the individual refugee. Increasingly, there is greater reason for asylum seekers to seek recognition of their refugee status, essential to avoid restrictions on freedom of movement and family reunification, to gain entitlement to work, access to education and welfare assistance which may be denied to those with temporary protection status.⁶¹ However, states are increasingly granting humanitarian and temporary protection, while simultaneously adopting repressive measures which make recognition procedures both unappealing and difficult; the process of asylum becoming a deterrent in itself.⁶² These arguments are especially pertinent to child refugees whose legitimate claims are often not pursued. Rather, children are frequently given temporary leave to remain which impacts their right to family reunification and carries significant disadvantage for children when they reach eighteen.

Bhabha has conceptualised the position of asylum seekers as ‘a temporary and increasingly disenfranchised category of non-citizen’.⁶³ While similarly noting their disadvantageous status, Hathaway reminds us that refugee recognition is not something which attaches to an individual upon the outcome

⁶¹ The term ‘temporary status’ is used here to cover all those categories of status issued which provide less advantage than ‘refugee status’, such as ‘temporary status’ or ‘humanitarian leave to remain’

⁶² The disparity between refugee recognition rates and the percentage of grants of humanitarian leave to remain, with Finland recognizing 0.8% of applicants as refugees but granting 34.6% humanitarian status. Likewise, in Switzerland 8.7% of applicants were recognized as refugees contrasted to 37.3% granted humanitarian status and Norway recognized 2.7% as refugees with 23.9% granted humanitarian status. See further Mary-Anne Kate ‘The provision of protection to asylum-seekers in destination countries’ Working Paper No. 114 UNHCR Evaluation and Policy Analysis Unit at 4. Available at: <http://www.unhcr.org/cgi-bin/texis/vtx/research/opedoc.pdf?tbl=RESEARCH&id=42846e7f2> [accessed 10th April 2006]

⁶³ J Bhabha ‘Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights’ [2002] *Harvard Human Rights Journal* Vol. 15 at 155.

of adjudication. Rather, the purpose of the Convention definition is to ensure an individual, 'is recognized because he is a refugee.'⁶⁴

'[T]here is no legal magic in the various alternative protection labels assigned by states. Because the recognition is simply declaratory, not a constitutive act, a person is a refugee with entitlement to Convention rights as soon as he or she in fact meets the refugee definition.... A government may not rely on its decision to delay or avoid verification of refugee status in order to circumvent respect for rights which are, as a matter of international law, its duty to uphold.'⁶⁵

In reality, many individuals and children with legitimate refugee claims are denied recognition of refugee status. Whether such denial is through restrictive interpretation of the refugee definition, inaccessible systems of adjudication or grants of lesser status, governments which seek to distort the potential protection provision of the Refugee Convention are failing in their duty under international law.⁶⁶

Disparity of treatment between children asylum seeking, those granted temporary status and recognised child refugees can not be justified under the CRC's principle of non-discrimination.⁶⁷ It is suggested that the CRC potentially provides greater protection for children than that available for adults subject to discriminatory procedures.⁶⁸ It may be possible therefore, to argue that restrictions ensuing from children's status, such as restrictions on family

⁶⁴ 'UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' U.N. Doc. HCR/IP/4/Eng/REV.1 [1992] at para 28. [Hereafter referred to as the UNHCR Handbonk.]

⁶⁵ J Hathaway 'What's in a Label?' [2003] *European Journal of Migration & Law*. 5, No. 1 1at 2.

⁶⁶ For further discussion of the issue surrounding temporary status see further C Sawyer and P Turpin 'Neither Here Nor There: Temporary Admission to the UK' *International Journal of Refugee Law* Vol. 17 No. 4 688-728 and D Luca 'Questioning Temporary Protection' *International Journal of Refugee Law* Vol. 6 535.

⁶⁷ Article 2

⁶⁸ Note, however, Belgium's interpretive declaration in relation to Article 2(1) in relation to 'foreigners' which states, '1. With regard to article 2, paragraph 1, according to the interpretation of the Belgian Government non-discrimination on grounds of national origin does not necessarily imply the obligation for States automatically to guarantee foreigners the same rights as their nationals. This concept should be understood as designed to rule out all arbitrary conduct but not differences in treatment based on objective and reasonable considerations, in accordance with the principles prevailing in democratic societies.'

reunion for children with temporary status, are in violation of CRC obligations.⁶⁹

There are great regional differences in the administration of recognition processes, however, with the vast majority of refugees within Africa, Asia and the CASWANAME region recognised 'en mass'. In contrast, general determination applies to only one per-cent of asylum seekers within America and twenty four percent within Europe.⁷⁰ To this extent, the asylum processes at issue are substantially related to Western destination states. However, the same standards and definition are used by UNHCR when officiating individual asylum applications within host countries. In fact, for the majority of children, their refugee status will be administered by the UNHCR on a group basis. Currently, nearly two thirds of the global refugee population have received such *prima facie* recognition, the other third relying on individual recognition processes.⁷¹ It has been highlighted that UNHCR institutional processes likewise fail child applicants and to this extent, it is suggested that the following debate is timely and of importance to all child refugees.⁷²

For many of the child refugees who overcome the inherent difficulties of flight and reach a country of asylum, their most significant obstacle in securing protection may lie in proving their refugee status. While the refusal of States to recognise vulnerable groups as 'refugees' does not alter their *de facto* refugee status, the detrimental reality remains that many potentially vulnerable groups, such as child refugees, may fall outside the confines of protection mechanisms. Research has highlighted that average recognition rates in destination countries in 2002, was as low as thirteen percent on average, with great disparities

⁶⁹ In the case of restrictions on family reunion there is likely to be further conflict with Articles 9 and 10 of the CRC.

⁷⁰ In Africa 86%, Central Asia, South-West Asia, North Africa and The Middle East [Hereafter referred to as the CASWANAME region] 87% and Asia and Pacific 72% of refugees are categorized by UNHCR as *prima facie* refugees. 2004 Global Refugee Trends *ibid*.

⁷¹ *Supra* note 29 at 5.

⁷² See further the report of M Kagan who notes that a review of rejections issued by the UNHCR regional Office in Cairo over a ten week period in 2002 showed that seventy-seven percent of rejections were attributable to applicant's 'lack of credibility.' The Cairo office processes the largest individual status determination caseload of any UNHCR field office. Recognition rates for refugee status during the period of the study stood at 25%; M Kagan 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' 2002-2003 *17 Geo. Immigration Law Journal* 367 at 369.

operating between states.⁷³

There are divergent scenarios in which children may need to make an asylum application in their own right. While many children will be included in parental applications, it may be the case that the claim of the family in fact rests upon the persecution of their child. Further, it is imperative that where a child has a legitimate claim for asylum, they lodge their claims simultaneously with their parents', to avoid sever rules which prohibit a separate claim after that of the family has been denied, as in Australia. Children who have been separated from their parents or customary care giver and present their own claims, face the greatest disadvantage in the asylum process.⁷⁴ Procedural difficulties notwithstanding, the question of how the CRC has assisted (and could assist) the expansion of the operation of the definition is considered. The child refugee faces several hurdles in proving the applicability of the refugee definition to their individual circumstances. The refugee definition may be broken up into sub-sections each of which must be fulfilled by the individual claiming refugee status.

Well Founded Fear.

A primary hurdle for many children is the task of proving their ability to perceive a 'well founded fear' of persecution. Adult concepts of childhood have traditionally applied a welfare construction which negates children's capacity, in which children are thought to be unable to understand or contribute to matters affecting them. Many children have therefore been denied refugee status on the grounds that they are presumptively deemed incapable of experiencing the necessary 'well founded fear of persecution'.

⁷³ Recognition rates in 2002 were reportedly as low as 0.4% in Greece, 0.8% Finland, 1.3% in the Netherlands and Norway. Canada had the highest recognition rate at 57.8% with the United Kingdom recognising 16.6%. Mary-Anne Kate supra. See further the Bhabha's findings which suggest that in contrast to the higher recognition rates related to women, children asylum seekers were disadvantaged by 'immigration and crime control preoccupations which generate scepticism, even hostility to separated children' op cit note 40 at 238.

⁷⁴ The specific issues relating to separated children within the adjudication process are considered further within chapter three.

Perhaps most damaging to the child's claim therefore, are the cultural perceptions of 'childhood' which prevail with adjudicators, 'child protection is seen as the prerogative of concerned adults, with children viewed as objects of concern and not as protagonists or social actors.'⁷⁵ Tolfree notes the adult roles which many children are required to play within the context of their home cultures. Thus, in some societies, it is usual for children to take responsibility for the running of households and the care of very young siblings, making daily decisions which would be characterised as 'adult' within Western cultures. When such children come before adjudication processes, however, it is a Western construct of childhood that is applied to them and their perceived capacity.

Illustrating such 'underestimation', the UNHCR's own Handbook advises that a presumption of immaturity be applied to all children below the age of sixteen, noting that the fear of those under that age, 'may not have the same significance as in the case of an adult.'⁷⁶ Van Bueren has criticised these Handbook recommendations, noting that they operate against the child's best interests and potentially damage the credibility of the child's claim.⁷⁷ Such criticisms gain great import in light of Kagan's emphasises that the challenge of establishing credibility before an immigration judge forms perhaps the 'single biggest substantive hurdle' for asylum seekers. He argues, '[s]ince applicants can rarely corroborate their claims with specific independent evidence, establishing the facts in refugee cases usually depends on the value of the applicant's testimonies.'⁷⁸

Given the difficulties for children in presenting testimony, it is essential that consideration is made of their age and emotional maturity, in terms of the value and credibility attached.⁷⁹

⁷⁵ Tolfree op cit note 31 at 1

⁷⁶ Supra note 64 at para 215

⁷⁷ van Bueren op cit note 49 at 365

⁷⁸ M Kagan op cit note 72 at 368.

⁷⁹ The 1997 Guidelines emphasis this need, 'in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults. Therefore, in the examination of their claims, it may

The danger for applicants when a high threshold of credibility is applied is evidenced in the in the case of *Re Kasinga*, a decision of the United States Board of Immigration Appeals.⁸⁰ This case concerned the application for asylum of a young woman, who had fled Togo aged seventeen, having been forced into marriage and who feared subjection to female genital mutilation (FGM). At first instance the immigration judges had dismissed her claim, finding that the applicant lacked credibility, ‘based on a perceived lack of “rationality,” “persuasiveness,” and “consistency.”’⁸¹

Overturning the decision, the Appeal Board specifically emphasised the vulnerable position of the applicant and the trauma of her flight. At seventeen her father had died; she had been forcibly separated from her mother, forced into a polygamous marriage ceremony to a significantly older man and expected to be imminently subjected to the painful procedure of FGM. Further, upon fleeing thousands of miles and reaching the USA, she immediately claimed asylum and had subsequently been held in deplorable conditions of immigration detention for over eight continuous months. In these circumstances, the Appeals Board criticised the initial finding, that the failure of the applicant to provide specific information related to minor details of her claim was enough to convince the court that the applicant lacked credibility. Over-ruling this decision the Appeals Board clearly gave the applicant the ‘benefit of the doubt.’

‘Each of those matters was adequately and reasonably explained by the applicant during her testimony and each of them reasonably could have happened to a teenage girl in the applicant’s situation.’⁸²

Commentators further call for awareness that children’s psychological state may impact upon the credibility of their evidence. Some children may try

be necessary to have greater regard to certain objective factors, and to determine, based upon these factors, whether a child may be presumed to have a well-founded fear of persecution.’ at para.8.6. See also the 1994 Guidelines which call for the evidence of children to be given the ‘benefit of the doubt’ at chapter 8.1.(e)

⁸⁰ United States Department of Justice Board of Immigration Appeals Interim Decision 3278 (BIA); 21 I. & N. Dec. 357, 1996 BIA LEXIS 15 In *Re Fauziya Kasinga*, Applicant File A73 476 695-Elizabeth Decided June 13, 1996.

⁸¹ Ibid at para D.

⁸² Ibid at para D.

to be brave and underplay their fears while, for others, the experience of giving evidence may prove too traumatic for them to be able to present a clear picture. To this extent a cultural change in the credibility afforded to children's testimony is demanded by the CRC. Of paramount importance in this regard, the principle of the child's right to participation, now enshrines the obligation on State parties to,

'...assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'⁸³

Within the status determination system the onus lies with the applicant to prove their case. Given this enormous burden for children, it is essential that the obligation under Article 12 is complied with when evaluating evidence. Too often, judgment of evidence attesting to a well-founded fear applies an adult standard which fails to take account of the individual child's development and betrays the children.

The UNHCR guidelines acknowledge such difficulties and recommend that in addition to children's evidence, states must take objective evidence into account, allowing the child the benefit of the doubt where possible.⁸⁴ For this reason an objective assessment of their claim in light of in-country evidence and testimonials from those with knowledge of the situation are of high importance. Increasingly, the persuasive value of UNHCR reports and research from Non-Governmental organisations and human rights groups relating to conditions and human rights abuses in countries of origin are recognised.

Persecution

⁸³ CRC Article 12 (1)

⁸⁴ 'The problem of "proof" is great in every refugee status determination. It is compounded in the case of children. For this reason, the decision on a child's refugee status calls for a liberal application of the principle of the benefit of the doubt. This means that should there be some hesitation regarding the credibility of the child's story, the burden is not on the child to provide proof, but the child should be given the benefit of the doubt.' 1994 Guidelines (*supra*) at Section 8 (e).

Intrinsically linked to the necessity that the fear of persecution be ‘well founded’ is the question of whether the action feared itself amounts to persecution. ‘Persecution’ is not authoritatively defined and while this has led to a disparity of interpretations, there has also been an opportunity for the concept to evolve to include treatment previously considered beyond the remit of international protection, such as rape, domestic violence and child abuse. As noted, the interchange between human rights and refugee law has been highly influential in this area with the concept of persecution including the violation of fundamental rights. Calling for a human rights construction of ‘persecution’ Hathaway has suggested, ‘persecution is most appropriately defined as the sustained or systemic failure of state protection in relation to one of the core entitlements which has been recognised by the international community.’⁸⁵

It is suggested that the provisions of the CRC have acted as an important stimulus in this regard, signifying near universal consensus of the ‘core entitlements’ due to children. Furthermore, the Convention has formed the impetus for important research into key areas of child vulnerability and provides a basis for wider acceptance of the concept of child specific persecution. Today, certain treatment or actions against children are universally recognised as constituting the necessary threshold of a well founded fear of persecution.

Leading the way, the Grac’a Machel study on the effects of armed conflict on children⁸⁶ has been welcomed as an authoritative source of the recognition of child persecution.⁸⁷ The study highlights the changing nature of conflict, which increasingly targets children and considers the damaging effect of conflict on the development of children and their exposure to further dangers. Examples of child specific persecution included in the Machel study refer to, the recruitment of child soldiers⁸⁸ and child focused genocide, trafficking of

⁸⁵ J. Hathaway *The Law of Refugee Status* [1991] at 112.

⁸⁶ ‘Impact of Armed Conflict on Children’ Report of the expert of the Secretary-General, Ms. Grac’a Machel, submitted pursuant to General Assembly resolution 48/157, A/51/306 26 August 1996.

⁸⁷ Executive Committee of the UNHCR Conclusion No 84 *ibid*.

⁸⁸ The International Labour Organization subsequently adopted the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, prohibiting the forced or compulsory recruitment of children for use in armed conflict. C182 Place: Geneva Session of the Conference:87 coming into force: 10:11:2000) Available at:

children and sexual abuse, incest, female genital mutilation, child marriage and child labour.

The 1997 Guidelines further reference the importance of the CRC in this matter, noting,

‘[U]nder the Convention on the Rights of the Child, children are recognized certain specific human rights, and that the manner in which those rights may be violated as well as the nature of such violations may be different from those that may occur in the case of adults. Certain policies and practices constituting gross violations of specific rights of the child may, under certain circumstances, lead to situations that fall within the Scope of the refugee Convention.’⁸⁹

The framework of the CRC is specifically referenced throughout the Machel report and the impact of the study was highly influential in the drafting of the Optional Protocol to the CRC relating to the involvement of children in armed conflict.⁹⁰ It is submitted that the creation of the CRC protocols reflect the growing awareness of child specific issues which may amount to persecution. Thus, the Second Optional Protocol relates to the sale of children, child prostitution and child pornography, an area receiving increased international attention.⁹¹

<http://www.ilo.org/public/english/standards/ipec/ratification/convention/text.htm> [accessed on 10th April 2006]. As of first of April 2006 132 Ratifications were listed.

⁸⁹ 1997 Guidelines at para 8.7

⁹⁰ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002. Available at: <http://www.ohchr.org/english/law/crc-conflict.htm> [accessed 10th April 2006]. As of the 26th January 2006 104 states were Party to the Protocol. UNHCR has implemented a follow up strategy to the Machel Study, adopted by the Executive Committee (Conclusion No. 84 following standing committee report EC/47/SC/CRP.19 of 9 April 1997) and issued as a directive of the High Commissioner in IOM/40/FOM/47/97, ‘The Machel Study on the Impact of Armed Conflict on Children’ 15 July 1997. This strategy emphasizes performance objectives on priority child protection issues such as adolescents, sexual exploitation, education, prevention and monitoring of military recruitment, and separated children. Additional measures include the appointment of the Special Representative for Children and Armed Conflict, as of the 7th February 2006 Radhika Coomaraswamy, an attorney and internationally recognized human rights advocate from Sri Lanka, holds this position; See further ‘Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of UNHCR’s activities’ EPAU/2002/02 UNHCR available at <http://www.unhcr.org/cgi-bin/texis/vtx/research/openssl.pdf?tbl=RESEARCH&id=3cd6363aa> [accessed 10th April 2006]

⁹¹ Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002. Available at: <http://www.ohchr.org/english/law/crc-sale.htm> as of the 26th January 2006 103 states were Party to the Protocol. Additional protection measures come from the appointment of the Special

Children will face the greatest challenge in asserting their claims in light of ‘persecution’ which hinges on less well established grounds, for example within the private sphere. It is submitted that the CRC may potentially influence the evolution of persecution to include the violation of children’s rights which have so far failed to receive universal recognition. Thus Bhabha and Young argue that the CRC may be utilised to extend child specific protection to cases where the fundamental human rights of children are at risk. Citing such examples as ‘separation from family’, ‘deprivation of education’, ‘homelessness’, ‘prostitution’ and the heightened vulnerability of children in the aftermath of civil conflict, they go so far as to suggest that the violation of children’s cultural and socio-economic rights may also equate to persecution.⁹²

The best interests principle is essential in stressing the need to take into account the child’s emotional development and the impact the trauma of their experience has upon them in establishing whether their treatment meets the severity of ‘persecution’. Thus, child advocates argue that actions which may not equate to persecution when directed against adults may suffice to establish such treatment in relation to children.⁹³

The CRC places an obligation on states not only to act in the best interests of the child, but to give meaningful opportunity to the child to be heard according to their evolving capacities and give weight to the testimony of children in establishing fear. It is suggested that the approach of the European Court of Human Rights, so far as it applies a subject test to claims of violations of inhuman and degrading treatment, may be of further influence in the development of this argument. The test for establishing a violation of Article 3 of the European Convention on Human Rights requires the ill-treatment to have attained a minimum level of severity.

Rapporteur on the sale of children, child prostitution and child pornography, currently Mr. Juan Miguel Petit (Uruguay) who was appointed in July 2001.

⁹² ‘[D]epriving a child of social and economic rights such as the opportunity to attend school, access to health care, food, or housing may also constitute violations which rise to the level of persecution.’ J Bhabha and W Young ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines’ *International Journal of Refugee Law* Vol. 11 No.1 84 at 105

⁹³ *Ibid* at 102.

‘The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim’,⁹⁴

A Convention group:

Having cleared the primary hurdles and established a well founded fear of persecution, a further challenge belies children who must demonstrate that such well founded fear was based upon the specific grounds recognised by the Refugee Convention. Thus, the cause of their established fear of persecution must relate to, ‘reasons of race, religion, nationality, membership of a particular social group or political opinion.’⁹⁵

Some child refugees will be able to prove they have been persecuted due to demonstrable reasons of race, religion or nationality, where they are fleeing ethnic cleansing or genocide. In recognition of such cases European States have pledged to operate a broad construction of the terms of ‘race’ and ‘religion’ and children able to establish their claims within such grounds, face a lesser struggle at this stage.⁹⁶ The CRC provides express recognition of the right to freedom of religion,⁹⁷ protection for minority groups within a state,⁹⁸ the right to a nationality⁹⁹ and protects all groups within these grounds under the fundamental principle of non-discrimination.¹⁰⁰

In the absence of age specific grounds, children who can not prove their persecution lies within one of the first three reasons must attempt to bring their claim within the grounds of political opinion or membership of a particular social group. It is in such attempts that children face greatest exclusion.

⁹⁴ *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, Series A no. 247-C, p. 59, § 30 [(1993) A 247-C]

⁹⁵ *Ibid* Article 2.1

⁹⁶ ‘Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term “refugee” in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA).’ Where European States agreed to interpret the grounds of ‘race’ and ‘religion’ in a ‘broad sense’. Such an expansive perspective is not, however, extended to the other Convention grounds.

⁹⁷ Article 14

⁹⁸ Article 30

⁹⁹ Article 7

¹⁰⁰ Article 2

Political opinion

Following from the pervasive belief that children lack capacity, children have faced further difficulties in establishing the credibility of their claims when related to reasons of 'political opinion'. Such barriers are intrinsically linked to a reluctance of the adjudicator to find credible, either a child's ability to form political conscience, or the concept of a political regime bothering to persecute children. Further, any political role played by children is most likely to take place within a private, supportive sphere, traditionally unrecognised as political.

Advances have been made, however, and it is suggested these are intrinsically related to a shift in the perception of children, as refocused by the CRC's emphasis on children's civil and political rights and their evolving capacities. Of significance, children's right to freedom of political conscience is expressly protected under Article 14, which gives credence to the reality that children develop the increasing capacity to hold autonomous political opinion. Other essential and 'traditional' civil and political rights are also protected. Article 13 specifically recognises children's right to freedom of expression, which includes the right to receive and impart information, emphasising children have a role in circulating political information. Children's right to public protest or demonstration is further enshrined within Article 15 which protects the right to freedom of association and freedom of assembly.

There are multiple examples of children playing a legitimate role in political struggles and the persecution of the South African Soweto students during the Apartheid regime remains one powerful instance. The legacy of child activist Iqbal Masih from Pakistan, who having achieved freedom from bonded labour, succeeded in a campaign of liberation for over three thousand other children, illustrates the political capabilities of children; his murder at the age of twelve by carpet factory owners highlighting the reality that children are often regarded as a real threat. In addition, children may be imputed to hold the political opinion of their parents, family or community and face persecution on this proxy basis.

Despite the growing awareness of children's political capacity, in many instances the necessary change in perspective has yet to transfer through to the decision makers on the ground. Research has therefore highlighted numerous cases within American Immigration Board hearings where child applicants have been excluded from asylum, having been told they are 'too young to be persecuted on grounds of political opinion.'¹⁰¹

Social Group.

Potentially, a child's best option will be to claim asylum based on the persecution grounds of 'membership of a social group'. This category has been recently defined by the San Remo Round Table as,

'a group of persons who share a common characteristic other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one which is innate, unchangeable, or which is otherwise fundamental to human dignity.'¹⁰²

Van Bueren has forwarded that Childhood is one such 'social group',

'Childhood is also a distinct legal and social status precisely because children share a number of characteristics which all stem from the perception, that because of their vulnerability, children are entitled to special care and assistance.'¹⁰³

In light of restrictive state policies, however, it is likely that any expansion of social group related to children will be carefully limited. Political constraints will ensure, for the immediate future, that grounds of asylum based solely on the severe deprivation of children are avoided, despite the recognition of such rights within the CRC. Against state's perceived need to protect themselves against a flood of asylum seekers, successfully demonstrating the existence of a new social group will be a great challenge and an evolving process. Thus, where

¹⁰¹ Bhabha and Yong reference to the case of a young Chinese girl told she was too young to hold a political opinion and rather to return to China and apply for a Student visa. *Supra* note 92 at 110.

¹⁰² 'Summary Conclusion: membership of a particular social group' Expert Roundtable organised by the UNHCR and the International Institute of Humanitarian Law San Remo Italy [6-8 September 2001] available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419cbe9e4>

[accessed 1st April 2006]

¹⁰³ *Supra* note 49 at 363.

recognition of children's claims within membership of a social group has succeeded, the group has been narrowly defined.

In the case of *re Kasinga* above, asylum was granted to a young girl fleeing the practise of female genital mutilation on the highly specific social group of,

‘Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term “refugee.”’¹⁰⁴

It is submitted that the concept of a social group will continue to expand with reference to the CRC as the guiding principle. To this extent there has been recognition of the positive duty on states to protect children from domestic abuse and from the dangers of police persecution while living on the streets. Nevertheless, each recognition of a ‘social group’ in these cases has been so narrowly defined as to almost limit the class to an individual. In the case of *Lopez-Cruz Juan Pablo* asylum was granted on the specific grounds of the applicant’s ‘membership in the particular social group of his full siblings,’¹⁰⁵ recognising the extreme physical and psychological abuse inflicted on the child, his brother and sister by their mother. Despite the confines of the social group, the precedent setting value of the judgments is of enormous import.¹⁰⁶

¹⁰⁴ Supra

¹⁰⁵ Unreported case before the USA Executive Office for Immigration Review available at : http://www.nationalimmigrationproject.org/gang_imm/legal_policy/lopez-cruz_ij_asylum_grant.pdf [accessed 10th April 2006]

¹⁰⁶ In the following un-reported American cases, persecution of street children has been recognized on the grounds of a social group; *In re Dennis Reyes-Dias* (EOIR Aug. 2, 2001) Asylum was granted to a Honduran street child who was having suffered extreme domestic violence at the hands of his aunt became a street child, suffering further harassment from the Police; *In re Aurelio Mauricio Lopez* (EOIR. Nov. 28, 2001) Asylum was granted to a street child from Guatemala who feared persecution from the police, military and private security guards in the form of sexual abuse and violence. Cases available at the website of the Centre for Applied Legal Studies : http://www.nationalimmigrationproject.org/gang_imm/legal_policy/lopez-cruz_brief_support_asylum_app.pdf [accessed 10th April 2006]

State Protection.

The final challenge of the definition requires the individual to establish that as a result of the persecution they are, 'unable or, owing to such fear, [are] unwilling to avail himself of the protection of that country.'¹⁰⁷

Some states have interpreted this provision to require that the asylum seeker's State of origin be directly culpable in the persecution. To this extent, the Refugee Convention has been constructed in terms of a system of 'surrogate protection' for the individual, protecting the individual only when the ability of the home state to do so is lacking.¹⁰⁸ There is disparity, however, between the concept of a State's inability to protect and its unwillingness.

A key example of how a narrow interpretation of the Refugee Convention obscures its applicability to modern day scenarios is evident in the continued refusal of many states to acknowledge civil conflict as a legitimate ground of persecution. The inappropriateness of such a position is evident from the fact that in the last decade, intra-state conflict accounted for 85 per cent of all armed conflict.¹⁰⁹ The failure of States to recognize the plight of those fleeing 'civil' persecution, therefore, fundamentally undermines the principle of asylum as a human right.

More difficult is the arbitrary adoption of such interpretations by individual states. This has led to the situation whereby an individual's claim may, on exactly the same facts, succeed in one country but fail in another. The disadvantage of state disparity in this regard is illustrated by the joint House of Lords judgment in *Ex Parte Adan and Aitseguer*.¹¹⁰ This case concerned an appeal against the deportation of two young asylum seekers, Adan, a woman from Somalia and Aitseguer, a man from Algeria, to Germany and France respectively. Both countries refused to recognise the non-state persecution of

¹⁰⁷ Article 2:1 *ibid*.

¹⁰⁸ Hathaway *op cite* note 85 at 135.

¹⁰⁹ The Inter-Agency Advisory Group on AIDS (IAAG)

¹¹⁰ *Regina v. Secretary of State For The Home Department, Ex Parte Adan Regina v. Secretary of State For The Home Department Ex Parte Aitseguer*; [2001] 2 WLR 143 HL

their flight.¹¹¹ It was argued that removal from the United Kingdom in such circumstances, amounted to a violation of the Refugee Convention and the principle of non-refoulement, as it was likely to result in their further deportation to their home Countries. In contrast, their claims would have succeeded in the United Kingdom, where the nexus between state persecution and the failure of protection is accepted.¹¹²

The recognition of persecution at the hands of non-state actors has been more recently confirmed within the UK, in the House of Lords case of *Horvath v. Secretary of State for the Home Department*,¹¹³ where it was determined that the failure or unwillingness of the state to protect against persecution constituted a ‘bridge’ between the concept of state and non-state actors.¹¹⁴ It is submitted that the United Kingdom approach reflects one guided by human rights principles and is increasingly supported.

The recognition of a positive duty on States to protect its citizens, rather than merely a negative obligation not to inflict harm, is itself a direct evolution of human rights principles. It is therefore suggested that in relation to the CRC, the high standard which the CRC demands in terms of positive rights for children may well come to have real significance. For example, State parties are under an obligation to provide protection for children against,

‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.’¹¹⁵

¹¹¹ The applicants had filed asylum applications in Germany and France before arriving in the United Kingdom, under the Dublin Convention however the first country through which an asylum seeker enters the European Union must now take responsibility for processing the claim.

¹¹² In other words that what is sometimes called the ‘protection’ theory rather than the ‘accountability’ theory is adopted. On the basis of the decision of the House of Lords, *Adan v. The Secretary of State* [1999] 1 A.C. 293 Lord Slynn at para 3

¹¹³ [2001] 1 AC 489

¹¹⁴ In this case the Court considered the meaning of ‘fear of being persecuted’ in the context of the non-state persecution of a man from the Roma Community within Slovakia by skinheads. It was held, that the Slovakian Government did provide sufficient means of protection and his claim was rejected.

‘Persecution’ would be established, however, where it was demonstrated that the State had been ‘unable or unwilling’ to provide protection. *Ibid* at 387 para F-G.

¹¹⁵ Article 19

It is therefore suggested that mere ratification of the CRC is not sufficient to demonstrate state protection but rather, the CRC specifically imposes positive obligations on States to implement the provisions. Applying the House of Lord's 'holistic' test of persecution,¹¹⁶ it is possibly foreseeable that where children have been subject to treatment which the CRC imposes a positive duty on States to prevent, and, where the State has significantly failed to effect protection against such treatment, a potential asylum claim may succeed.

It is submitted that the positive obligation of implementation under the CRC requires that states make real and effective efforts to protect children. Under Hathaway's construction of 'persecution', failure to do so may well equate to grounds for asylum; '...the sustained or systematic violation of basic human rights [are] demonstrative of a failure of State protection.'¹¹⁷

Thus, the failure of States to protect against violations such as trafficking,¹¹⁸ sexual exploitation and abuse,¹¹⁹ wide-spread discrimination,¹²⁰ the violation of civil and political rights, the right for children deprived of a family environment to special care and assistance,¹²¹ the right to health¹²² and an adequate standard of living,¹²³ the right to education¹²⁴ and protection from child labour,¹²⁵ amongst other rights, all protected under the CRC, may well lead to the acknowledgement of state sanctioned persecution.

¹¹⁶ Applying the 'Horvath' test; the establishment of fear along with the unwillingness of the State to provide protection.

¹¹⁷ Hathaway supra note 85 at 104

¹¹⁸ Article 35

¹¹⁹ Article 34

¹²⁰ Article 2

¹²¹ Article 20

¹²² Article 24

¹²³ Article 27

¹²⁴ Article 28

¹²⁵ Article 32

Chapter Two: To what extent has the Convention on the Rights of the Child redefined the protection and provision for child refugees living within the environment of a refugee camp?

UNHCR figures estimate over two and a half million children are currently living out their childhood within the environment of a refugee camp. Many children have been born within refugee flight and have grown up within the dangers and limitations of camp scenarios.¹²⁶ Intended as emergency solutions, refugee camps are increasingly the living environment for refugees in the longer term. Thus, refugee camps address divergent mass flight scenarios of emergency and long term provisions, with different priorities at play in each idiosyncratic situation. It is suggested that the CRC provides important standards through which to assess the humanitarian strategies of governments, UNHCR and other organizations in their response to children's rights within the camp environment. It is the proposition of this paper that Children's right to survival and development must remain a priority, regardless of the nature of the camp's structure.

Upon mass exodus children are often the first to suffer and suffer with the greatest severity. Within the population demographic of refugee camps in Africa and the CASWANAME region children form the majority and are far greater in number than that reflected in the refugee population as a whole. This is due in part to larger birthrates within Africa and Asia and the difficulty for women and children to travel as far as single adult males. What ever the numbers and the context, individual children will face difficult challenges as a result of their specific situation.¹²⁷

¹²⁶ 4.7 million individuals were residing in camps or centres in 2003. Camp sizes vary, with the average containing ten thousand residents; 47% and 40% of UNHCR beneficiaries are located within CASWANAME and Africa respectively where children are estimated to account for 47% of the populations. In contrast, statistics estimate the number of child refugees within European countries to be as low as 23 per cent and 25 per cent in the Americas; Op cit note 7.

¹²⁷ Studies by the Women's Commission estimate over 60% of the Kosovo refugee population to have been under 25 years old in 1999, that 65% of Sudanese refugees in Uganda were also under 25, with 51% of Afghan refugees in Pakistan under 18 in 2002.

Despite their considerable presence in number, '[i]n situations of mass flight, child refugees are being treated as part of an undifferentiated mass.'¹²⁸ The danger for children when specific measures are not taken to protect them is severe within the camp context. Rather than reach a 'safe-haven' within the camps, children remain 'vulnerable to physical abuse, sexual violence and exploitation, and cross border attacks.'¹²⁹ The conditions in camps may well be worse than those the refugee was fleeing and are often more dangerous especially when refuge is sought in unstable neighbouring states.¹³⁰ In addition, resentment from local communities in the host countries may lead to further dangers, especially for females.

Grac'a Machel's 1996 report on 'the Impact of Armed Conflict on Children' has observed the devastating effect of conflict on children and recognises the increase of child targeted violence and persecution. In relation to the specific plight of child refugees living in refugee camps, the report highlights the dangers for children stemming from the dis-functional working of camp society,

'Ideally, camps for refugees or the internally displaced should be places of safety, offering protection and assistance. However, displaced populations are complex societies that often reproduce former divisions and power struggles. At the same time their traditional systems of social protection come under strain or break down completely and there are often high levels of violence, alcohol and substance abuse, family quarrels and sexual assault. Women and adolescent girls are particularly vulnerable and even the youngest children can be affected when they witness an attack on a mother or a sister.'¹³¹

¹²⁸ Amnesty International 'A Stolen Future: Protecting the rights of child refugees' AI Index ref: ACT 31/04/97

¹²⁹ Human Rights Watch 'Easy Targets: Violence against Children Worldwide' available at <http://www.hrw.org/reports/2001/children/children.pdf> [accessed 10th April 2006]

¹³⁰ Ghosh 'Elusive Protection, Uncertain Lands: Migrants' Access to Human Rights' *International Organisation for Migration* 2003; Referring to the African Great Lakes region where many refugees have been forced to flee their camps at the out break of civil war in the host states, noting the conditions for Ugandan refugees in Zaire (DRC) and Congo, the 2.5 million refugees in Tanzania and Zaire in 1994 and Somali refugees in Kenya. Ethiopian refugees in camps in Somalia were forced to flee when civil war broke out.

¹³¹ Ibid at para 77.

The study particularly identified the risk for children of recruitment into armed factions. One cause, the lack of security within the camps, place children at increased risk of abduction by armed forces. ExCom have acknowledged the risk of armed recruitment for children,

‘Recognizing the special protection needs of refugee children and adolescents who, especially when living in camps where refugees are mixed with armed elements, are particularly vulnerable to recruitment by government armed forces or organized armed groups.’¹³²

The susceptibility of refugees to attacks on camps for the purpose of forcible recruitment has most recently been illustrated in Chad, where Sudanese refugees in UNHCR camps were targeted. ‘Refugees said recruiters mainly targeted boys and men ranging in age from 15 to 35. Some of them were even younger. Most were recruited by force, but some joined voluntarily.’¹³³

While it is the responsibility of the host nation to protect the physical security of refugees UNHCR often struggles to ensure compliance, relying on public pressure and negotiations with state leaders.¹³⁴ Many children, including girl children, identify themselves as having ‘voluntarily’ entered armed forces as a means of ‘taking control of their lives’ and escaping desperate situations.¹³⁵ Limited opportunities for education and self-sufficiency within refugee camp environments and the abuse which such situations often entail correlate to such desperate push factors.

¹³² ‘Conclusions on the Civilian and Humanitarian Character of Asylum’ 2002 (Executive Committee—53rd Session) No 94; Echoing the acknowledgement of obligations expressed in earlier Conclusions; ‘safeguarding the physical security of refugee children and adolescents, securing the location of camps and settlements at a reasonable distance from the frontiers of countries of origin, and taking steps to preserve the civilian character and humanitarian nature of refugee camps and settlements;’ at para (b) (ii). See also the 1997 Executive Committee Conclusion on Refugee Children and Adolescents 48th Session No. 84 (XLVIII)

¹³³ Press briefing at the Palais des Nations in Geneva, by UNHCR spokesperson Ron Redmond [31 March 2006] available at: <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=442d00114> [accessed 10th April 2006]

¹³⁴ Following the recent attacks on UNHCR refugee camps in Chad UNHCR held negotiations with the Chad Government. At the outcome, ‘The government promised to increase the deployment of gendarmes around the camps to prevent the entry of armed groups or individuals.’ UNHCR News Stories, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/news/opendoc.htm?tbl=NEWS&page=home&id=443e5afb4> [accessed 10th April 2006]

¹³⁵ Brett supra at note 36.

A 1998 Human Rights Watch study into conditions in refugee camps highlights that separated children within the camps faced greater risks and often abuse by their care givers. Girls were highly at risk of sexual violence and rape, with high levels of sexual abuse identified. Rape in refugee camps is now a well documented problem and represents a real danger to young female refugees. Rape statistics from refugee camps in Tanzania illustrate the formidable dangers for young female refugees, where children accounted for between forty and sixty one per cent of reported victims.¹³⁶ Many girls listed the belief they would be able to protect themselves from sexual assault through having a gun in the military, as a motivational reason for enlisting.¹³⁷

Further, women and children are susceptible to male power structures within the camps and are often victim to an abuses of resource allocation, with men demanding ‘bribes or sexual favours’.¹³⁸ The loss of traditional social mores has been documented to lead to an increase in early and forced marriages under camp conditions.¹³⁹ UNHCR also note the young age of sexual activity within the camps, often a result of adolescent boredom and the culture of violence.

Williams observes,

‘in conditions of extreme poverty or marginalization, sex for money or other forms of reward is used by women as a survival strategy...it is common to find a proliferation of prostitution in and around refugee camp settlements, as women and girls lose the support of their family through separation, and society through dislocation.’¹⁴⁰

¹³⁶ The Sexual and Gender Based Violence Programmes reported rape statistics in Tanzania refugee camps for the April – December 2000 reporting period: ‘Out of 139 reported rapes around Kibondo, 61% of the victims were children; 10% were under the age of 12. In camps around Kasulu, 30 out of 41 reported rape victims were children. Twelve of the victims were between 3 and 9 years old. 33% of alleged perpetrators were minors. In Lugufu camp, 40% of assailants in reported rape cases were aged 12 to 18.’ See further the UNHCR impact evaluation. Supra at 28

¹³⁷ Brett supra note 36 at 33

¹³⁸ Ibid at para 78

¹³⁹ K Williams ‘AIDS, Gender and the Refugee Protection Framework’ Working Paper No. 19 Refugee Studies Centre Oxford University. Available at www.rsc.ox.ac.uk [accessed 10th April 2006]

¹⁴⁰ Ibid at 14-15

The extent of sexual abuse within refugee camp structures and the violation of human rights which it represents demand urgent measures from states and UNHCR to protect children.¹⁴¹ Under Article 19 of the CRC, states have an express obligation to protect children from sexual exploitation.

Traditionally and expressly under the CRC, the family is declared to be the most appropriate environment for the protection and nurture of children.¹⁴² Families within refugee camps face intense pressures as they adapt to their change in circumstance. Children often suffer as a result. Research carried out by child refugees, emphasized their changed role within the family unit, as a consequence of their refugee predicament, resulted in greater responsibilities. As a consequence of the loss of parental care or through greater expectations on the children to support their parents, children faced increased burdens as refugees.¹⁴³ Children are increasingly required to take on adult roles, working or caring for family members and through this can often lose their identity as children. Given the essential role which children often play within refugee communities, greater recognition needs to be given to their contribution through direct consultation.

Most promisingly, Tolfree has identified the strengthened role which children can play in their protection. He suggests a wide construction of the principle of participation which includes children as duty bearers and thus, 'encourages and facilitates children's activism in refugee contexts.'¹⁴⁴

Tolfree's findings, from the Save the Children study, challenges the assumption that children are wholly dependent on adults for their care and protection and

¹⁴¹ '[The Committee]...*Noting* distressing reports over the last few years that refugees and asylum-seekers, in particular women and children, have been victims of sexual abuse and exploitation during flight or upon arrival in their country of asylum, and deeply concerned that this has negatively impacted their access to basic protection and assistance, including health care and education, the issuance of personal documentation or granting of refugee status' The Executive Committee Conclusion no 98 2003, 54th Session, on 'Protection from Sexual Abuse and Exploitation'

¹⁴² The Preamble of the CRC states: 'Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'

¹⁴³ J Lowicki and A Pillsbury 'Supporting Young Refugees' Participation in their own Protection and Recovery: Lessons Learned' [2004] *Refugee Survey Quarterly*, Vol.23, No.2 72-88.

¹⁴⁴ *Ibid* at 89.

recognizes children's remarkable capacity to create care and protection networks. Such potential can be extraordinary when given appropriate direction and support. Thus in refugee camps in Liberia, following education by a Children's Advocate within an informal context of children's clubs, children were, 'able to play a significant role in the ensuring the protection of children in their blocks of the camp.'¹⁴⁵ Indeed, through the process of empowerment and mobilization, young people are 'able to release their energies in a way that is likely to enhance their resilience.'¹⁴⁶ Such benefits are of significant value when considered against environment of increased risk which these young people find themselves living within.

Durable Solutions:

Time is a precious commodity for children in the context of their developing years. The 1994 Guidelines compare children's development to 'a tower of bricks, each layer depending on the one below it',¹⁴⁷ recognizing the long term disadvantages caused by interruptions to childhood. Despite their permanency in duration, camps continue to be regarded as 'temporary' measures. Sinclair has conceptualized the camp environment as akin to 'keeping children in some kind of storage.'¹⁴⁸

Van Bueren highlights that the extended period which many children endure in the camps is incompatible with the principle of best interests under the CRC, which demands that focus be given to formulating durable solutions for children.¹⁴⁹ Likewise Goodwin-Gill emphasizes that needs of children can not be 'mortgaged to some future time and place'. In contrast to general concepts of durable solutions as long term goals, solutions must contribute in the present, ensuring the full development of the child.

¹⁴⁵ Tolfree *ibid* at 94

¹⁴⁶ Tolfree *ibid.* at 96

¹⁴⁷ *Ibid* 1994 Guidelines preface.

¹⁴⁸ M Sinclair 'Education in Emergencies' *Learning for a future: refugee education in developing countries* available at <http://www.unhcr.org/cgi-bin/txis/vtx/home?id=searchibid> [accessed 10th April 2006] Chapter 1 at 7.

¹⁴⁹ van Bueren *supra* note 49 at 365.

Traditional focus on durable solutions has been to identify long term protection agendas which represent life after the necessity of refugee camps. Such measures have usually focused on repatriation or resettlement and services for children successful in receiving asylum,¹⁵⁰ little of which serves the children 'stored' in the refugee camps for their indefinite future. The emphasis on best interests and the CRC is therefore essential in order to re-focus conceptions of durable solutions to recognize the needs of children.

Emphasis on the CRC is more vital given the limited relevance of the Refugee Convention in this specific context, in so far as it contains no mention of admission, resettlement or voluntary return, and specifically fails to mention possible solutions for problems such as unaccompanied minors. Goodwin-Gill therefore identifies the need to look further a-field to other international instruments and state practice in order to inform the content of 'durable solutions' for children. To this extent he suggests, 'the Convention on the rights of the Child offers substantial general support for a comprehensive approach to durable solutions, but in a sense wider than is normally understood with respect to refugees.'¹⁵¹

Thus, access to education and health care, psychological support and safety measures to protect the integrity of the individual child, are all integral aspects of 'durable solutions' necessary for the fulfilled development of the child. To make children's durable solutions a reality it is argued that the principle of best interests must be expanded to inform all decisions relating to funding and policies for refugees on a global scale and within refugee camps in order to prioritise delivery of these rights to children. Noting that, The UNHCR 1994 guidelines call for such solutions to be 'implemented without delay'.¹⁵²

¹⁵⁰ Where a child has been granted asylum, such solutions may take the form of family reunification, or where impossible, long-term community care. The child's long term health and education are further factors of consideration and here the right to psychiatric counselling is essential. In some cases it may be in the child's best interests that they be repatriated, however, the requirement that durable solutions be implemented according to the best interests of the child mean States are obliged to ensure the child will receive all necessary care provision before they are returned.

¹⁵¹ Goodwin-Gill *op cit* note 41 at 406.

¹⁵² 1997 Guidelines *supra* at Chapter 9.

Although the legal obligation to refugees rests with the host nation, it is increasingly apparent that children within the refugee camps are unlikely to receive provision of their essential development need from this source alone. It is therefore suggested that the implementation obligation under Article 4 of the CRC has an essential role to play in making children's durable solutions reality.¹⁵³ This provision places an obligation on states to provide international assistance and it is argued reinforces the principle of burden sharing under the Refugee Convention.¹⁵⁴

In their fifth General Comment¹⁵⁵ the Committee on the CRC emphasize the repeated pledges of states, under United Nations initiatives, to provide international assistance. As such, the Committee identifies the need for 'rights based assistance' adhering to the framework of the CRC.¹⁵⁶ The Committee has used this position to censure State parties who fall short of such obligations. In the concluding observations addressed to Germany,¹⁵⁷ the annual budget assigned to international assistance of 0.27 per cent was criticized for falling short of the 0.7 per cent international standard pledged.¹⁵⁸

¹⁵³ 'Article 4: States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, **where needed, within the framework of international co-operation.**' [Emphasis added]

¹⁵⁴ The Preamble of the Refugee Convention reads; 'CONSIDERING that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without **international co-operation.**' [Emphasis added]

¹⁵⁵ General Comment No. 5 (2003) 'General measures of implementation of the Convention on the Rights of the Child' (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5 available at: [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En?OpenDocument) [accessed 10th April 2006]

¹⁵⁶ Ibid at para 60 - 61. Examples of pledged assistance referenced are the Millennium Development Goals and the International Conference on Financing for Development at which contributions of 0.7% GDP were negotiated.

¹⁵⁷ CRC/C/15/Add.226

¹⁵⁸ '[The Committee]...remains concerned that the State party devotes only about 0.27 per cent of its gross national income to the official development assistance, and that the foreseen increase to 0.33 per cent in 2006 is very slow...In light of its previous recommendations (para. 25), the Committee encourages the State party to implement the United Nations target of allocating 0.7 per cent of gross domestic product to overseas development assistance as soon as possible and emphasize its concern about basic social services to attain the objectives of the Copenhagen 20/20 Initiative.' CRC/C/15/Add.22 ,at para. 21-22

‘[T]here is a clear disparity between what we in the developed world spend on refugee determination at the national level and what we contribute to refugee protection in all other parts of the world’.¹⁵⁹ It is proposed that the insufficiency of international assistance reflects a Western denial of their international responsibility under International Human Rights Treaties¹⁶⁰ and the Refugee Convention, while the poorest countries of the world bear the heaviest burden in caring for refugee neighbours. Rather than fulfil obligations under the CRC and provide for children’s futures, Western States continue to prioritize spending on immigration control. UNHCR’s remit is highly influenced by the funding decisions of its donors. Recently it has been suggested that the expansion of UNHCR’s humanitarian mandate reflect the ‘enthusiasm’ of the major funding states towards ‘in-country assistance’.¹⁶¹ McNamara has questioned whether,

‘Xenophobia and hostility towards asylum seekers has reached such a point that we would rather see the UNHCR transformed into a humanitarian emergency aid organisation that no longer specifically focuses on the promotion of asylum’¹⁶²

Highlighting the concern that a humanitarian emphasis undermines UNHCR’s effectiveness and ability to safe guard the rights of asylum seekers.

Similar concerns have been raised in relation to the increasingly political role of the UNHCR, by those fearing a dominance of ‘humanitarianism’ over the law’. Cuncliffe and Pugh refer to UNHCR’s role within the former Yugoslavia, as demonstrative of the dangers of humanitarianism as a substitute for ‘a coherent international political response’.¹⁶³

¹⁵⁹ G Goodwin-Gill ‘A Convention and a Purpose’ Editorial *Asylum* 2001 at 2.

¹⁶⁰ See also the General Comment No. 3 from the Committee on the ICESCR ‘The Nature of States parties Obligations’ para.14. Note also the comments of the Special Rapporteur for Health, Mr. Paul Hunt, who in the context of health provision as ‘humanitarian assistance’ for refugees and the Internally Displaced has emphasised the need for a ‘rights approach to assistance programming’, calling for a political culture of rights awareness to permeate all levels of government’s decision making as a means of enforcing international assistance obligations. E/CN.4/2003/58 para.28-29

¹⁶¹ Specifically European States, the USA and Japan.

¹⁶² D McNamara and G Goodwin –Gill ‘UNHCR and International Refugee protection’ Refugee Studies Programme Working Paper No.2 available at www.rsc.ox.ac.uk [accessed 10th April 2006]

¹⁶³ S A Cuncliffe and M Pugh ‘UNHCR as a leader in humanitarian assistance: a triumph of politics over law?’ Twomney and Nicholson eds. *Refugee Rights and Realities* at chapter 9.

In the context of this discussion, humanitarian policies are allied with one of camp maintenance. A dichotomy exists between ‘charity’ extended to those far away and the lack of a similar compassion, should the same individuals seek protection closer to home. Indeed, the increasing difficulty for refugee groups to travel in order to claim asylum has led some to conclude that, for the majority of refugees, it now seems possible to challenge the conception of the ‘refugee as a moving entity’,¹⁶⁴ ‘the refugee as a workable and meaningful concept thus has an uncertain future... the imperative behind this fact exists in the undeniable fact that there are fewer and fewer spaces of meaningful refugee movement available.’¹⁶⁵

Tuitt further argues that ‘humanitarian policies’ greatly impact against women and children, binding them to static and dangerous camp environments.¹⁶⁶ In this respect it is apt to re-iterate the call for the principle of a child’s best interest to be strengthened, so far that it extends to all aspects of policy making which affects children, even at the international level.

Education.

One essential right which is integral to the long term protection of children and form an essential aspect of children’s durable solutions is the right to education. Child refugees have identified education as one of their utmost concerns and emphasize the importance of education in providing hope for the future. ‘[Education] ensures the health and psychological well-being of young people and enhances their prospects of finding jobs and other means of economic support.’¹⁶⁷ As a protection tool education is also essential as a medium for the transfer of survival messages. Vital information concerning sexual education, HIV/AIDS, Gender equality, land mine awareness, environmental concerns and human rights can be conveyed to children through an educational forum.

¹⁶⁴ P Tuitt ‘Rethinking the refugee concept’ in *Refugee Rights and Realities*, Twomney and Nicholson eds. at Chapter 5.

¹⁶⁵ Tuitt *ibid* at 107.

¹⁶⁶ ‘Refugee women and children more often gain ‘protection’ in refugee camps...camps are often subject to disease-ridden conditions, where food and medical supplies are scarce’, Tuitt *ibid* at 116

¹⁶⁷ Executive Summary of the Women’s Commission report summarising the findings of research undertaken by child refugees themselves following training by a children’s rights adviser; *supra* at 3.

Educational programmes should therefore be implemented as a priority within all camp scenarios. However, given the ‘emergency’ categorization of education within all camp scenarios, educational programmes are the first to be cut due to funding priorities.¹⁶⁸ Perhaps the lack of emphasis on education reflects the de-prioritization of child refugees generally. As Harrell-Bond has commented,

‘Refugee children are the forgotten children even though they are specifically mentioned in the Convention on the Rights of the Child. Few NGOs and governments have taken responsibility and as a consequence, untold thousands of refugee children are growing up without access to adequate education....’¹⁶⁹

In the longer term, lack of capacity can mean that even when camps are running at non-emergency levels, the fundamental rights of children are not fully implemented. The right to education for all children is provided under International human rights law, most specifically under Article 28 of the CRC,¹⁷⁰ and under Article 13 of the ICESCR, both of which provide for ‘free

¹⁶⁸ Inter-agency responses classify education in situations where children lack access to their national education systems as “emergency education” the reality remaining therefore that almost all UNHCR education assistance is “emergency education” in the broad sense of the term.

¹⁶⁹ Barbara Harrell-Bond quoted in Al-Ahram Weekly Online, [9 - 15 May 2002] Issue No.585 available at: <http://weekly.ahram.org.eg/2002/585/fe2.htm> [accessed 19th March 2006].

¹⁷⁰ Article 28:1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties **shall promote and encourage international cooperation in matters relating to education**, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, **particular account shall be taken of the needs of developing countries.** (my emphasis) The Committee on the Rights of the Child recommend that A28 be read together with A29, ‘Article 29 (1) not only adds to the right to education recognized in article 28 a qualitative dimension which reflects the rights and inherent dignity of the child; it also insists upon the need for education to be child-centred, child-friendly and empowering, and it highlights the need for educational processes to be based upon the very principles it enunciates’ The Committee’s General Comment on The Aims of Education :17/04/2001. CRC/GC/2001/1 at para 2. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument) [accessed 10th April 2006]

primary education to all'.¹⁷¹ Further, Article 22 of the Refugee Convention places the responsibility on host states to provide specific protection of refugee's education,

- '1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.'

Furthermore, education provides an accessible medium through which it is possible for State parties to meet other obligations under the CRC such as, the duty to promote physical and psychological recovery and reintegration for child victims of armed conflict and abuse¹⁷² and the right to play.¹⁷³ The 1994 Guidelines¹⁷⁴ explicitly recognize education as a means of enabling children to deal with the psychological impact of living within the insecurity of the refugee camp environment and the need for such therapy if future generations are to be enabled to live peacefully. Indeed the Machel Study validates such opinions, recognizing the therapeutic influence of introducing routine for children and the semblance of normality which attending school and student status can provide. Children will also benefit from the support of their peers and teachers, who will ideally be able to monitor their physiological development.

¹⁷¹ See also General Comment on The right to education (Art.13) 08/12/99. E/C.12/1999/10 from the Committee on the ICESCR and UNESCO Convention Against Discrimination 1960 (Adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960 and entered into force on 22 May 1962.) which specifically precludes discrimination in education and extends the right to all within a State's territory under article 3(e).

¹⁷² CRC Article 39 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.'

¹⁷³ CRC Article 31.1 ' States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

¹⁷⁴ Ibid at para 38–39

Many host nations struggle to implement the right to education for their own nationals, with barriers such as fees and uniform affecting enrolment figures across developing nations.¹⁷⁵ The pattern of high enrolment figures aligned with high drop out rates among UNHCR run educational programmes mirrors the educational situation in host countries. Many refugees are already educationally disadvantaged and originate from rural areas where they would not have accessed education or have parents for whom education is not a priority or for whom even the minimal costs of education are too much. Despite the economic burden for host states, many fall short of the implementation prioritization required under the CRC. To the extent that many developing countries spend significantly more of their national budgets on their armed forces than on education, such States parties can be said to be failing children and their international obligations.¹⁷⁶

UNHCR is often left responsible for implementing educational programmes in the majority of its two hundred and fifty camps worldwide. As emphasized, there is a great need for education to be implemented as an urgent priority but, as Sinclair identifies, education is often not seen as a key part of humanitarian intervention priorities by those responsible for planning such actions.¹⁷⁷ UNHCR is often reliant upon its implementation partners to provide education, usually only at the primary level. Some of the schools provide additional feeding programmes and opportunities for play, however, these initiatives apply only to a small number of the children of primary school age, while adolescents are left un-stimulated and under-developed, without even

¹⁷⁵ Identifying education as the second Millennium Development Goal, UNICEF recognize that 'Children living in the world's poorest countries are most at risk of missing out on Primary and Secondary school....Children living in the least developed countries, the poorest communities, and the most impoverished households are less likely to be enrolled in, or be able to regularly attend school, as are children in rural areas, children with disabilities and those living in areas affected by armed conflict.' The report further emphasizes the importance of education for girls as a means of reducing teenage pregnancy and child marriages. UNICEF 'State of the World's Children 2006: Excluded and Invisible' available at: www.unicef.org.uk/publications/pub_detail.asp?pub_id=27 [accessed 10th April 2006]

¹⁷⁶ See the similar comment related to national education budgets from the Machel study *ibid.* at para 202; 'If countries continue to employ four times as many soldiers as teachers, education and social systems will remain fragile and inadequate and Governments will continue to fail children and break the promises made to them through ratification of the Convention on the Rights of the Child.'

¹⁷⁷ *Ibid* at 7

vocational or skills training.¹⁷⁸ Yet, this age group presents an urgent need for ‘rapid response’ in terms of education provision, given their increased risks of HIV/AIDS, recruitment into armed forces and sexual violence.

There is great potential for education to act as a tool for integration with the local host community, however, many host states are reluctant to allow child refugees to attend local schools for fear it will lead to their permanent settlement in the area. In an abhorrent violation of the CRC and the Refugee Convention, some states have even prohibited UNHCR from establishing schools for such children within the boundaries of the refugee camps. Secondary education is prohibited as a matter of policy for refugees within the Democratic Republic of the Congo (DRC) and Tanzania.¹⁷⁹ It is suggested that if UNHCR educational budgets were made available to local schools on the condition of their accepting, without discrimination, child refugees, then such initiatives would provide important stimulus to aid acceptance of refugees and increase understanding between the communities. Strengthening local resources and community infrastructures may be one way for host communities to benefit from their obligations to refugees and foster understanding.

It is essential to remember that within the refugee camp a great potential resource exists in the form of the refugees themselves. One positive example of what can be achieved when the refugee community is mobilised comes from Guinea, where a programme funded by the International Red Cross established voluntary schools in refugee camps staffed by volunteer teachers from Sierra Leone, Liberia and parents. With UNHCR’s financial support enrolment rates soared to over seventy five thousand students across one hundred and thirty five schools.¹⁸⁰

As the Machel Study recognizes, education can play an essential role in dealing both with children’s trauma and preventing their recruitment into

¹⁷⁸ Many important resources, such as Temporary Teaching Packs (TEPs) or ‘schools in a box’, distributed widely in recent emergency stages of refugee camp formation, are limited to primary education.

¹⁷⁹ Sinclair op cit note 148 at 11

¹⁸⁰ Unfortunately due to the outbreak of violence in Guinea in 2000 the schools had to be relocated and struggled to survive on the UNHCR funding available.

military service.¹⁸¹ Clearly there is a need for the youth to receive education as their educational neglect will have long term consequences for the development of their community as a whole. As Amnesty International emphasize, ‘The stolen future of some 20 million children casts doubt on the future peace and well being of whole communities’.¹⁸² Children represent the future of such communities and it is therefore essential that they are equipped and educated for the future.

Enforcing protection in Camps.

It has been noted above that the obligation for protection and fulfilment of children’s rights within the environment of the refugee camp rests with the host nation. It is suggested, however, that unless the host state benefits from the implementation of refugee programmes, there will be little progress made. It is difficult to convince states that precious resources be directed to future generations which do not belong to them. Nevertheless, the obligations remain and it will be the intention of this final section in the chapter to discuss how best to enforce such obligations within the refugee camps and this discussion will focus mainly on Africa.

UNHCR has the role of ‘assisting governments’ under the Refugee Convention. In the refugee camp scenario, recognising the apathy or incapacity of host states, the majority hand over all control and responsibility for the running of the camps. UNHCR is currently responsible for seven million refugees living within refugee camps. Barrel-Bond has emphasised the ‘State like’ power of the organisation, likening their assumption of ‘defacto sovereignty...independently of the government, outside its judicial system with no checks on powers, and in effect, without legal remedies against abuses.’¹⁸³

It is suggested that potential power abuses are exacerbated by the lack of human rights training of field staff, specifically in issues directly relating to children. To this extent it has been observed that UNHCR often fail to

¹⁸¹ Supra at para 194

¹⁸² Supra note 128.

¹⁸³ B Harrell-Bond ‘Can Humanitarian Work with Refugees be Humane?’ [2002] *Human Rights Quarterly* 24 51-85

implement a situational analysis which includes child specific needs from the outset.¹⁸⁴ Evaluating the performance of UNHCR in the protection of child refugees, the major failings identified related to the lack of accountability, mainstreaming of child specific issues and gaps in understanding and ‘operationalizing’ the protection of refugee children.

The system of accountability within UNHCR needs to be strengthened to extend to those working with refugees in the field. Harrell-Bond questions whether, the long-term protection interests are in fact the highest priority or if there is an underlying need to keep refugees dependable and vulnerable, in order to justify the humanitarian remit. She argues that until refugees have access to a mechanism through which they can enforce their rights, humanitarian assistance will continue to be inhumanely delivered to refugees.¹⁸⁵ While it has been suggested that UNHCR is bound by the obligation to respect human rights under the UN Charter,¹⁸⁶ enforcing the obligation is another matter. It is rather proposed that host nations should retain responsibility for refugees within their jurisdiction and that UNHCR should direct more resources to strengthening the infrastructure of host countries to promote the respect of human rights principles which will benefit host citizens and refugees.¹⁸⁷ In reference to successful past initiatives, it has been found that, in many cases, the local capacity will already exist, ‘it only requires that resources are made available to people who can take an interest in playing these roles.’¹⁸⁸

One further area of refugee’s human rights enforcement in Africa may come from the regional human rights protection of the African Charter of

¹⁸⁴ Supra note 90 at 42

¹⁸⁵ Ibid.

¹⁸⁶ Article 55 includes the obligation to promote ‘universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion’ Goodwin-Gill suggests this provision ‘constrains the office, by its subject matter to pursue a particular ideal of individual freedom in the formulation of its policies of protection, and its programmes of assistance and solutions’.

¹⁸⁷ See further the example of capacity strengthening in Uganda where an investigation into the imprisonment of refugees revealed massive human rights breaches and extended detention periods for prisoners on remand across all sectors of Ugandan society. As a result of the investigation, work shops and training for the judiciary and police were run with impressive results. B. Harrell-Bond ‘What’s wrong with Our Justice System’ New Vision [29 September 1999] and Y Abbey ‘24 Sudanese, Congo Refugees Languish in Luzira Prisons’ New Vision [15 September 1999.] Cited in Harrell-Bond supra at note 183.

¹⁸⁸ Ibid at 85

Human and People's Rights.¹⁸⁹ The African Commission, the human rights body established under the African Charter, has clarified that 'this provision should be read as including a general protection of all those who are subject to persecution, that they may seek refuge in another State.' As noted, the Convention Governing the Specific Aspects of Refugee Problems in Africa, has expanded the Geneva Convention's definition of a refugee to afford protection for all those fleeing civil conflicts and natural disasters and persecution within the private sphere.

Child refugees, receive focused attention under Article 23 of the African Charter on the Rights and Welfare of the Child,¹⁹⁰ which provides for 'appropriate protection and humanitarian assistance' of all children 'seeking refugee status'. The Charter further strengthens states' obligations with reference to 'other international human rights and humanitarian instruments to which the States are Parties'¹⁹¹ which would include the Convention on the Rights of the Child.¹⁹² While the impact of the African Children's Charter has been claimed to have, '...brought fundamental and profound changes in the protection of refugee minors',¹⁹³ such an impact is disputed, given the limited practical use of the Charter to date. Nonetheless, the standard-setting value of a

¹⁸⁹ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986. Article 12(3) provides; Specific protection of the right to seek asylum; 'Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.' Further protection, against refoulement, is provided under subsection 4 of the same article; 'A non-national legally admitted in a territory of a State Party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law'

¹⁹⁰ OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 hereafter referred to as the 'African Children's Charter' Note that the definition of a refugee therein follows that enshrined in the OAU Convention; with an important extension under Article 4 of the Charter to 'apply mutatis mutandis to internally displaced children.'

¹⁹¹ Article 23(1); 'States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.'

¹⁹² Article 23(4); The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

¹⁹³ T Kaime 'From Lofty Jargon to Durable Solutions: Unaccompanied Refugee Children and the African Charter on the Rights and Welfare of the Child' *International Journal of Refugee Law* Vol.16 No.3 at 337.

regional child specific refugee protection, for a region with over a million child refugees, is significant.

The impact the African Children's Charter is arguably limited by its lack of legally binding enforcement. In contrast to the Committee on the CRC, the African Committee of Experts on the Rights and Welfare of the Child is empowered to receive individual and representative complaints, and undertake investigative, fact finding missions to member States.¹⁹⁴ It is a missed opportunity that to date, the Committee of Experts has yet to consider any individual complaints, or commence an investigative mission,¹⁹⁵ and it is suggested that visits to refugee camps within the region would be an import place to begin their work.

It is further frustrating that the opportunity for child refugee's rights to have been championed and refined within a complaints process has been so far missed. In the absence of an African Human Rights Court, it falls for complaints to be addressed to the African Commission on Human Rights. While complaints relating to refugee rights have arisen before the Commission, there has been no explicit child focus.¹⁹⁶ The Commission has demonstrated sympathy to refugee complainants and established the principle of 'constructive exhaustion of local

¹⁹⁴In light of the difficulty for children to make direct complaints, exacerbated by education deprivation and poverty in the continent, it is hoped that this mandate could be exercised to report on some of the known camp violations.

¹⁹⁵ Lack of assigned resources and question over the independence of the Committee have rather plagued progress, with the lack of resources assigned to the Committee by the AU are such that the Committee remains understaffed, lacking a Secretary and permanent office and vastly behind schedule on its work plan. Furthermore three members of the Committee recently resigned over a conflict of interests due to other political roles.

¹⁹⁶ Cases involving children have been considered before the Commission, but so far child refugee issues have not received specific attention. Children formed part of the class of complainants in the complaint of *Organisation Mondiale Contre La Torture and Others v. Rwanda* African Commission on Human and Peoples' Rights, Comm. Nos. 27/89, 46/91, 49/91 and 99/93 (1996), which related to massive violations of human rights under the African Charter by the Government of Rwanda. Offences included ethnic persecution, arbitrary detention of Tutsis, summary execution and the forced expulsion of Burundian refugees, without opportunity for appeal. A massive breach of human rights was found. Note that this case was heard before the adoption of the African Children's Charter, and perhaps the lack of specific consideration of the violations on the children is explicable to this extent. The Provisions of the CRC also did not figure however. The fact that the violations were found to be so comprehensive may be a further reason why a more detailed consideration of the children was not undertaken, the violations having been established so widely.

remedies’¹⁹⁷ which presents an important opportunity for refugees to raise attention towards the human rights violations in their home countries. Bringing refugee-producing states to account before the Commission increases public awareness of the violations, potentially resulting in political censure from the African Union and the international Community.

Recently, however, there is the promise that greater priority will be paid to the needs of refugees, and child refugees within the region. In 2004, the African Commission on Human and Peoples’ rights at the 36th Ordinary Session in Dakar, passed the ‘Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa’¹⁹⁸ Appointing Bahame Tom Nyanduga as the Special Rapporteur, the Resolution recognises;

‘[R]efugees in Africa continue to face untold suffering arising principally from the lack of respect of their basic and fundamental human rights as individuals, inter *alia*, women, children and the elderly being the most vulnerable among refugees’¹⁹⁹

The mandate of the Special Rapporteur includes undertaking investigative missions to refugee camps, assisting African Union Member States in the development of policies and requires cooperation and engagement in dialogue with ‘Member States, National Human Rights Institutions, relevant intergovernmental and non governmental bodies, international and regional mechanisms involved in the promotion and protection of the rights of refugees, asylum seekers and internally displaced persons’²⁰⁰ There is the great scope for the Special Rapporteur to work closely with the Committee on the CRC and advance on their recent achievements. What steps have been taken so far is yet

¹⁹⁷ *John D. Ouko v. Kenya, African Commission on Human and Peoples’ Rights*, Comm. No. 232/99 (2000) This case before the Commission identified the lack of political freedom in Kenya and identified the treatment of the applicant as violating of Articles 5, 6, 9, 10 and 12 (1) and (2) of the African Charter on Human and Peoples’ Rights. The Commission affirmed its previous jurisprudence issued in the case of *Rights International v. Nigeria* (Communication 215/98 - Rights International/Nigeria) where the Commission had previously applied the principle of a constructive exhaustion of local remedies.

¹⁹⁸The African Commission on Human and Peoples’ Rights meeting at its 36th Ordinary Session held from 23rd November to 7th December 2004, in Dakar, Senegal;

¹⁹⁹ Ibid.

²⁰⁰ Ibid at (e)

unclear, as the report remains unpublished.²⁰¹ There are grounds for optimism that the Special Rapporteur will aid the refocus of child refugees' rights within the camp scenarios of Africa, and world-wide, and will emphasise the simultaneous obligations of the CRC in this process.

²⁰¹ So far as the author is aware, the African Commission's 2005 meetings have not been published and are not available on their website [accessed 10th April 2006].

Chapter Three: To what extent has the Convention on the Rights of the Child influenced a refocus of policies related to the treatment of Separated Children within reception procedures?

‘Separated children’ are children²⁰², who have been separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. The Committee on the Rights of the Child has recognized the potential vulnerability of this special group of children in its recent General Comment,²⁰³ which relates also to ‘unaccompanied children’. The term ‘separated children,’ however, is wider in scope than the definition associated with the term ‘unaccompanied children’ and has thus gained preferential usage in recent years by the UNHCR and relevant NGO’s.²⁰⁴ ‘Unaccompanied children’ have been defined as ‘children under 18 years of age who have been separated from both parents and are not being cared for by an adult who, by law or custom, is responsible to do so.’²⁰⁵ However, this rather narrows the scope of protection for children given that many child refugees do travel or arrive in a country of asylum with an adult but that often there may be no pre-existing family or customary care giving relationship between them.²⁰⁶

It is widely estimated that separated children account for between two to five per cent of the global refugee population.²⁰⁷ While many of these children remain in refugee camps, it appears that the group are proportionately more

²⁰² As defined in Article 1 of the Convention on the Rights of the Child

²⁰³ General Comment No. 6 (2005) ‘Treatment of Unaccompanied and Separated Children outside of their Country of Origin.’ CRC/GC/2005/6 [1st September 2005]

²⁰⁴ See further: Save the Children ‘Young Refugees, A guide to the rights and entitlements of separated refugee children’; the S Ruxton Separated Children in Europe Programme ‘Separated Children and EU Asylum and Immigration Policy’ and ‘Trends in Unaccompanied and Separated children Seeking Asylum in Industrialized Countries, 2001 – 2003’ (supra note 7). The latter notes that many industrialized states are reluctant to use the more expansive definition of ‘Separated children’.

²⁰⁵ Report of the Secretary-General to the United Nations General Assembly on Protection and assistance to unaccompanied and separated child refugees, [7 September 2001] A/56/333.

²⁰⁶ In the course of this paper the term ‘Separated Children’ will be used and should be taken to encompass ‘unaccompanied children’, unless specifically stated otherwise.

²⁰⁷ UNHCR statistics indicate that separated asylum seeking children are most likely to be male, especially those reaching Central European countries, with females accounting for approximately twenty eight percent of the total figures in 2003. Supra note 7.

mobile than other refugees such as accompanied children, women or the elderly, and the group accounts for a greater proportion of children represented in the data of industrialized asylum destination countries²⁰⁸.

There is increasing recognition of the specific nature of this group of refugees, and the inappropriateness of adult asylum processes to which they are often subject; practices which detrimentally affect their claims or expose them to dangers. It is the view of this paper that the CRC has influenced important reform of some procedural aspects of the immigration and refugee determination process for children and certainly the production of relevant national guidelines, which may or may not be followed in practice. As the Committee of the CRC highlight, however, there is much still to be done. It is apt to note the Committee's assessment of some of the failings of immigration services for separated children,

'In some situations, such children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice. In many countries, unaccompanied and separated children are routinely denied entry to or detained by border or immigration officials. In other cases they are admitted but are denied access to asylum procedures or their asylum claims are not handled in an age and gender-sensitive manner. Some countries prohibit separated children who are recognized as refugees from applying for family reunification; others permit reunification but impose conditions so restrictive as to make it virtually impossible to achieve. Many such children are granted only temporary status, which ends when they turn 18, and there are few effective return programmes.'²⁰⁹

To date, consolidated, reliable and uniform data on the number of separated children is still unavailable, even from the most industrialized states.²¹⁰ UNHCR has emphasized that,

²⁰⁸ The practice of States such as Germany, who do not record children over sixteen as separated or unaccompanied, means that the actual numbers may be even greater than the current data suggests.

²⁰⁹ General Comment CRC/GC/2005/6 *ibid* at Para. 3

²¹⁰ Note the SCE Programme estimate that 22,000 Separated Children enter Europe every year and seek asylum, noting that the number of Children who do not report themselves to authorities may be significantly larger. *Supra* note 204.

‘...national definitions of unaccompanied and separated children vary significantly across countries and are often not in line with international recommendations. As a result, comparative analysis at international level is hindered.’²¹¹

In contrast to the over all numbers of asylum seekers, which has reduced in recent years, the numbers of separated children seeking asylum appear to be slowly rising, explicable in part by known causes of child-specific flight such as the increase in armed recruitment and trafficking. The majority of separated children seeking asylum within twenty European Countries studies by UNHCR, were from Afghanistan and Angola, yet these countries account for a far lower proportion of the total number of asylum seekers.²¹² It has been questioned whether children’s increased knowledge of their rights is itself an additional factor.²¹³

The Convention on the Rights of Child provides specific protection for this highly marginalised group. One significant obligation under Article 20 requires States to provide all children without parental care with ‘special protection and assistance’.²¹⁴ This obligation remains largely unfulfilled, as these children struggle to access their socio-economic rights to health care, housing, nutrition and education. Where states have taken action, measures invariably fall far below that of ‘special protection and assistance’ required by the CRC. In a recent South African Case related to separated children, Judge De Vos of the Pretoria High Court, highlighted the dichotomy which exists between human rights rhetoric and fulfilment, warning such ideals, ‘become

²¹¹ Supra note 7 at 7.

²¹² Separated Children seeking asylum in the twenty countries studied accounted for thirteen percent of the total coming from Afghanistan and ten percent from Angola, in contrast asylum seekers from Afghanistan account for seven percent of the total Asylum seeker figures, and Angola two percent.

²¹³ Bhabha supra. However, other countries producing the highest number of separated child asylum seekers in 2003 were: Somali, Sierra Leone, Serbia and Montenegro, Guinea, China, the Democratic Republic of the Congo and Nigeria, UNHCR statistics *ibid*. The extent to which children from these countries would have knowledge of their rights is questionable.

²¹⁴ Article 20:1.’ A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.’

“hypocritical nonsense” if they are not translated into action by the people who have been appointed and paid by the government to make them a reality.’²¹⁵

Article 22 of the CRC places a further obligation on States to ensure separated child refugees receive, ‘appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention.’²¹⁶ As the Committee on the CRC has observed, many State parties fail separated children. The Committee identifies heightened risks for children due in part to, ‘protection gaps in the treatment of such children’, which increase the risk of these children being exposed to, ‘...sexual exploitation and abuse, military recruitment, child labour [including for their foster families] and detention.’²¹⁷ Further, girls within this group have been identified as at high risk of ‘gender-based violence’.²¹⁸

As discussed above, a ‘deterrent’ immigration policy is continued by many states, with the result that the right of the children to seek asylum will be obstructed from the beginning. It is submitted that states further endanger children through insensitive practices. Despite the repeated concerns of the Committee on the CRC, it is staggering to note the number of separated child asylum seekers who disappear from refugee reception centres of upon their arrival in Western European Countries. For example, ‘The high number of unaccompanied children having gone missing from the Swedish Migration Board’s special units for children without custodians’²¹⁹

²¹⁵ *Centre for Child Law and Ellis NO v Minister of Home Affairs and Others* 2005 (6) SA 50 (T), at para 30. This judgment, which will be discussed further in the paper, confirmed that under section 28 of the South African Constitution, which specifically provides for children, the Government held a positive duty to provide protection for separated children in the Country and that ‘foreign’ children would come within the provisions for children under the Child Care Act 74 of 1983.

²¹⁶ Article 22.

²¹⁷ *Ibid* at para. 3

²¹⁸ *Ibid*.

²¹⁹ Concluding Observations addressed to Sweden, CRC/C/15/Add.248 at para 63 (a); see also Recommendations of the Committee on the Convention of the Rights of the Child addressed to Denmark, CRC/C/DNK/CO/3 at para 52; ‘The Committee is also concerned that a number of unaccompanied asylum-seeking children disappear from reception centres.’

Reception of Child Asylum Seekers.

When separated children arrive in a destination country, seeking asylum, they face what Bhabha has characterized as a ‘Janus like’ reception; a ‘clash of normative frameworks of welfare and immigration control’.²²⁰ Thus, immigration institutions which operate from a basis of suspicion on behalf of state based protectionist policies, tend to focus the issues towards those of the asylum seeker, negating those of the child. In contrast, the ‘welfare approach’ of social service departments assigned to such children may also undermine the rights of the child, as they have traditionally focused on the child’s dependency and lack of capacity.

It is clear from the CRC that the State parties have a positive obligation to these children. Thus, they are obliged to take positive measures in accordance with the Convention principles, to ensure that no harm befalls them. The following discussion sets out many of the varying state practices which are not yet fully aligned with Convention obligations. It is submitted that the identified gap between policy and practice illustrates the low priority which such children are given and that the CRC should be utilized to emphasize states’ legal and moral duty to these children.

For all children required to under-go refugee status determination procedures it is imperative that the legal protections of the CRC are met. For separated children who lack the guidance of a family adult adviser and protector, such safe-guards are all the more pressing. The recent General Comment interprets ‘appropriate measures’ within Article 22 of the CRC to include the obligation on State parties to establish functioning asylum systems. This includes the need for all children to be represented by an adult who can act in their best interests. Children’s right to participation has informed much of the discussion so far. However, it is clear from sub-section 2 of Article 12, that the standard is subject to greater safe-guards in certain contexts,

‘For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings

²²⁰ Supra note 5 at 292

affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.’²²¹

In order that children’s participation rights are realised within the determination process, it is essential that they have a meaningful opportunity to understand the proceedings in which they are involved. As van Bueren has emphasised, ‘Children often require additional assistance in order to be able to exercise their right to freedom of expression.’²²² Likewise, in order that children are able to meaningfully participate, judicial and administrative procedures must be adapted to enable the child to meaningfully communicate their fears. UNHCR guidelines therefore require proceedings to be explained to the child and interviews of children to take place in a child friendly atmosphere, by officials trained in working with children.²²³

Understanding the procedures is not enough. It is essential that children can communicate their view and to this extent they must have access to interpreters, legal advice and a guardian. It is now universally recognised within the different guidelines and frameworks on this issue that the appointment of a guardian, to act in the child’s best interests, forms as an essential aspect of all children’s protection.²²⁴ In the case of separated children, free legal representation is required as a mandatory obligation.²²⁵ The unfairness of placing an unrepresented child into such an environment is expressed by Sadoway who argues,

‘Just as we would cringe at the thought of pitting a 250 pound adult male against a 70 pound boy in a physical fight, we should recognize that children are not equipped to spar with the intellectual and verbal skills of adults in the hearing room.’²²⁶

²²¹ Article 12 (2)

²²² Supra note 49 at 131-132

²²³ 1997 Guidelines supra.

²²⁴ The appointment of a Guardian is recommended in the UNHCR, the US and Canadian Guidelines, further the European Joint Position also acknowledges such a need for adult representation but does not require that person to have knowledge of the asylum procedures.

²²⁵ Supra at 69

²²⁶ G Sadoway ‘Child refugees before the Immigration and Refugee Board’ [1997] 35 *Immigration Law Reports* (Articles) 2nd Series at 106

Statistics show that a child's chances of success in their asylum claims are far greater where they have legal representation.²²⁷ Figures suggest that over eighty per cent of children in American proceedings appear in the immigration court with out a lawyer.²²⁸ Alarminglly the Amnesty International report also indicated that of those children recorded as accessing legal representation, evidence exists that the lawyers have been found to represent smugglers or traffickers who have brought the children into the country.

The excessive duration of asylum procedures has been identified as a recurring problem of severe detriment to children. Despite UNHCR calls for the prioritization of children with asylum processes, delay and uncertainly continue to colour asylum experience. The psychological effect upon children waiting in uncertainly for the outcome of their cases has documented detrimental effects, especially where they are awaiting such outcomes while in detention.²²⁹

Family Unity.

The CRC places strong emphasis on the role of the family in securing the well-being, care and protection of the child. For separated children it is essential that all efforts are made to re-unite the child with family members, where possible. To this extent Article 22(2) of the CRC places an obligation on State parties to,

‘...provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to

²²⁷ [Amnesty International] believes that the U.S. government should ensure that all unaccompanied children receive legal representation, including providing paid counsel at the government's expense if effective pro bono representation cannot be guaranteed, in accordance with international law and standards.' Amnesty International 'United States of America Unaccompanied Children in Immigration Detention' at para 7.2 Available at: http://www.amnestyusa.org/refugee/children_detention.html [accessed 10th April 2006]

²²⁸ Ibid.

²²⁹ Save the Children / Separated Children in Europe Programme, Statement on the Detention of Separated Children in Europe, June 2003. Note that the UNHCR lists the USA, South Africa, Germany, Austria, the Netherlands, Sweden and Canada as the Countries with the largest number of undecided cases in 2004 [supra note 7]

obtain information necessary for reunification with his or her family....²³⁰

While the duty does not require re-unification to take place on the soil of the host nation, it remains the right of the child to have access to their family. To this extent, Article 10 provides additional safeguards, ‘...applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner’.²³¹ It is submitted that when read with the principle of the child’s best interests, these provisions ensure reunification in the destination country can not be ruled out as a possibility for the child. A further disadvantage for children is that their right to re-unification is often less than that afforded to adults. Where an adult granted refugee status will be entitled to pass that status onto his/her family, often the same privileges do not exist for children. Such disparity is evidence of the disenfranchisement of children in society.

The European Joint Position has placed emphasis on the importance of family unity for separated children and efforts have been made to increase their protection within the recent Council Directive.²³² It has been noted, however, following pressure from some State parties, that the definition of ‘family’ has been considerably narrowed.²³³ This has significant implications for the

²³⁰ Article 22 (2)

²³¹ Article 10 (1) ‘In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.’

²³² Council Directive 2003/9/EC [27 January 2003] Laying down minimum standards for the reception of asylum seekers.

²³³ Under a draft of the Directive, Article 2(i) the definition of ‘family members’ included the spouse / partner and children of the applicant and also ‘where appropriate other persons to whom the applicant is related and who used to live in the same home in the country of origin, provided that one is dependent on the other...’ Ruxton (supra) notes this definition was close to that called for by the UNHCR Handbook, (SCE Report *ibid.*) The wider definition has, however, been removed from the Council Directive which now reads; ‘2 (1)(d) "family members" shall mean, in so far as the family already existed in the country of origin, the following members of the applicant's family who are present in the same Member State in relation to the application for asylum:

(i) the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens;

(ii) the minor children of the couple referred to in point (i) or of the applicant, on condition that they

individual child, who may be prevented from re-uniting with extended family in another Member State. In compliance with the CRC Article 22, the Directive places an obligation on states to assist in family tracing but does not offer comfort that re-unification will take place within Europe.²³⁴

A significant influence of the CRC upon the Directive is evident in the formulation of the obligation for the State to acknowledge ‘The best interests of the child shall be a primary consideration for Member States when implementing the provisions of this Directive that involve minors.’²³⁵ The best interest’s principle remains to be tested before the European Court of Justice, and the Directive is not legally binding on State parties, to the extent that they can implement the provisions within domestic legislation to a lesser standards.²³⁶ However, while the European Court of Human Rights is distinct from the European Union, the ECHR forms part of the EU *aquis*, along with both the Refugee Convention and the 1967 Protocol. Thus all Member States of the European Union must ratify and abide by the ECHR.

The European Court of Human Rights has appeared willing, in some cases, to advance a broader construction of family relationships than that of the Directive, under the right to family life protected under Article 8. However, this is one area where results are varied for applicants and the concept of ‘the family’ is still in formation. In the Case of *Nsona*,²³⁷ the Court failed to adhere to principles of the best interests of the child or recognise a relationship of ‘family life’ between a child and her aunt. The impact of the decision condoned the forcible separation of a 9 year old separated child from her aunt, her only surviving care giver, on the basis that the aunt had lied to the Dutch Immigration authorities.²³⁸

are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;’

²³⁴ Article 19 (3)

²³⁵ Article 18 (1)

²³⁶ The Directive can not be relied on as binding in a national Court.

²³⁷ *Nsona v. The Netherlands* - 23366/94 [1996] ECHR 62 (28 November 1996)

²³⁸ The Court held that the Netherlands Immigration Service could not be blamed for doubting the validity of the claimed family relationship given the aunt’s deceit in using a forged passport. The applicant, a child of 9, was then removed from the aunt and deported, unaccompanied and without reception at the home airport. The applicants claimed a violation of Article 3 in the suffering caused to

Clearly child refugees within Europe would benefit from the adoption by the ECtHR of a broad definition of family relationships. To this extent it has been suggested that concept of the ‘family environment’ contained in the CRC (and endorsed in the African Children’s Charter) heralds an important approach with ‘important implications outside of the biological family’.²³⁹ It is suggested that the CRC will continue to influence developments within the context of family life.

A further difficulty for children seeking family re-unification within the destination country are procedures, such as those in Canada, which delay the reunification process; only allowing the child refugee to send for a relative once refugee status has been determined. Despite UNHCR calls for the prioritization of children, delay and uncertainty continue to colour all aspects of the asylum process. Given the psychological effects upon children of waiting in uncertainty for the outcome of their cases, children’s claims ought to be fast-tracked.

the child and of Article 8, the right to family life. The Court found no Violation. In a succinctly scathing dissent, Judge De Meyer argued the ‘haste’ of the immigration authorities in removing a 9 year old girl, without taking care to ensure her welfare once she left their control, amounted to ‘treatment that it is difficult to consider human.’ And suggested the authorities should have taken greater care to establish whether there was a family relationship, before they deported the child.

²³⁹ G van Bueren ‘The International Protection of Family Members’ Rights as the 21st Century Approaches’ (1995) *Human Rights Quarterly* 17(4) 732 at 733–734. Noting that even after the year of the family in 1994 ‘the family is still a concept in transition’ and emphasising the varying terms under the different international human rights instruments at 746.

Chapter Four: To what extent has the Convention on the Rights of the Child impacted on State's practice of immigration detention for child refugees?

Perhaps most shocking and most contentious amongst state policies is the practice of detaining child refugees. The dichotomy between international standards and obligations and state practice is clearly evident in the context of the detention of child asylum seekers, identified a 'persistent protection problem facing refugee children'.²⁴⁰ The Executive Committee of the UNHCR has stressed that despite the UNHCR Guidelines, their previous Conclusions on the Detention of Refugees and Asylum-Seekers and Refugee children,²⁴¹ and international human rights law, reiterating the importance of 'avoiding any form of detention of children', the reality remains that, '...[the] practice continues, upon their-or their parents' - irregular entry into some countries of asylum, as well as in the case of suspected criminal or undisciplined behaviour.'²⁴²

Under the Convention on the Rights of the Child, arbitrary or unlawful deprivation of a child's liberty is expressly prohibited and where detention is legally permitted, it must be administered according to the principles that detention is only acceptable when used as a 'measure of last resort' and for the 'shortest appropriate period of time'.²⁴³ The CRC therefore incorporates essential international principles relating to the detention of minors under the UN Beijing Rules,²⁴⁴ incorporating some of the 'soft law' principles into binding obligations.

²⁴⁰ ExCom 'Persistent Protection Problems Facing Refugee Children' at para B(4) available at http://www.unhcr.org/cgi-bin/texis/vtx/excom/opendoc.htm?tbl=EXCOM&page=home&id=3ae68cd114#_ftn7 [accessed 10th April 2006]

²⁴¹ Executive Committee Conclusion Number 44(XXXVII) (1986) on the Detention of Refugees and Asylum-Seekers and Number 47(XXXVIII) (1987) on Refugee Children

²⁴² Ibid.

²⁴³ Article 37 (b) of the CRC; 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'

²⁴⁴ United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Adopted by General Assembly resolution 40/33 of 29 November 1985 (hereafter referred to as the 'Beijing Rules') Rule 13. Available at: http://www.unhcr.ch/html/menu3/b/h_comp48.htm [accessed 5th April 2006]

Where children are held in detention, the conditions must comply with standards which respect their human dignity and rights as children.²⁴⁵ Thus, there should be access to education, health care and psychological counselling. Children should be separated from adult detainees²⁴⁶ and granted prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty.²⁴⁷ The emphasis should rest on ‘care’ rather than detention.²⁴⁸

The Committee on the CRC urge;

‘...all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.’²⁴⁹

And likewise, UNHCR’s guidelines recommend; ‘Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.’²⁵⁰ At times, attempts have been made to justify such continued policies on the grounds of a ‘welfare approach’, in order to safeguard children’s protection.²⁵¹ Alternatively, detention is identified as an essential factor of restrictive immigration policy.

Despite the clarity of international law against the immigration detention of children, numerous State parties continue the practice under terrible conditions which further violate the CRC. This policy affects separated children and children accompanied by their families, with highly detrimental effects.

²⁴⁵ CRC 37 (c) ‘Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;’

²⁴⁶ CRC Article 37 (c)

²⁴⁷ CRC Article 37 (d)

²⁴⁸ Rule 13.5 of the Beijing Rules, affirmed in the General Comment of the Committee on the Rights of the Child *supra* at para 63.

²⁴⁹ *Ibid* at para 61

²⁵⁰ 1997 Guidelines at para 6.7

²⁵¹ As by the United State of America, see discussion below.

However, the risks are amplified for separated children. It is for this reason, and given the increasing condemnation of the practice, that the detention of child refugees will be discussed within this section, as an issue of priority.

Australia.

In attempting to justify the use of mandatory detention for all children arriving without visas, the Australian Department of Immigration and Multicultural and Indigenous Affairs, has the offered explanatory grounds of, ‘deterrence, containment and the high cost of the alternative; providing for the children and families within the community’.²⁵² These reasons have all been found to be disproportionate to the severity of detention of children; the mandatory or extended imposition of which contravenes the Convention on the Rights of the Child. Such detention, especially when continued for an excessive duration and where imposed without procedural safe guards of legal review, has been held to amount to the arbitrary detention of children,²⁵³ and is prohibited under Article 37(b) of the CRC.²⁵⁴

It should be remembered that detention of these children equates to the detention of refugees. Having escaped persecution and suffered the detriment of flight children are consequently subjected to unacceptable conditions of detention.²⁵⁵ Of children held in Australian detention since 1999, ninety two per cent have been given refugee status.²⁵⁶ Such figures emphasis earlier comments related to the dangers of categorizing individuals within the asylum process and discriminating against those with less than full refugee status. The policy

²⁵² Lengths of detention varied, figures from 2003 revealed the average length of detention to be ‘one year, eight months and 11 days’, with the longest reported time recorded as ‘five years, five months and 20 days’ Australian Human Rights and Equal Opportunity Commission ‘A Last Resort’ Executive Summary at Chapter 17, available at:<http://www.hreoc.gov.au/human%5Frights/children%5Fdetention%5Freport/report/exec.htm> [accessed on 5th April 2006]

²⁵³ Communication 1069/2002 before the Human rights Committee, under the Optional Protocol. CCPR/C/79/D/1069/2002

²⁵⁴ Article 37 (b) ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily.’

²⁵⁵ See the recognition of this fact from the United States of America Immigrations Appeals Board in the case of *Kasinga* supra.

²⁵⁶ The figures were higher in relation to children from Iraq, 97.6 per cent of detained Iraqi children were found to be refugees and released from detention. Supra at note 252.

detention of child refugees (including those with asylum seeker status) has been found to be, fundamentally inconsistent with the objectives of the CRC. The result is a serious and ongoing breach of a child's right to personal liberty'²⁵⁷ and further contravenes refugee's rights under the Refugee Convention.²⁵⁸

The majority of separated children do not travel with identification documents or valid entry visas. This makes them highly vulnerable to mandatory detention policies which operate in some states for all 'illegal entrants'. Article 31 of the Refugee Convention provides specific recognition of the reality that many individuals will be forced to flee their country without possession of legal travel documentation or visas and thus, under the Refugee Convention, 'provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence' refugees should not be penalised or subjected to unnecessary restrictions of their freedom of movement.'²⁵⁹ The Committee on the CRC has explicitly emphasized the violation of article 31 of the Refugee Convention, with specific emphasis on separated children in the recent General Comment;

'With regard to asylum-seeking, unaccompanied and separated children, States must, in particular, respect their obligations deriving from article 31 (1) of the 1951 Refugee Convention. States should further take into account that illegal entry into or stay in a country by an unaccompanied or separated child may also be justified according to general principles of law, where such entry or stay is the only way of preventing a violation of the fundamental human rights of the child.'²⁶⁰

It is submitted that the view of the Committee can be pursued in legal argument. Thus the implementation of mandatory detention due to lack of valid travel documents, has been an element in the recent decision of the Human Rights

²⁵⁷ Supra note 252 at Chapter 6.

²⁵⁸ Article 31 discussed below.

²⁵⁹ 'Article 31 - Refugees Unlawfully in the Country of Refuge 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

²⁶⁰ Supra at para 61

Commission, finding the detention of child refugees in Australia to amount to arbitrary detention.²⁶¹ In addition to violations of their rights as refugees, detention offends essential human rights principles.

Arbitrary detention is prohibited under the Convention on the Rights of the Child, Article 37 (c). However, the inability of the Committee on the CRC to receive individual complaints limits its effectiveness for individuals struggling to enforce this important right. Children are simultaneously protected, however, under the ICCPR which allows individual complaints to the Human Rights Commission, where State parties have ratified the Optional Protocol.²⁶² Article 9 of the ICCPR provides against arbitrary detention and the General Comment of the Human Rights Committee has clarified that this provision is applicable to detention for immigration purposes.²⁶³ It has been possible to protect children from arbitrary detention through the individual complaints mechanism of the Human Rights Committee,²⁶⁴ in the case of *Bakhtiyari v Australia*.²⁶⁵

This important case concerned the detention of a family under the Australian Migration Act²⁶⁶ which provides for the mandatory detention for all immigrants arriving in the territory without a valid visa. This led to the arbitrary imprisonment of five children and their mother for a period of over two years.²⁶⁷ The family, claiming asylum as Afghan nationals, arrived in Australia having been smuggled from Pakistan. On the journey the family were separated and the

²⁶¹ *Supra*.

²⁶² Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 9. As of 26th January 2006 105 States were party to the Optional Protocol.

²⁶³ The [Human Rights] Committee points out that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, *immigration control*, etc.... If such procedures entail arrest, the safeguards of the Covenant relating to deprivation of liberty (arts. 9 and 10) may also be applicable.' General Comment No. 8 at para.1 and 9 [emphasis added]

²⁶⁴ The Treaty body of the ICCPR [hereafter also referred to as the 'HRC']

²⁶⁵ Communication 1069/2002 before the Human rights Committee, under the Optional Protocol. CCPR/C/79/D/1069/2002

²⁶⁶ Migration Legislation Amendment Act (No. 6) 2001 (Cth), section 5 [Australia]

²⁶⁷ Under the Migration Act there no longer existed the possibility for judicial review of the decision to detain non-nationals. Thus the detention of the children could not initially be challenged through the Family Court.

father arrived alone in Australia before the rest of his family. He was granted a temporary protection permit.

When Mrs. Bakhtiyari and the children arrived, they were unaware of Mr. Bakhtiyari's previous arrival and were not alerted to the fact by officials. Following an interview with immigration, Mrs. Bakhtiyari and her five young children, aged between fourteen and five years of age, were determined to be pursuing a false claim of Afghan identify and held in mandatory detention. The asylum claim of Mrs. Bakhtiyari and the children was rejected and in the interim the father's temporary visa was revoked due to suspected fraud in his claim. The family were eventually reunited in detention, after two years apart and scheduled for deportation, against which they appealed.²⁶⁸

The family took their case before the Human Rights Committee which found the prolonged detention of Mrs. Bakhtiyari, for two years and ten months and of her children for two years and eight months to be unjustified²⁶⁹ and amounted to arbitrary detention in contravention of article 9(1) of the ICCPR. Employing a test of proportionality the Commission held;

'...the State party has not demonstrated that other, less intrusive measures could not have achieved the same end of compliance with the State party's immigration policies...as a result the continuation of immigration detention for Mrs. Bakhtiyari and her children for the length of time described above, without appropriate justification was arbitrary and contrary to article 9.'²⁷⁰

²⁶⁸ 'In June 2003 the Full Bench of the Family Court held by a majority that the Court did have jurisdiction to make an order against the Minister, including release from detention, if that was in the best interests of the child' *ibid* at para 1:14

²⁶⁹ To this extent the Committee noted that a breach of article 9(1) would occur if detention continued beyond the period for which a State party can provide appropriate justification. *Ibid* at para 9.2.

²⁷⁰ The inability of Asylum seekers to challenge the mandatory detention in the courts further contravenes Article 16 (1) of the Refugee Convention which provides, 'A refugee shall have free access to the courts of law on the territory of all Contracting States.' *Ibid* at para 9.3.

Further, in view of the lack of a judicial review mechanism for immigration detention decisions, the Commission found the State in contravention of ICCPR Article 9(4).²⁷¹

In relation to the Bakhtiyari children, the HRC determined a further contravention of ICCPR, under Article 24. Article 24 relates specifically to children and provides the child with, ‘...the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.’²⁷² The applicants claimed that the failure of the authorities to release the children into the care of their father violated their obligations to the children, in terms of the best interests of the children. The HRC recognised the severe psychological consequences for the children as a result of the detention. Citing an assessment report the Commission noted, ,

‘... a number of instances of self-harm, including instances where the two boys stitched their lips together (Almadar on two occasions), slashed their arms (Almadar also cut the word "Freedom" into his forearm), voluntarily starved themselves and behaved in numerous erratic ways, including drawing disturbed pictures. In addition, the children witnessed Mrs Bakhtiyari's lips sewn shut.’²⁷³

The Commission concluded that all the children suffered from, ‘demonstrable and on-going adverse effects of detention’.²⁷⁴

Strengthening protection for children under the ICCPR, the Commission explicitly widened the concept of ‘measures of protection’ to include the formulation of the best interests principle,

‘the Committee considers that the principle that in all decisions affecting a child, its best interests shall be a primary consideration, forms an integral part of every child's right to such measures of

²⁷¹ ‘Article 9.4: Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.’

²⁷² ‘Article 24 : (1)Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
(2) Every child shall be registered immediately after birth and shall have a name.
(3) Every child has the right to acquire a nationality.’

²⁷³ Ibid at para 4.1

²⁷⁴ Ibid at para. 9.7

protection as required by his or her status as a minor, on the part of his or her family, society and the State, as required by article 24, paragraph 1, of the Covenant²⁷⁵

It is submitted that the use of the exact terms of the best interest principle, as stated in the CRC is a deliberate effort to standardize the protection for children under the international human right law. The Committee further emphasized the pervasiveness of the principle into all aspects of state decision making and concluded; “The Committee considers that the measures taken by the State party had not...been guided by the best interests of the children and thus revealed a violation of article 24 paragraph 1.”²⁷⁶

This interpretation is potentially highly important for children wishing to enforce rights protected under the Convention on the Rights of the Child, so far as the duty to act in the child’s best interests can now be argued to constitute an, ‘integral part of every child’s right to such measures of protection as required by his or her status as a minor.’²⁷⁷

It is suggested that if given a wide interpretation, Article 24 of the ICCPR has the potential to incorporate other fundamental provisions of the Convention on the Rights of the Child. Such inclusion further marks the ‘universal acceptance’ of key principles of the CRC and illustrates how the CRC has already succeeded in refocusing the interpretation of obligations. The clear advantage of an expansion of Article 24 is that where states are party to the Optional Protocol this provision could provide an essential means of enforcement; a ‘back door’ or ‘Trojan Horse’ method perhaps, but an exciting one.

A further significant benefit of a hearing before the HRC lies in the public attention which often accompanies such proceedings. Following the public outcry accompanying the Bakhtiyari case, the Australian Human Rights and Equal Opportunity Commission (HREOC) carried out a legal review of the

²⁷⁵ Ibid at para 9.7

²⁷⁶ Ibid.

²⁷⁷ Ibid.

practice of detaining child refugees; ‘A last resort - The National enquiry into children in immigration detention’.²⁷⁸ At the core of the report were the standards of the CRC which provided the key frame of reference for the investigation. While the normative value of the CRC is sometimes regarded as an empty promise, its use for such purposes illustrates the effectiveness of the CRC when it is championed by a powerful lobby. Following the publication of the report, which further raised public awareness, the practice of mandatory detention for children has been abandoned.²⁷⁹

The United States of America.

One State where such an expansive reading of the Convention on the Rights of the Child within article 24 of the ICCPR, may be influential is in relation to the children in immigration detention in the United States of America.²⁸⁰ The USA immigration policy clearly emphasizes the disadvantage to children where State policies fail to live up to international standards. While the United States is not a Party to the Convention on the Rights of the Child, it has signed the Treaty²⁸¹ and the CRC provisions have served as persuasive influence in the drafting and standards of the United States Guidelines on the treatment of unaccompanied children.²⁸² Although reports from respected human rights organizations emphasize that the Guidelines have yet to prevent the practice.

The United States of America is another state which operates a mandatory system of immigration detention. All separated children are placed in removal proceedings and it is estimated the American Immigration and Naturalization Service (INS) currently hold over five thousand asylum seeking children in detention across America.²⁸³ Worryingly, the length of detention may be indeterminable as current policy related to separated children seriously

²⁷⁸ Op cit note 252.

²⁷⁹ Many children currently remain in immigration detention in Australia.

²⁸⁰ The United States of America (USA) is not party to the Optional Protocol but have ratified the ICCPR [8th June 1992] <http://www.ohchr.org/english/countries/ratification/4.htm>

²⁸¹ Signed on the 15th February 1995. <http://www.ohchr.org/english/countries/ratification/11.htm>

²⁸² USA Guidelines for Children’s Asylum Claims, 1998

²⁸³ Human Rights Watch ‘United States Locked Away: Immigration Detainees in Jails in the United States’ [September 1998] Vol. 10, No. 1 (G) available at:<http://www.hrw.org/reports98/us-immig/> [accessed 10th April 2006]

affects their ability to access judicial review of their detention.²⁸⁴ Furthermore, children's claims are less likely to receive refugee status and they are often granted a lower, child specific, status of leave to remain; 'Special Immigrant Juvenile (SIJ) status', on grounds of abuse, neglect or abandonment.²⁸⁵

Given the difficulties for children to prove their refugee status, discussed above, SIJ status is often urgently sought as the only means for separated children to remain within the USA. In order to gain SIJ status, however, children must demonstrate before a Juvenile Court that they would be endangered on the above grounds if they were returned to their home country. If successful they are eligible for long-term foster care. The problem for children lies in the paradox that in order to gain access to the court, children must first receive permission from INS. This policy has therefore created a conflict of interest whereby INS has the discretionary power to grant access to the courts²⁸⁶ and thereby controls the contrasting services of immigration and welfare provision, with highly detrimental effects for children.

The conditions of detention for the children are a further source of international criticism. Breaching the cardinal principle of child detention, findings from Amnesty International's research highlight the overuse of juvenile jails for separated children when less restrictive options remain.²⁸⁷ Violating further international principles, separated children are frequently detained with juvenile or adult criminals in secured detention. Often children will spend time in such units before their transfer to a less restrictive setting. Multiple international law provisions now exist which provide guidance on acceptable rules and conditions of detention, which current US practice contravenes.²⁸⁸

²⁸⁴ Any indeterminable detention which can not be challenged in a court of law amounts to arbitrary detention under the ICCPR and the CRC as discussed above.

²⁸⁵ Those who have commented on the disadvantageous association of labelling children 'juveniles' may rightly balk at the addition of 'immigrant' to that label.

²⁸⁶ The arbitrariness of whether the INS grant permission to access the Juvenile Court is highlighted by the disparity between Federal State practices, with the INS in some Federal States having never granted permission to appear before the Court, see further Amnesty supra note 227 at para 3.2.1

²⁸⁷ 'This may be representative of the INS's primary goal of law enforcement combined with a fundamental lack of child-care expertise that results in an overly restrictive interpretation of Flores and the inappropriate placing of children in secure detention' Amnesty ibid at para 3.2.2

²⁸⁸ Convention on the Rights of the Child article 37 (c), ICCPR Article 10, Rule 85 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Children interviewed for the Amnesty report repeatedly refer to the distressing experience and suffering from physical discomfort in the cells and the lack of access to legal advice.²⁸⁹ Further, a failure to consider the best interests of the children has led to severe implications, even where initiatives are followed which aim to implement standards. Thus, applying a policy of separation between detained child refugees and convicted juveniles, (motivated as a result of violence between male youth offenders and immigrants rather than concern for international standards), young male refugees are now subject to conditions tantamount to solitary confinement, which prohibit their access to the right to education and recreation.²⁹⁰

The highly vulnerable status of separated children arriving in America was highlighted in the case of *Reno v Flores* in the early nineties.²⁹¹ While this case predates both the UNHCR guidelines and those of the INS, the issues identified remain highly relevant for separated children, as Justice Scalia noted, ‘This problem is a serious one, since the INS arrests thousands of alien juveniles each year (more than 8,500 in 1990 alone) as many as 70% of them unaccompanied.’²⁹² The case concerned a class action on behalf of separated children subject to deportation proceedings. The group were severely affected by a change in INS policy which provided that minors would only be released from detention to parents or legal guardians. While the State claimed the policy was motivated by a welfare approach the consequences for separated children led to their indefinite detention in ‘deplorable’ conditions within correctional facilities.

The applicants argued that the detention of the child asylum seekers was unconstitutional and further that the INS had a constitutional obligation to consider the best interests of each child on an individual basis before referring them to detention facilities. Dismissing both arguments, the Majority of the

²⁸⁹ Ibid at para 3.2.1

²⁹⁰ Human Rights Watch supra note 288; female detainees remain ‘co-mingled’.

²⁹¹ (91-905), 507 U.S. 292 (1993).

²⁹² Ibid Justice Scalia at para 1.

Supreme Court²⁹³ held that children had no constitutional right to demand such release and the resulting deprivation of liberty did not contravene the children's constitutional rights, the institutional conditions being 'good enough'.²⁹⁴

The highly conservative lead opinion of Justice Scalia severely limits the import of the best interest principle as an obligation in decision making. He found,

'It seems to us, however, that if institutional custody (despite the availability of responsible private custodians) is not unconstitutional in itself, it does not become so simply because it is shown to be less desirable than some other arrangement for the particular child. "The best interests of the child," a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion--much less the sole *constitutional* criterion--for other, less narrowly channelled judgments involving children, where their interests conflict in varying degrees with the interests of others.'²⁹⁵

In contrast, the Dissenting opinion of Justice Stephens emphasizes the dangers for children when their best interests are not legitimately considered at the policy making stage,

'How a responsible administrator could possibly conclude that the practice of commingling harmless children with adults of the opposite sex in detention centers protected by barbed wire fences, without providing them with education, recreation, or visitation, while subjecting them to arbitrary strip searches, would be in their best interests is most difficult to comprehend.'²⁹⁶

²⁹³ Justice Scalia delivered the opinion of the Court in which Rehnquist, C. J., White, Kennedy and Thomas, JJ. joined. O'Connor, J., filed a concurring opinion, in which Souter, JJ. joined. Stevens, J., filed a dissenting opinion, in which Blackmun, J., joined.

²⁹⁴ The Majority held that the INS policy did not violate the Due Process Clause, and that the substantive right of the children to release to a private custodian could not be considered a fundamental right. It was, 'therefore sufficient that the regulation was rationally connected to the government's interest in preserving and promoting the welfare of detained juveniles' and was not punitive. Any complaint related to the conditions of detentions could be pursued on an individual bases under a civil action. Full judgment available at <http://www.law.cornell.edu/supct/html/91-905.ZS.html>. [accessed on 10th April 2006]

²⁹⁵ Ibid.

²⁹⁶ Ibid. [original footnotes removed]

Indeed the lack of expansion of the best interests principle to an individualized standard, as required by the CRC, led to the effect that,

‘...the omission of any provision for individualized consideration of the best interests of the juvenile in a rule authorizing an indefinite period of detention of presumptively innocent and harmless children denies them precisely that liberty.’²⁹⁷

It is therefore submitted that the principle of best interests as constructed under the CRC, to require that ‘the best interests of the child shall be a primary consideration’ would radically alter the detention policy of the INS. The evolution of this principle, under the lens of the CRC, has resulted in a radical re- conceptualization of children’s rights in many policy areas. Ratification of the CRC by the USA may therefore send an important message to policy makers of the pervasiveness of the best interests obligation to children, placing real emphasis on the impact of policies on children’s rights and interests.²⁹⁸

Europe.

It is submitted, that even where legal safeguards are in place, real protection will not filter to the individual child without a cultural change in policy making which reflects the values of the CRC. This position is evident within European States. Although it has been claimed that children within Europe have “the best of both worlds”²⁹⁹ in terms of the human rights protection afforded by the CRC and the European Convention on Human Rights, European States continue to operate detention policies which adversely impact on separated children. State practice is divergent in this area, with Greece detaining children as young as 13, and the Netherlands and the Czech Republic detaining 16 and 15 year olds. Belgium reportedly fails to distinguish between the adults and children within

²⁹⁷ Ibid at Concluding para.

²⁹⁸ Even in light of Justice Scalia’s known reluctance to be led by International Law it is possible that if the USA were party to the CRC at the time of this judgment, he would have faced difficulty sustaining the opinion that ‘best interests’ was a value mainly related to the realm of family law. His refusal to acknowledge best interests as the ‘sole consideration’ may be legitimate, the CRC requiring that it be the ‘primary consideration’, however, it is submitted that the level of consideration given to the principle would be far higher if guided by the CRC values.

²⁹⁹ U Kilkelly ‘The Best of Both Worlds for Children’s Rights? Interpreting the ECHR via the CRC’ [2001] *Human Rights Quarterly* at 326. Kilkelly concludes ‘Thus, using the CRC to guide the interpretation of the ECHR in children’s cases, either implicitly or expressly, holds real promise for maximising the potential of both treaties to protect and promote children’s rights. It is indeed the best of both worlds for children’s rights’

detention policies and as a result the detention of 3 and 4 year olds have been reported.³⁰⁰

Children are victim of repressive immigration policies which receive legitimacy under the ECHR, whereby detention for the purpose of preventing illegal entry is specifically included as an exception to Article 5 (1) (f).³⁰¹ Additionally, despite the UNHCR guidelines and the obligations under the CRC, the European Union has expressly have kept open the possibility of the detention of child refugees. Following from the Treaty of Amsterdam,³⁰² the Council of Europe drafted the Directive on ‘minimum standards on the reception of asylum-seekers in Member States’.³⁰³ However, despite progress incorporating the principle of the best interests of the child,³⁰⁴ the Directive fails to prohibit the detention of child asylum seekers, allowing for their ‘accommodation’ within ‘...centres with special provisions for minors’ and ‘... other accommodation suitable for minors’.³⁰⁵ The Article further allows for children to be kept in asylum centres with adults.³⁰⁶ Ruxton has highlighted these failings and warns, ‘[i]t appears that detention is often used purely for administrative convenience, in contravention of the ‘best interests’ principle.’³⁰⁷ Greater safeguards for children are therefore necessary.

³⁰⁰ Save the Children / Separated Children in Europe Programme, Statement on the Detention of Separated Children in Europe [June 2003].

³⁰¹ Article 5, (1), (f): ‘the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.’

³⁰² 1997

³⁰³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Note the European Commission are due to submit their report on the implementation of this Directive in August 2006.

³⁰⁴ Article 18

³⁰⁵ ‘Article 19 (2) Unaccompanied minors who make an application for asylum shall, from the moment they are admitted to the territory to the moment they are obliged to leave the host Member State in which the application for asylum was made or is being examined, be placed:

- (a) with adult relatives;
- (b) with a foster-family;
- (c) in accommodation centres with special provisions for minors;
- (d) in other accommodation suitable for minors.

Member States may place unaccompanied minors aged 16 or over in accommodation centres for adult asylum seekers.

As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.’

³⁰⁶ Article 19 *ibid*. Note also the number of European States which have entered a reservation against Article 37 (c) of the CRC including the Netherlands, United Kingdom, Switzerland and Iceland.

³⁰⁷ *Supra* note 204 at 37

The reality remains, that despite growing consensus against the detention of child refugees, children are reliant upon the political motivation of states to discontinue the practice. In this context the opinions of the Committee on the CRC as a persuasive force are emphasized. In the Committee's concluding observations against the Netherlands, the practice of detaining children whose asylum claims have been rejected is criticized. The inappropriateness of the detention conditions for children and the limited possibilities for education and recreation are further highlighted, '[the] Committee is concerned that children whose applications for refugee status have been rejected are detained in closed camps with limited possibilities for education and leisure activities.'³⁰⁸

The European Court of Human Rights has expressly acknowledged the relevance of CRC principles. In the case of *T. and V. v. The UK*³⁰⁹ the Court referred to the 'binding force under international law' of the CRC on all European States,³¹⁰ specifically including the obligation under 37 (b) that, 'arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'³¹¹ Commenting on the Court's decision in *T. v V. Kilkelly* argues the judgment amounts to, 'firm evidence that the CRC standards in the area of juvenile justice has been accepted by the court.'³¹²

Unfortunately for child refugees, there is an inconsistency operating in relation to the detention of children and the determinate aspect of this practice related to asylum processes. This is contrasted to case law in less controversial areas corporal punishment³¹³ and standards of juvenile justice,³¹⁴ in which Member States are more uniform in their policies and the Court appears more willing to 'look outside itself for guidance'. Although the principles of the CRC

³⁰⁸ Concluding observations addressed to the Netherlands CRC/C/15/Add.227 at para 52.

³⁰⁹ *V. v. The United Kingdom* - 24888/94 [1999] ECHR 171 (16 December 1999)

³¹⁰ *Ibid* at para 46, all European States are Contracting States of the CRC.

³¹¹ *Ibid* at para. 46.

³¹² *Supra* note 299at 324.

³¹³ See for example, *A. v United Kingdom* [1998] 2 FLR 959 in which the standards of the CRC were referred in the construction of a positive duty on the State to protect the child, at Para.22.

³¹⁴ *Ibid*.

are equally applicable to children in immigration detention, awareness of such obligations are too often ignored by those responsible for implementing the processes. The reality remains that child refugees and asylum seekers appear at times to be further beyond the pale of protection than children convicted of even the most heinous crimes.

South Africa.

One country where the influence of the CRC on children's rights has had great effect is within South Africa, where child specific rights are specifically included within the Constitution.³¹⁵ Section 28 incorporated essential provisions of the CRC, including at S28 (2) the right that, 'a child's best interests are of paramount importance in every matter concerning the child'.³¹⁶

Despite the progressive protection of the Constitution, disparity between state policy and practice remains. The relationship between the respect for children's human rights (lack of) and the treatment of child refugees is highlighted in the recent South African case of *Centre for Child Law and Ellis NO v Minister of Home Affairs and Others*.³¹⁷ This case was brought before the Pretoria High Court on behalf of thirteen separated children held at the Lindela repatriation centre who faced unlawful deportation and conditions of detention which further violated their human rights.

Despite the inclusion of child-specific rights within the South African Constitution, which expressly incorporate the CRC safe-guards against the arbitrary or prolonged detention of children, the respondents operated a policy of detention as a measure of primary resort. The obligation on South Africa to abide by its international obligations and specifically, to implement the provisions of the CRC in terms of detention had previously been confirmed by the Courts. In the Case of *S v Kwalase*,³¹⁸ the Cape Provincial Division emphasized the relevance of the CRC in terms of Section 28 (1) (g) of the Constitution,

³¹⁵ Constitution of South African, Act 11111 of 1996.

³¹⁶ Section 28 (2) Constitution of South Africa.

³¹⁷ 2005 (6) SA 50 (T)

³¹⁸ 2000 (2) SACR 135 (C)

‘...on 16 June 1995, South Africa ratified the United Nations *Convention on the Rights of the Child* (1989) ('CRC') and, by so doing, assumed an international legal obligation to put into effect in its domestic law the provisions of this Convention (see article 4) ... In terms of article 37(b), children must be arrested, detained or imprisoned “*only as a measure of last resort and for the shortest appropriate period of time*’.”³¹⁹

While the Kwalase case related to detention of Juveniles under the Criminal Justice system, the principles indisputably relate to all circumstances of detention.

Applying these principles in a damning judgment, Judge De Vos emphasized the hardship and human rights violations caused by the State’s policy of detention and removal of children from South Africa. There was no regard to children’s rights nor further thought to their on-going safety,

‘We subscribe to the principles contained in the international treaties ... We claim to enforce the laws put in place to protect the rights of illegal immigrants, and especially those pertaining to children. Yet all these lofty ideals become hypocritical nonsense if those policies and sentiments are not translated into action by those who are put in positions of power by the state to do exactly that; who are paid to execute these admirable laws and yet, because of apathy and lack of compassion, fail to do so.’³²⁰

The psychological effects of detention on the children were highly detrimental, and twelve of the children had been held for over six months.³²¹

The Lindela Centre is a notoriously over-crowded facility on the northern border of South Africa, where the applicant children were held together with adults and children convicted of criminal offences. At the time the case was heard the applicants and one hundred and twenty-three other children had been transferred to the Dyambo centre, ‘a place of safety’ under a previous court order. Despite the earlier ruling, however, the children remained in detention in

³¹⁹ Van Heerden J.

³²⁰ Ibid at para 30.

³²¹ ‘Due to such prolonged detention, their state of mind has deteriorated to the extent that there have been incidents of attempted escape, threats of suicide and a stabbing.’ Ibid at para.10

that alternative centre and their right to have their case determined before the Children's Court had not been complied with by the respondents.³²²

Of pressing further concern, newly arrived children continued to be held at the Lindela Centre for purposes of deportation, which in practice involved the children being, 'loaded into trucks and taken to the train station. There, they are transferred onto the train, transported to their country's border, loaded onto a truck, and taken to the nearest police station within that country.'³²³ Where the respondent's would, 'dump them without money, food or assistance at the nearest police station on the other side of the border, or at the border itself'.³²⁴

In a 'ground breaking' judgment, Judge De Vos's criticized the Government's 'shameful' failure to act in the best interests of the children and articulated the equality of treatment due to all children who lacked parental care.³²⁵ This principle included further confirmation of the positive obligation on the State to provide for children's socio-economic rights in all cases where the child lacks family care, including cases of foreign unaccompanied children. Section 28 (b) of the South African Constitution, entitles all children within South Africa, 'to family care or parental care, or to appropriate alternative care when removed from the family environment.'

The Section has been interpreted by the Constitutional Court, to place the primary obligation for provision and protection of children upon the child's parents and family.³²⁶ However, where such familial protection is absent, Judge De Vos emphasized that the State could not escape its 'direct duty' to ensure that, 'those children who lack basic necessities of life are provided with

³²²Section 13 of the Child Care Act, amongst others, provides that any child who appears to have no parent or guardian or, if the child has a parent or guardian who cannot be traced or has been abandoned or is without visible means of support, or lives in circumstances likely to cause or be conducive to his/her seduction, abduction or sexual exploitation; or who lives in or exposed to H circumstances which may seriously harm the physical, mental or social well-being of the child, must be brought before a children's court for an inquiry to determine whether the child is a child in need of care, and whether that child should be removed to a place of safety.' Ibid at para 20

³²³ Ibid at para 5

³²⁴ Ibid.

³²⁵ Ibid at para 3-4

³²⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1196)

them'.³²⁷ Stressing international obligations under the CRC, the judge emphasized the right of children to, 'health, the right to social security and to education.'³²⁸

Judge De Vos further issued a significant extension of the positive duty on the state to provide legal representation under Section 28 (1) (g) of the Constitution, confirming the provision applied to unaccompanied foreign children. Asylum seeking children must now be granted legal representation, a fundamental aid in their attempts to access asylum, given the inaccessibility and dangers of the process;

'[A]ll unaccompanied children that find themselves in South Africa illegally should have legal representation appointed to them by the State. This is especially so in view of the respondents' past track record in this regard.'³²⁹

This judgment is of considerable importance as a rare articulation of the rights of due process and provision required for separated child asylum seekers. As emphasized, while there has been much development of the CRC principles in terms of Juvenile Justice, such progress remains deficient with regard to child refugees, despite the undeniable applicability of the same principles to procedures and detention of separated children

Once again, the lack of an individual complaints system under the Committee on the CRC is emphasised as contributing to the dearth of important standard setting, persuasive jurisprudence. Until there is more litigation against the detention of child refugees, (unlikely given their limited access to legal representation), the opportunity for the CRC to be judicially enforced is limited. Meanwhile, public attention can be harnessed immediately and through the increasing number of organisations currently addressing this important issue, it is hoped that political pressure can be mobilised to end the practice.

³²⁷ Ibid at para 17

³²⁸ Ibid at para 24. Further reference was made to similar obligations under the African Charter on the Rights and Welfare of the Child and the United Nations Convention Relating to the Status of Refugees, which requires States to provide compulsory primary education for refugee children of a standard equivalent to that provided to its own nationals.

³²⁹ Ibid at para 29

Conclusion

Child refugees continue to face many disadvantages and dangers. Not all of the urgent protection priorities, such as the right to birth registration, could be discussed within this paper. It is hoped however, that the ambitious title of this paper and the breadth of issues which it encompasses, (and indeed those that it has not been able to encompass) emphasise to some extent the urgent need for the obligations of the CRC to permeate all aspects of the refugee experience of children.

It was intended that by dividing the discussion into specific scenarios, it would be possible to emphasise the disparity between the human rights rhetoric and the reality for children on the ground, illustrating areas where the CRC has led to improved policies and those where there remains urgent need for implementation. It has been the aim of this paper to evaluate the influence of the CRC, in its current form, and to that extent the focus has deliberately not engaged in an evaluation of the merits of different human rights enforcement methods. Although the possibility for greater enforcement of child refugee's rights through an individual complaints system before the Committee on the CRC has been noted, the emphasis has attempted to stay relevant to the current reality and pervasiveness of the CRC as the main frame of reference.

In camp scenarios, children too often remain a neglected element, de-prioritised within strategy planning. The difficulty of enforcing refugee's human rights within the humanitarian framework further exacerbates their isolation and potential vulnerability. For children reaching destination countries, many factors culminate in their disadvantage within asylum systems: the protracted process and delay, the lack of translators and legal assistance for the children, lack of welfare provision and access to education and the culture of suspicion through which the children are perceived as street children and potential criminals, with separated children having been found most unlikely to succeed with asylum claims.³³⁰

³³⁰ Ibid.

In all aspects of children's rights, protection could (and should) be stronger. For child refugees however, it is apparent that the CRC needs a far far stronger commitment from State parties if they are to fulfil their legal obligations to these children. The political impetus must be greater than currently exists and it is suggested that the overpowering identity of children as refugees, currently impacts on the attention afforded to the group.

The CRC therefore, offers an effective lens through which to reconsider judgments about children and their capacity. It is suggested recognition of children's potential will increase in the future. It is hoped that conceptions of child refugees as vulnerable and hopeless will transform to recognise the resilience and potential of each individual child. Furthermore, benefits which reach children will inevitably reach out to all members of the refugee community. Programmes which have strengthened community capacity have proved a fundamental element in ensuring the protection of children to this extent, with empowering and enfranchising results.

To this extent, programmes which have implemented the child's right to participation have been areas for great encouragement. The sooner child refugees are empowered with education and enfranchised in decision making processes, the sooner they will be able to call for greater enforcement of their rights. It has been suggested that 'children's right to participate is perhaps the most radical innovation of the CRC'.³³¹ However, while some areas of progress herald much optimism, full recognition of the potential of this principle remain short of the potential paradigm shift in this area.

The wider implementation of the Principle of best interests has also led to important protections for child refugees. The acceptance of the principle within the South African Constitution signalling perhaps the strongest commitment, while the recent incorporation of the principle within European

³³¹ World Vision Discussion Papers Number 9 'Kid's talk: freedom of expression and the UN convention on the rights of the child' at 13 available at: <http://www.worldvision.org.uk/resources/childparticipation.pdf> [accessed 12th March 2006.]

Directives signals the breaking of significant frontiers. Once more however, a political awareness is essential if the true potential of the principle is to be fulfilled. Thus, it is imperative that all decision makers are aware of the obligation to consider the impact of their policies on children, weighing children's best interests as a primary consideration.

In conclusion, it is found that the CRC has indeed provided an essential lens for the refocus of attention on the rights of child refugees. Emphasising at the last, the fundamental import of the CRC as the lynch pin of progressive frameworks and as a tool for advocacy and civil society. Most significantly however, it has provided a spot light to emphasise the need for child specific policies addressing child specific obligations.

BIBLIOGRAPHY

Secondary Sources

Books:

J Hathaway *The Law of Refugee Status* 1991 Butterworths

Nicholson and Twomey eds. *Refugee Rights and Realities*. 1999 Cambridge University Press

Verhellen Eds. *Understanding children's right: collected papers presented at the First International inter-disciplinary Course in Children's rights* 1996 University of Ghent

Guy Goodwin-Gill *The Refugee in International Law* 1986 Clarendon Press

G van Bueren *The International Law on the Rights of the Child* 1995 Martinus Nijhoff Dordrecht

Davel ed. *Introduction to Child Law in South Africa* 2000 Juta Law, Lansdown South Africa

Ghosh *Elusive Protection, Uncertain Lands: Migrants: Access to Human Rights* 2003 International Organisation for Migration

J Symonides Ed *Human Rights: International Protection, Monitoring, Enforcement* UNESCO Publishing 2003

J Doek, H van Loon, P Vlaardingerbroek eds. *Children on the Move: How to Implement Their Right to Family Life* Martinus Nijhoff Publishers 1996

M Freeman and P Veerman eds. *Ideologies of Children's Rights* 1992 Kluwer Academic Publishers, Netherlands

V Gowlland-Bebbas Martinus eds. *The Problem of Refugees in the Light of Contemporary International Law Issues* 1994 Nijhoff Publishers

U Kilkelly *The Child and the European Convention on Human Rights* 1999 Dartmouth Publishing Company Limited

E Feller, V Turk and F Nicholson eds. *Refugee Protection in International Law* 2003 Cambridge University Press

R Brownsword ed. *Global Governance and the Quest for Justice* 2004 Volume 4 Human Rights Hart Publishing

Journal Articles

D Anker 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) *15 Harvard Human Rights Journal* 133

L Berger and D Figeroux 'Protecting Accompanied Child refugees from the One-year Deadline: Minority as a Legal Disability' (2001-2002) *16 Georgetown Immigration. Law Journal* 855

J Bhabha 'Demography and Rights: Women, Children and Access to Asylum' *International Journal of Refugee Law* Vol. 16 No.2 227- 243

J Bhabha 'Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights' (2002) *Harvard Human Rights Journal* / Vol. 15, Spring 154

J Bhabha 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum Seekers' (2001) *European Journal of Migration and Law* 3: 283 – 314

J Bhabha and W Young 'Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines' *International Journal of Refugee Law* Vol. 11 No.184 – 125

C Bierwirth 'The Protection of Refugee and Asylum-Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child' *Refugee Survey Quarterly*, Vol. 24 Issue 2 98 – 124

C Breen 'Refugee Law in Ireland: Disregarding the Rights of the Child-Citizen, Discriminating against the Rights of the Child' *International Journal of Refugee Law* Vol. 15 No 4 Pages 750 - 785

R Brett 'Girl Soldiers: Denial of Rights and Responsibilities' (2004) *Refugee Survey Quarterly*, Vol. 23, No. 2

M Candappa 'The right to education and an adequate standard of living: refugee children in the UK' (2001) *International Journal of Children's Rights*

R Cholewinski 'Family reunification and Conditions placed on Family Members: Dismantling a Fundamental Human Right' (2002) *European Journal of Migration and Law* 4: 271 – 290

T Clark 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation' *International Journal of Refugee Law* Vol. 16 No.4 584 - 608

J Crisp 'Meeting the needs and realizing the rights of refugee children and adolescents: from policy to practice' *Refugee Survey Quarterly* Vol 15, No3

M Day 'Sexual Violence and Exploitation: The Experience of refugee Children in Guinea, Liberia and Sierra Leone' (2002) *316 Georgetown Immigration Law Journal*

J E Doek 'The UN CRC: Some Observations on the Monitoring and the Social Context of its Implementation' (2003) *University of Florida Journal of Law and Public Policy Spring* 125.

G Goodwin-Gill 'Unaccompanied Refugee Minors; The Role and Place of International Law in the Pursuit of Durable Solutions' (1995) *The International Journal of Children's Rights* 3: 405 – 416

G Goodwin-Gill 'Asylum 2001 – A Convention and a Purpose' Editorial (2000) *International Journal of Refugee Law Vol. 13 No. 1/2*

G Goodwin-Gill 'The International Protection of Refugees: What Future?' (2000) Editorial *International Journal of Refugee Law Vol. 12 No.1*

B Gorlick 'Human Rights and Refugees: Enhancing Protection through International Human Rights Law' *The Journal of Humanitarian Assistance* available at: <http://www.jha.ac/articles/u030.htm> [accessed 10th April 2006]

B Harrell-Bond 'Can humanitarian work with refugees be humane?' (2002) *Human Rights Quarterly* 24 51-85

C Harvey 'Justice, Migration and Human Rights' (2003) *Oxford Journal of Legal Studies* Vol.23, No.1 147 - 156

J Hathaway 'What's in a Label?' (2003) *European Journal of Migration and Law* 5:1-21

J Hathaway and A Cusick 'Refugee Rights Are Not Negotiable' *14 Georgetown. Immigration Law Journal* 481

A Hunter 'Between the Domestic and the International: The role of the European Union in providing protection for unaccompanied refugee children in the United Kingdom' (2001) *European Journal of Migration and Law* 3: 383 – 410

K Jastram and S Cavalieri 'Human Rights in Refugee Tribunals' (2005) *Refugee Survey Quarterly*, Vol 24 Issue 2

M Kagan 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002-2003) *17 Georgetown Immigration Law Journal* 367

T Kaime 'From lofty jargon to durable solutions: unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child' *International Journal of Refugee Law* Vol. 16, No.3 336-348

- U Kilkelly 'Nsona v. the Netherlands: The Treatment of Minors and the European Convention on Human Rights' (1996) *International Journal of Refugee Law* Vol. 8 No.4
- U Kilkelly 'The Best of Both Worlds for Children's Rights? Interpreting the ECHR via the CRC' (2001) *Human Rights Quarterly* 308
- Judith Kumin 'New Approaches to Asylum: Reconciling Individual Rights and State interests' *Refugee Introduction* Vol.22 No.1 3-5
- H Lambert 'The Conceptualisation of "Persecution" by the House of Lords: Horvath v. Secretary of State for the Home Department' (2001) *International Journal of Refugee Law* Vol. 13 NO 1/2
- J Lowicki and A Pillsbury 'Supporting Young Refugees' Participation in their Own Protection and Recovery: Lessons Learned' (2004) *Refugee Survey Quarterly*, Vol 23, No.2
- D Luca 'Questioning Temporary Protection' (1994) *International Journal of Refugee Law* Vol. 6 535.
- P Margulies 'Children, Parents, and Asylum' (2000-2001) *15 Georgetown Immigration Law Journal* 289
- E Nykanen 'Protecting Children? The European Convention on Human Rights and Child Asylum Seekers' (2001) *European Journal of Migration and Law* 3: 315 – 345
- E D Pask 'Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-making and Representation' (1989) *International Journal of Refugee Law* Vol. 1/2 199-219
- S Peers 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) *European Journal of Migration and Law* 3: 141 – 169
- G Sadoway 'Canada's Treatment of Separated Refugee Children' (2001) *European Journal of Migration and Law* 3: 347 – 381
- Caroline Sawyer and Philip Turpin 'Neither Here Nor There: Temporary Admission to the UK' *International Journal of Refugee Law* Vol. 17, No. 4 688-728
- H Shepherd 'Towards a Common European Asylum System: Asylum, Human Rights, and European Values' *Refugee* Vol.22 No.1 96 – 107
- J Sloth-Nielson 'Children's rights in the South African Courts: An overview since ratification of the UN Convention on the Rights of the Child.' (2002) *The International Journal of Children's Rights* 10: 137-156

D Sutton and T Smith 'Is Europe Failing Separated Children?' *Forced Migration Review* 23: 30

S Takahashi 'Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention' (2004) *Netherlands Quarterly of Human Rights* Vol.20/1 53-74

G van Bueren 'The International Protection of Family Members' Rights as the 21st Century Approaches' (1995) 17(4) *Human Rights Quarterly* 732-734.

D Tolfree 'Child Protection and Participation in Refugee Emergencies' 2004 *Refugee Survey Quarterly* Vol 2: 2

Unpublished Papers

Michael Bell Associates et al. 'Refugees and the London economy: Maximising the Economic Potential & Impact of London's Refugee Communities' Research Report Draft Available on request from www.mba4consultancy.co.uk

BIVS (Berliner Institut für Vergleichende Sozialforschung) *Family Federation Finland and Università Degli Studi Di Firenze* (2000) Unaccompanied Minor Migrants as a Vulnerable Group.

Daniele Calvani 'Initial Overview of the Linguistic Diversity of the Refugee Communities in Cairo' *Forced Migration and Refugee Studies Working Paper* No. (4th September 2003)

L Druke 'Human rights and refugee protection in the context of the EU Integration' Lecture presented at the 'Diplomatic Seminar' South-West University 'Neofit Rilski' Blagoevgrad (22nd April 2004)

G Goodwin-Gill 'Refugees and their Human Rights' Paper presented at the *Barbara Harrell-Bond Lecture* (12th November 2003) All Souls College London www.rsc.ox.ac.uk

C Nicholson 'Oh the shame of it: A first call on available resources for child refugees in South Africa' paper presented at the 4th *World Congress of Family and Children's Rights* (March 2005) Cape Town South Africa available at: www.lawrights.asn.au [accessed on 10th April 2006]

D McNamara and G Goodwin –Gill 'UNHCR and International Refugee protection' *Refugee Studies Programme Working Paper No.2* www.rsc.ox.ac.uk

G Mann and D Tolfree 'Children's Participation in Research: Reflections from the Care and Protection of Separated Children in Emergencies Project' Commissioned by *Save the Children International*.

S Maloney 'Comparative policies and practices in North America and Europe' Paper presented at the *Conference and Symposium Report on the Transatlantic*

Workshop on Unaccompanied / Separated children Georgetown University (June 2001).

M Robinson 'Harnessing Energies to Make Children's Rights a Reality' paper presented at the Hon. Dr. Peter Nygh memorial Lecture at the 4th World Congress on Family Law and Children's Rights, (20th March 2005) Cape Town South Africa. available at : http://www.lawrights.asn.au/html/2005_papers.htm [accessed 10th April 2006]

A Skelton 'No Dumping: litigating for the proper treatment of unaccompanied foreign children in South Africa' Paper presented at the 4th World Congress on Family Law and Children's Rights (20th - 23rd March 2005) Cape Town. Available at:http://www.lawrights.asn.au/html/2005_papers.htm [accessed 10th April 2006]

K Williams 'AIDS, Gender and the Refugee Protection Framework' Refugee Studies Centre Working Paper No.19 available at:www.rsc.ox.ac.uk [accessed 10th April 2006]

M Zard, C. Beyani and C. Anselm Odinklau 'Refugees and the African Commission on Human and Peoples' Rights' available at:<http://www.fmreview.org/pdf/Zard.pdf> [accessed 10th April 2006]

Reports:

Amnesty International 'A Stolen Future: Protecting the rights of refugee children' AI Index ref: ACT 31/04/97: available at <http://web.amnesty.org/library/index/ENGA310041997> [accessed 10th April 2006]

Amnesty International 'United States of America Unaccompanied Children in Immigration Detention' available at: http://www.amnestyusa.org/refugee/children_detention.html [accessed 10th April 2006]

Australian Human Rights and Equal Opportunities Commission, 'A Last resort' The National Inquiry into Children in Immigration Detention available at:<http://www.hreoc.gov.au/human%5Frights/children%5Fdetention%5Freport/index.html> [accessed 10th April 2006]

M Ewer 'From Streets to the States: Asylum Claims from Guatemalan and Honduran Street Children' American Immigration Law Foundation available at: www.aifl.org [accessed at 10th April 2006]

S Grant 'International Migration and Human Rights' paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (September 2005)

Lawyers for Human Rights (South Africa) Submission for Inclusion in the Draft Children's Bill July 2004 available at:www.lhr.org.za [accessed 10th April 2006]

Dennis McNamara 'Promises Broken' *Human Rights Watch* available at:
<http://www.hrw.org/campaigns/crp/promises/refugees.html> 02/01/2006
[accessed 10th April 2006]

Human Rights Watch 'Easy Targets: Violence against Children Worldwide'
available at:<http://www.hrw.org/reports/2001/children/children.pdf> [accessed
10th April 2006]

Human Rights Watch 'Forgotten Children of War: Sierra Leonean Refugee
Children in Guinea' available at:<http://www.hrw.org/reports/1999/guinea/>
[accessed 10th April 2006]

Human Rights Watch 'United States Locked Away: Immigration Detainees in
Jails in the United States' (September 1998) Vol. 10, No. 1 (G) available at
<http://www.hrw.org/reports98/us-immig/> [accessed 10th April 2006]

Joint Committee on Human Rights 'Government Responses to Reports from the
Committee in the last Parliament' Eighth Report of Session 2005–06 (23
January 2006) Appendix 3; 'Government Response to the Committee's
Seventeenth Report of Session 2004-05 on The Review of International Human
Rights Instruments' Available at the website of the United Kingdom Parliament:
<http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/104/104.pdf>
[accessed 10th April 2006]

JUSTICE (paper prepared on behalf of the NGO Human Rights Forum) 'Review
of the UK's Reservations to International Human Rights Treaty Obligations'
available at: [http://www.liberty-human-rights.org.uk/resources/policy-
papers/policy-papers-2002/pdf-documents/interventions-dec-2002.pdf](http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/interventions-dec-2002.pdf) [accessed
10th April 2006]

G Machel 'Impact on Armed Conflict on Children' Report Commissioned by
the Secretary-General of the UN 1996 available
at:http://www.unicef.org/graca/a51-306_en.pdf [accessed 10th April 2006]

World Vision Discussion Paper 9 "Kid's talk: freedom of expression and the
UN convention on the rights of the child" available
at:<http://www.worldvision.org.uk/resources/childparticipation.pdf> [accessed
12th March 2006].

Save the Children and the Separated Children In Europe Programme 'Position
Paper on: Returns and Separated Children' September 2004 available at:
[http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/648_dafvo
11.pdf](http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/648_dafvo11.pdf) [accessed 10th April 2006]

Save the Children and the Separated Children in Europe Programme 'Statement
on the Detention of Separated Children in Europe' (June 2003) available at:

http://www.savethechildren.org.uk/scuk_cache/scuk/cache/cmsattach/2414_no_place_for_a_child.pdf [accessed 10th April 2006]

Sandy Ruxton 'Separated Children and EU Asylum and Immigration Policy'. Report commissioned by Save the Children 2003 available at: [www.separated-children-europe-programme.org/separated children/publications/reports/ -22k](http://www.separated-children-europe-programme.org/separated_children/publications/reports/-22k) [accessed 10th April 2006]

UNHCR Documents

Conclusions Adopted by the Executive Committee on the International Protection of Refugees 1975 – 2004 (Conclusion No. 1 – 101)

'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' U.N. Doc. HCR/IP/4/Eng/REV.1 (1992).

'Executive Committee of the High Commissioner's Programme 44th Session: Sub-Committee of the Whole on International Protection' Doc. No. EC/SCP/82 23rd Meeting (6 August 1993)

'Refugee Children: Guidelines on Protection and Care' Geneva (1994)
<http://www.unhcr.org/cgi-bin/texis/vtx/protect>

'Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum' UNHCR (February 1997)

'Summary Conclusion: membership of a particular social group' Expert Roundtable organised by the UNHCR and the International Institute of Humanitarian Law, San Remo, Italy, (6-8 September 2001) available at: <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=419cbe9e4> [accessed 10th April 2006]

'Statistics and Registration: A Progress Report' Executive Committee of the EC/50/SC/CRP.10 High Commissioner's Programme 7 February 2000 Standing Committee, 17th meeting available at: <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=3c99bae14> [accessed 10th April 2006]

Report of the Secretary-General to the United Nations General Assembly on Protection and assistance to unaccompanied and separated child refugees A/56/333 (7 September 2001)

Valid International 'Meeting the rights and protection needs of refugee children: An independent evaluation of the impact of the UNHCR activities.' Oxford, UK EPAU/2002/02 available at: <http://www.unhcr.org/cgi-bin/texis/vtx/research/opendoc.pdf?tbl=RESEARCH&id=3cd6363aa> [accessed 10th April 2006]

'Trends in Unaccompanied and Separated children Seeking Asylum in Industrialized Countries, 2001 – 2003' (July 2004) available at: <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opedoc.pdf?tbl=STATISTICS&id=40f646444> [accessed 10th April 2006]

Executive Committee 'Conclusions on the Civilian and Humanitarian Character of Asylum' (2002) 53rd Session No 94

Population and geographical Data Section Division of Operational Support UNHCR Geneva '2004 Global Refugee Trends' available at: <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opedoc.pdf?tbl=STATISTICS&id=42b283744> [accessed 10th April 2006]

Executive Committee of the High Commissioner's Programme 'Protracted Refugee Situations' Standing Committee 30th Meeting EC/54/SC/CRP.14, 10 (June 2004) available at: <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opedoc.pdf?tbl=STATISTICS&id=40ed5b384> [accessed 3rd April 2006]

M Sinclair 'Learning for a future: refugee education in developing countries' Chapter 1 *Education in Emergencies* Chapter 1 available at: <http://www.unhcr.org/cgi-bin/texis/vtx/home?id=search> [accessed 10th April 2006]

UNICEF State of the World's Children 2006: Excluded and Invisible' available at: www.unicef.org.uk/publications/pub_detail.asp?pub_id=27 [accessed at 10th April 2006]

Concluding Observations of the Committee on the Rights of the Child Available from the Treaty Body website: <http://www.unhchr.ch/tbs/doc.nsf> [accessed 5th April 2006]

A review of all Concluding Observations issued since 2000 was undertaken in the preliminary research stages of this paper. Specifically quoted are:

Austria, CRC/C/15/Add.251;
Bangladesh CRC/C/15/Add.221
Botswana, CRC/C/15/Add.242;
Croatia, CRC/C/15/Add.243;
Denmark, CRC/C/DNK/CO/3
Eritrea CRC/C/15/Add.204
Germany CRC/C/15/Add.226
Panama, CRC/C/15/Add.233.
Sweden, CRC/C/15/Add.248

General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5

General Comment No. 6 (2005) Treatment of Unaccompanied and Separated Children outside of their Country of Origin. CRC/GC/2005/6

ICESCR Committee's General Comment on The Aims of Education: 17/04/2001. CRC/GC/2001

General Comment No. 09: Human Rights Commission treatment of persons deprived of liberty (Art. 10): 30/07/82.

General measures of implementation for the Convention on the Rights of the Child : 03/10/2003. CRC/GC/2003/5. (General Comments)

Communication 1069/2002 before the Human rights Committee, under the Optional Protocol. CCPR/C/79/D/1069/2002

Declaration on Territorial Asylum adopted by General Assembly resolution 2312 (XXII) of 14 December 1967

Primary Sources

Universal Declaration of Human Rights G.A. Res. 217A, UN. GAOR, 3d Sess, Supp. No. 16, U.N. Doc. A/810 (1948)

Convention relating to the Status of Refugees adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950. Entry into force: 22 April 1954, in accordance with article 43

UNESCO Convention Against Discrimination 1960 adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization on 14 December 1960 and entered into force on 22 May 1962.)

International Convention on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

International Covenant on Economic Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27

1967 Protocol Relating to the Status of Refugees Resolution 2198 (XXI) Adopted by the United Nations General Assembly, entered into force 4 October 1967

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entered into force on 18 January 2002

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/54/263 of 25 May 2000, entry into force 12 February 2002

United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Adopted by General Assembly resolution 40/33 of 29 November 1985 (hereafter 'Beijing Rules') Rule 13. Available at:
http://www.unhcr.ch/html/menu3/b/h_comp48.htm

European Convention on Human Rights Rome 4 November 1950

African Charter on Human and People's Rights adopted June 27 1981 OAU DOC. CAB/LEG/67/3 rev.5, 21 I.L.M. (1982) entered into force October 21st 1986

African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990) entered into force Nov. 29 1999

Case Law:

European Court of Human Rights:

A v UK [1998] 2 FLR 959

Costello-Roberts v. the United Kingdom, (1993) A 247-C,

Beldjoudi v. France - 12083/86 [1992] ECHR 42 (26 March 1992)

Berrehab v. The Netherlands - 10730/84 [1988] ECHR 14 (21 June 1988)

Chahal v. The United Kingdom - 22414/93 [1996] ECHR 54 (15 November 1996)

Cruz Varas And Others v. Sweden - 15576/89 [1991] ECHR 26 (20 March 1991)

Dalia v. France - 26102/95 [1998] ECHR 5 (19 February 1998)

Gul v Switzerland [1996] IIHRL 11 (19 February 1996) 570

Mehemi v. France - 25017/94 [1997] ECHR 77 (26 September 1997)

Nsona v. The Netherlands - 23366/94 [1996] ECHR 62 (28 November 1996)

V. v. The United Kingdom - 24888/94 [1999] ECHR 171 (16 December 1999)

Vilvarajah And Others v. The United Kingdom - 13163/87;13164/87;13165/87;. [1991] ECHR 47 (30 October 1991)

South Africa:

Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (2000 (11) BCLR 1196)

De Vos. J. Centre for Child Law and Ellis NO v Minister of Home Affairs and Others 2005 (6) SA 50 (T)

S v Kwalase 2000 (2) SACR 135 (C)

United States of America

Reno v. Flores, 507 U.S. 292 (1993)

United States Department of Justice Board of Immigration Appeals Interim Decision 3278 (BIA); 21 I. & N. Dec. 357, 1996 BIA LEXIS 15 In Re Fauziya Kasinga, Applicant File A73 476 695-Elizabeth Decided June 13, 1996.

United Kingdom

Regina v. Secretary of State For The Home Department, Ex Parte Adan Regina v. Secretary of State For The Home Department Ex Parte Aitseguer; [2001] 2 WLR 143 HL

Legislation:

Migration Legislation Amendment Act (No. 6) 2001 (Cth), section 5 [Australia]
Constitution of South African, Act 11111 of 1996.

African Commission

John D. Ouko v. Kenya, African Commission on Human and Peoples' Rights, Comm. No. 232/99 (2000)

Rights International v. Nigeria Communication 215/98 - Rights International Nigeria

Organisation Mondiale Contre La Torture and Others v. Rwanda African Commission on Human and Peoples' Rights, Comm. Nos. 27/89, 46/91, 49/91 and 99/93 (1996)

European Union

All Documents available at:

http://europa.eu.int/comm/justice_home/doc_centre/asylum/doc_asylum_intro_en.htm

[Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status](#)

[Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers](#)

Dublin Convention: State Responsible For Examining Applications for Asylum Lodged in one of the Member States of the European Communities

Tampere Summit Conclusions, 15-16 October 1999

European Social Charter, 1961

Websites

United Nations International Children's Fund (UNICEF) www.unicef.org

United Nations High Commissioner for Refugees www.unhcr.org

Women's Commission Reports: www.womenscommission.org

Office of the High Commissioner for Human Rights www.ohchr.org

The Separated Children in Europe Programme www.sce.gla.ac.uk

Save the Children www.savethechildren.org