

FAILING THE REFUGEE CHILD: GAPS IN THE REFUGEE CONVENTION RELATING TO CHILDREN

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“Although the definition of a refugee contained in Article 1(A)2 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol... applies to all individuals regardless of their age, it has traditionally been interpreted in light of adult experiences. This has meant that many refugee claims made by children have been assessed incorrectly or overlooked altogether.”¹

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1. U.N. High Comm’r for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009) (hereinafter “UNHCR Guidelines”), <http://www.unhcr.org/50ae46309.html>. (For purposes of this article, I will adhere to the Convention on the Rights of the Child approach to the age of majority for children – defining children as under 18 years of age).

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I. INTRODUCTION

The 1951 Convention relating to the Status of Refugees (“Refugee Convention”)² was a seminal document in the transition from state responsibility to the individual rights regime in the wake of human rights atrocities committed during World War II.³ The document was the culmination of several prior attempts to address specific refugee crises,⁴ and made universal the principle of non-refoulement: the duty not to return a person to persecution.⁵ For all its foresight, however, the document could not anticipate the shape of future refugee crises. A 2016 report issued by the United Nations High Commissioner for Refugees (UNHCR) found that an “unprecedented 65.6 million people around the world have been forced from home[; a]mong them are nearly 22.5 million refugees, *over half of whom are under the age of 18.*”⁶ While children constitute more than half of the global refugee population, the document designed to protect refugees fails to account for the special circumstances of childhood.

This article evaluates the failures of the Refugee Convention relating to children. The gaps in protection of children under the Refugee Convention come in many forms: gaps in the substantive law definition of the term “refugee,” the Refugee Convention’s lack of procedural guidance in applying the definition of “refugee” to children, gaps in protection from adverse government policies on immigration enforcement, and gaps in positive law obligations of States to help integrate children into their new country. These gaps are explored in the sections below, but generally they paint a clear picture: the international standard is failing refugee children, and more must be done to protect children seeking asylum.

The first section of this article analyzes the historical context in which the Refugee Convention and the rights of children emerged. This section provides background for how the Refugee Convention came to lack specific protections

2. U. N. Convention relating to the Status of Refugees, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter “Refugee Convention”]; Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267, [hereinafter “Refugee Protocol”] (The articles of the Refugee Convention, relevant to this article, are adopted by incorporation into the Refugee Protocol. The United States has only adopted the Protocol. As a result, I try to refer to the “Refugee Protocol” when examining U.S. practices, and the “Convention” when discussing universal obligations. That said, there are likely times when the two are used somewhat interchangeably.).

3. *See generally* The Refugee Convention of 1951: The Travaux Préparatoires analyzed with a commentary by Dr. Paul Weis, <https://www.unhcr.org/4ca34be29.pdf> (last visited Jan. 22, 2019).

4. Shauna Labman, *Looking Back, Moving Forward: The History and Future of Refugee Protection*, 10 CHI.-KENT J. INT’L & COMP. LAW (2010). (The League of Nations attempted to create documents to address the Russian refugee flows following the fall of the Russian empire and the Armenian refugees fleeing abuses by the Ottoman Empire.).

5. *Id.*

6. U.N. High Comm’r for Refugees, *Figures at a Glance*, (2016) (emphasis added), <http://www.unhcr.org/en-us/figures-at-a-glance.html> [hereinafter “UNHCR Figures at a Glance”].

for children. It also explains the current conceptualization of children as rights holders.

The second section evaluates gaps in the legal framework of the Refugee Convention using the United States' implementation as a case study. The legal framework for refugee children in the United States, adopted pursuant to the Refugee Convention, fails to incorporate affirmative protections for children such as a best interests standard for child asylum seekers, a definition of the term "refugee" that includes private-sphere persecution (commonly experienced by child refugees), and child-appropriate procedures to ensure due process in adjudicating child asylum cases.

This section continues to evaluate the gaps in the legal framework of the Refugee Convention by exploring adverse enforcement policies applied to child refugees in the United States. The Refugee Convention does not go far enough to protect children from adverse enforcement measures such as family separation. These policies demonstrate that more robust and clearly defined state obligations vis-à-vis children are necessary.

Section three looks at the gaps in positive law protections of children under the Refugee Convention. As the United States has not adopted international human rights treaties that create positive law obligations,⁷ the Article looks to the European Union (EU) to understand these gaps in the Refugee Convention. This section explains how the lack of positive law obligations in the Refugee Convention has created disparate provision of services for refugee children among EU member nations.

Finally, this Article closes with suggestions for how the international community can move forward, understanding that the Refugee Convention does not adequately protect children. As a starting point, human rights policy experts should investigate the comprehensive failures of the Refugee Convention as it relates to children. By engaging in a comparative analysis of these gaps by country, the full scope of deficiencies of the Refugee Convention will emerge. Once those deficiencies are understood, it will be possible to remedy the gaps and ensure that the refugee child is fully protected under international norms and practice.

7. The U.S. has ratified the International Convention on Civil and Political Rights which contains mostly negative law obligations—the obligation of the state to refrain from impinging upon an individual citizen's human rights. *See generally*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 (1967), 999 U.N.T.S. 17; Compare this with the International Convention on Economic Social and Cultural Rights or the Convention on the Elimination of All Forms of Discrimination Against Women which contain an array of positive law obligations for state parties including a duty to create government systems or services designed to meet the rights of the individuals contained in these Conventions. *See generally* Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. [hereinafter "CEDAW"]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter "ICESCR"].

II. CHILDREN AS AN AFTERTHOUGHT: THE INEVITABLE EXCLUSION OF CHILD-SPECIFIC NEEDS FROM THE REFUGEE CONVENTION

The Refugee Convention was adopted on July 28, 1951, before the concept of treating children as children, rather than property or adults in miniature, fully developed. This concept of children and childhood is a relatively recent phenomenon developing with the rise of children's rights during the latter half of the last century.⁸ The identification of children as individual rights holders did not fully develop until the adoption of the Convention on the Rights of the Child ("CRC") in 1989. The idea that children should be entitled to enjoy childhood and develop into adulthood was codified in the CRC, but the history of child rights clarifies why the Refugee Convention of 1951 does not contain child-specific provisions nor appear to contemplate the child as a rights holder.

At the end of the nineteenth century, a movement to protect children emerged in the United States emphasizing children were not simply the property of their parents.⁹ The movement began with non-government actors seeking to "prevent cruelty to children."¹⁰ Rather than merely prosecuting adults who acted criminally toward children, the movement sought to provide sustained protection to children who were subject to such abuses.¹¹ This movement countered the perception that children were merely quasi-property or economic assets and moved toward a paradigm of child welfare.¹²

These same principles of child welfare emerged in the international arena in 1924 through the League of Nations' Geneva Declaration on the Rights of the Child,¹³ which contained five principles of child welfare and development.¹⁴ Following World War II, international humanitarian law treaties added, for the first time, protective provisions aimed at reducing harm to children during times of war.¹⁵ The Fourth Geneva Convention Relative to the Protection of

8. See generally Library of Congress, *Children's Rights: International Laws* (July 2007), <https://www.loc.gov/law/help/child-rights/international-law.php>.

9. *Id.*

10. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAMILY L.Q. 449, 452 (2008).

11. Children's Rights: International Laws, *supra* note 8.

12. *Id.*

13. League of Nations Geneva Declaration on the Rights of the Child, Sept. 26, 1924.

14. *Id.* (stating that "(1) [t]he child must be given the means requisite for its normal development, both materially and spiritually; (2) [t]he child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored; (3) [t]he child must be the first to receive relief in times of distress; (4) [t]he child must be put in a position to earn a livelihood, and must be protected against every form of exploitation; (5) [t]he child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.").

15. *Children's Rights: International Laws*, *supra* note 8 (stating that "in the international context, '[t]he growth of children's rights in international and transnational law has been identified as a striking change in the post-war legal landscape'").

Civilians During Times of War (“Geneva IV”)¹⁶ was “the first international instrument to provide explicitly for the protection of children [as civilians] during armed conflict.”¹⁷ The Protocols to the Geneva Conventions presented the first ever codification on the prohibition of the use of children in armed conflict.¹⁸ These documents joined the movement to protect children – recognizing special care must be taken to preserve the well-being of children. However, these humanitarian law instruments, finalized in 1949, largely do not address the child as a rights-holder. Instead, they regulate the behavior of adults vis-à-vis children in the theatre of war.

In 1959, nearly a decade after the Refugee Convention was written, the world community began to discuss whether children were entitled to certain rights. The first instrument to accomplish this was not binding but a mere declaration of principles that concern children: The Declaration on the Rights of the Child.¹⁹ It took another thirty years to complete the CRC, a document that comprehensively sought to identify a child as a holder of specific rights tailored to the status of

16. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 24, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, [hereinafter “Geneva Convention IV”].

17. Jaap Doek, Disarmament Forum’s Children and Conflict, *International Legal Framework for the Protection of Children in Armed Conflict*, <http://www.unidir.org/files/publications/pdfs/children-and-conflict-en-315.pdf> (Last visited Jan. 22, 2019) (“Under Article 24 states parties to a conflict should ‘take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of war, are not left to their own resources’ and should ‘facilitate the reception of such children in a neutral country for the duration of the conflict.’ Furthermore, children younger than 12 should ‘be identified by the wearing of identity discs’. A similar provision can be found in Article 50 regarding children in occupied territories, with the explicit prohibition of changing the child’s personal status or enlisting them in organizations of the occupying power. During internment, families—in particular parents and children—shall stay in the same place (Article 82), and ‘expectant and nursing mothers and children under fifteen years of age, shall be given additional food’ (Article 89). However, there are not any child-specific provisions in the articles on the implementation of penal laws in occupied territories or in Chapter IX, on penal and disciplinary sanctions (Articles 117–126).”)

18. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 77(2), June 8, 1977, 1125 U.N.T.S. 3, 7 [hereinafter “Geneva Protocol I”]. (Article 77 – Protection of children: 1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason; 2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest; 3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war; 4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5; 5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed).

19. The U.N. Declaration of the Rights of the Child. G.A. Res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 [hereinafter “UN Declaration on the Rights of the Child”].

childhood. The CRC, adopted in 1989, finally realized the inherent, special rights associated with childhood and codified the conceptualization of human rights from a child's perspective.

The Refugee Convention of 1951 was unable to benefit from the vast understanding, social and scientific, that led to the creation of the Convention on the Rights of the Child in 1989. In order to properly protect refugee children, the world community needs to create a paradigm designed to address and complement the specific needs of children. Research must be undertaken to fully understand and analyze the extent of the existing gaps in protection and to develop best practices for children seeking asylum. One starting point is through a review of U.S. refugee law, as explored below.

III. GAPS IN PROTECTION UNDER THE REFUGEE DEFINITION: AN ANALYSIS OF U.S. REFUGEE LAW AND POLICY

The current Refugee Convention presents a broad range of complications for children seeking asylum in the United States. Most fundamental among those complications, the document's text contains legal elements for asylum directed toward adult refugees. As a result, UNHCR and other adjudicators of refugee status are forced to map the adult-focused elements of the definition "refugee" onto a child-appropriate framework. This approach falls short for children, as evidenced by the series of guidance from UNCHR and other organizations explaining how adjudicators might apply the document to children.²⁰ Ultimately, the analysis below demonstrates how a nebulous and uncertain protection regime for children has emerged, leaving a general lack of predictability around the application of refugee law to children in the United States.

The United States chose to adhere to the guidance provided in the Refugee Convention when it ratified the 1967 Protocol relating to the Status of Refugees ("Refugee Protocol").²¹ The Refugee Act of 1980²² indicated the United States' intention to conform to international standards. Indeed, the Refugee Act of 1980 contains nearly identical language to Article 1 of the Refugee Protocol.²³

20. See UNHCR Guidelines, *supra* note 1; see also U.N. High Comm'r for Refugees, Refugee Children: Guidelines on Protection and Care (1994), <https://www.refworld.org/docid/3ae6b3470.html> [hereinafter "UNHCR Guidelines on Protection and Care"]; see also *Guidelines for Children's Asylum Claims, Lesson Plan Overview, Asylum Officer Basic Training Course*, U.S. CITIZENSHIP & IMMIGRATION SERV'S (Mar. 21, 2009) https://cliniclegal.org/sites/default/files/AOBTC_Lesson_29_Guidelines_for_Childrens_Asylum_Claims_0.pdf (last visited Jan. 22, 2019) [hereinafter "USCIS Guidelines"].

21. Refugee Protocol, *supra* note 2.

22. Refugee Act, Pub. L. No. 96-212, 94 Stat. 102. (codified at 8 U.S.C. § 208) (1980).

23. Compare The Refugee Convention Article 1 (referenced in Refugee Protocol Article 1) (states that "[f]or the purposes of the present Convention, the term 'refugee' shall apply to any person who: . . . 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. In the case of a person who has more

Evaluating the Refugee Act provides an opportunity to view how the United States treats children pursuant to the Refugee Protocol. In doing so, several gaps in protection of refugee children become evident.

A. GAPS IN AFFIRMATIVE PROTECTIONS FOR THE CHILD REFUGEE

In assessing the application of the Refugee Convention to children in the U.S., gaps in affirmative protections under the Convention clearly emerge. First, the Protocol is generally interpreted in light of adult experiences resulting in incorrect assessments of children's eligibility for refugee status.²⁴ Considering these deficiencies, the UN Committee on the Rights of the Child (the "Committee") has urged adjudicators to

[interpret refugee status] in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children. Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds.²⁵

However, these instructions provide little, if any, concrete guidance on how the text of the Convention *actually* applies to children. This requires adjudicators to seek elaboration from additional sources. For example, UNHCR Guidelines state "factors such as rights specific to children, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status."²⁶ Yet, these suggestions are also imprecise,

than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.") with the Refugee Act 8 U.S.C. § 1158(a) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.").

24. UNHCR Guidelines, *supra* note 1, at ¶ 1.

25. U.N. Comm. on the Rights of the Child, General Comment No. 6 ¶ 74 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, Sep. 2005, <http://www.unhcr.org/refworld/docid/42dd174b4.html> (hereinafter "CRC, General Comment No. 6").

26. UNHCR Guidelines, *supra* note 1, at ¶ 4.

leaving the question of entitlement to protection under refugee law uncertain and unpredictable in its application to children. These gaps in affirmative protections have also lead to the absence of a child protective, best interests standard to evaluate children's refugee status as well as deficiencies in the substantive and procedural application of the asylum standard to children.

1. The Failure to Include the Paramount Child Right: the lack of a best interests obligation under international refugee law

As detailed above, the proposition that children should enjoy special protection was universally acknowledged through the unanimous adoption of the multi-lateral U.N. Declaration on the Rights of the Child in 1959.²⁷ The Declaration first announced an approach to child protection, setting out the proposition that the best interests of the child should be the paramount consideration in implementing child protection laws.²⁸ That principle was finally codified as being paramount in *all* decisions concerning the child, not merely questions of child protection, under the CRC as adopted in 1989.²⁹ Every country in the world has ratified the CRC with the sole exception of the United States.³⁰

The right of the child to have their best interests considered is the single most universally adopted principle of the CRC.³¹ While the best interests principle “has long been recognized by the civil and common law systems, in the context of family law and child welfare legislation[,] [i]ts transformation into a principle that applies to all actions concerning children. . . is one of the most significant accomplishments of the CRC.”³² Defining the scope of best interests is critical to

27. Luisa Blanchfield, Cong. Research Serv., R40484, *The United Nations Convention on the Rights of the Child: Background and Policy Issues* 1 (2010).

28. U.N. Declaration of the Rights of the Child, *supra* note 19 (stating: “Principle 2 The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration”).

29. U.N. Convention on the Rights of the Child, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 I.L.M. 1448, at art. 3(1), [hereinafter “CRC”] (stating that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”).

30. U.N. Treaty Collection, *Status of Treaties: The Convention on the Rights of the Child*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (last visited Jan. 22, 2019).

31. U.N. Children's Fund [UNICEF], *Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, published in conjunction with the Centre for Children's Rights, Queen's University Belfast, at page 4, available at <https://www.qub.ac.uk/research-centres/CentreforChildrensRights/filestore/Fileupload,368351.en.pdf>, [hereinafter “UNICEF Study”], (explaining that “Article 3 of the CRC (the best interests of the child) was the general principle that was most likely to be represented in domestic law, and most commonly in areas of child protection, alternative care and family law but sometimes in areas such as juvenile justice. . . and immigration. . .”).

32. U.N. Children's Fund [UNICEF], *Law Reform and Implementation of the Convention on the Rights of the Child*, published by the UNICEF Innocenti Research Centre, at 23, available at https://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf.

understanding why its absence presents such a problem for refugee children in the United States.

The U.N. Committee describes the best interests standard as “expressing one of the fundamental values of the Convention. . . .”³³ In order to explain the fundamental need for best interests determinations, the Committee developed a General Comment “on the right of the child to have his or her best interests taken as primary consideration.”³⁴ The twenty-one page document details the legal analysis and general principles applicable to a best interests determination.

The applicability of the principle is sweeping. General Comment 14 sets out, as a matter of procedure,

that every action relating to a child or children has to take into account their best interests as a primary consideration. The word “action” does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.³⁵

This directive indicates that *every decision* involving a child must be made with due regard for the best interests of the child. This rule applies to anyone, public or private, taking actions concerning a child.³⁶ The result is that *any* decision impacting a child, whether it is made in the public sphere by courts or administrative agencies or by private social welfare agencies, must give due consideration to the best interests of the child.

Moreover, the Comment demonstrates that the weight given to best interests is that of “paramount” importance to the Convention and to the rights of the child. Those who assess best interests must give the analysis *paramount consideration*: “[t]he words ‘shall be’ place a strong legal obligation on States and mean that States may not exercise discretion as to whether children’s best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.”³⁷ The Committee described the best interests standard as “a right, a principle and a rule of procedure based on an assessment of all elements of a child’s or children’s interests in a specific situation.”³⁸ Taken together, this language from the Convention and Comment makes clear that the international

33. Comm. on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, ¶1)*, ¶ 1, U.N. Doc. CRC/C/GC/13 (May 29, 2013), http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf [hereinafter “CRC General Comment 14”].

34. *Id.* at ¶ 6 (stating that “6. The Committee underlines that the child’s best interests is a threefold concept: (a) A substantive right. . . (b) A fundamental, interpretative legal principle. . . (c) A rule of procedure.”).

35. *Id.* at ¶ 17.

36. “The obligation of the States to duly consider the child’s best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children. . . .” *Id.* (art. 18, ¶ 1).

37. *Id.* at ¶ 36.

38. *Id.* at ¶ 46.

standard is meant to compel all decision makers to give significant consideration to a child's best interests in any decision that will impact a child.

As a practical matter, the substantive best interests determination is a case-by-case analysis that contemplates balancing all of the rights of the child contained in the CRC. These rights include: the right of the child to have their views be given due weight and consideration in accordance with their age and maturity,³⁹ the right of a child to preserve their identity,⁴⁰ the right to family integrity or environment,⁴¹ the right of a child to care, protection, and safety,⁴² and the right of a child to health and education.⁴³ In the end, the rights of a child contained within the CRC cannot be properly protected without employing a best interests analysis.

The best interests principle, however, does not appear in the Refugee Convention. Since the United States is not a party to the CRC and the Refugee Convention lacks a best interests standard, there is no obligation that the United States contemplate the best interests of a child-seeking asylum.⁴⁴ This has real consequences for children presenting themselves for asylum in the United States because the United States also has no best interests standard for children under its own immigration laws.⁴⁵

While the U.S. Supreme Court has explained that children cannot simply be treated as "adults in miniature," that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them,"⁴⁶ this fundamental understanding of children has not been extended to the immigration law context.⁴⁷ Instead, children in immigration and asylum proceedings are treated exactly like adults. The language of consideration for best interests appears only in one provision of law: the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).⁴⁸ Pursuant to the TVPRA, "best interests" set the standard for any determinations made by the

39. CRC, *supra* note 29, at art. 12.

40. CRC, *supra* note 29, at art. 8.

41. CRC, *supra* note 29, at arts. 9, 18 & 20.

42. CRC, *supra* note 29, at arts. 3(2) & 19.

43. CRC, *supra* note 29, at art. 24.

44. The United States, as a signatory to the CRC, has a general obligation to refrain from engaging in acts that contravene the object and purpose of the treaty. *See* Vienna Convention on the Law of Treaties, art. 16, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (*entered into force* Jan. 27, 1980) ("[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when. . . [i]t has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty.").

45. *See generally* Immigration and Nationality Act, 8 U.S.C. § 1101 (1952) [hereinafter "INA"].

46. *See also* AMERICAN BAR ASSOCIATION, DIVISION FOR PUBLIC EDUCATION, THE HISTORY OF JUVENILE JUSTICE, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf> (last visited Jan. 22, 2019); *JDB v. North Carolina*, 546 U.S. 261, 273-274 (2011); *Miller v. Alabama*, 567 U.S. 470 (2012).

47. *See generally* INA, *supra* note 45.

48. William Wilberforce Trafficking Victims Protection Reauthorization Act, 8 U.S.C. § 1232 (2008) [hereinafter "TVPRA"].

federal government as it relates to custody placements for unaccompanied immigrant children.⁴⁹ The result of this statute is that unaccompanied children seeking asylum are not detained with adults, and most of them enjoy a less restrictive environment than a jail. No other facet of federal immigration law or policy contemplates the application of a best interests standard for children.⁵⁰

The failure to incorporate a best interests standard under United States immigration law results in the implementation of the Immigration and Nationality Act with equal treatment of refugee children and adults. The rules of immigration law are applied to children in the same manner that they are applied to adults. Advocates for the rights of child migrants have made efforts to redress this deficiency in the law. The Young Center, for example, convened an inter-agency government task force to develop a “Framework for Considering the Best Interests of Immigrant Children.”⁵¹ The non-binding document was designed to ensure that decision-makers “would consider a child’s best interests as part of each decision along the continuum of a child’s care—from apprehension, to custody, to release, to a decision on the child’s legal claim, including the possibility of repatriation—and articulates specific factors to address as part of those decisions.”⁵² The current Administration has not made an effort to subscribe to these best interests principles. Absent a structured application of best interests under immigration law, children will continue to be treated exactly like adults under U.S. immigration law and administrative policy, including refugee children.

Refugee children also do not benefit from a best interests standard under the application of the Refugee Act of 1980 in applying the refugee definition.⁵³ Instead, children can be repatriated absent a determination that the child’s experience fits the definition of a refugee. This is true even where it is clearly contrary to the child’s best interests, safety, and well-being to be returned. In short, if a child is not determined to be a refugee, as defined by the United States’ implementation of the Refugee Convention, then that child can be repatriated to the country from which protection was sought even if it is dangerous or even deadly to do so. This is particularly problematic where the U.S. interpretation of the term

49. *Id.* (requiring a placement that is the “least restrictive setting that is in the best interests of the child”).

50. 8 U.S.C. § 1101(a)(27)(J). The special immigrant juvenile visa contains “best interests” language relating to state court orders for children who have been abused, abandoned or neglected. But, the language is only employed as it relates to children found before domestic courts of appropriate jurisdiction, in which this child protection approach is generally required. “Best interests” language or standards for children are not required by law to be applied to children by any federal agency (Department of Homeland Security, Department of State, Department of Justice) charged with adjudication or enforcement of immigration laws.

51. YOUNG CENTER FOR IMMIGRANT CHILDREN’S RIGHTS, SUBCOMMITTEE ON BEST INTERESTS OF THE INTERAGENCY WORKING GROUP ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED IMMIGRANT CHILDREN (2016), <https://www.law.georgetown.edu/human-rights-institute/wp-content/uploads/sites/7/2017/07/Best-Interests-Framework.pdf> (last visited Jan. 22, 2019).

52. *Id.* at 2.

53. Refugee Act, *supra* note 22.

“refugee” has been narrowly construed to exclude certain types of persecution, often experienced by children, from the definition of the term “refugee,” as explored below.

2. Public-Sphere Persecution versus Private-Sphere Persecution: How children are marginalized from the definition of “refugee” under the Refugee Convention

The substantive grounds for defining a “refugee” under the Refugee Convention do not clearly contemplate the experience of children. The enumerated grounds include race, religion, nationality, political opinion, and membership in a particular social group (“PSG”). The limits of the enumerated grounds, as explored below, reflect the failure at that time to integrate children’s rights into the international human rights law regime. The failure to draft human rights treaties from the perspective of children has been part of the evolution of human rights and shares similarities with the often-examined rights of women, namely the well-examined gendering of the public/private divide.

Feminist discourse has identified a gendered “public/private” divide as a central obstacle to accomplishing the full protection of women’s rights.⁵⁴ Namely, that in defining what interests should be protected in the human-rights regime—and subject to international supervision—the international community has left out supervision of the private sphere:

Traditionally, only the relationship between individuals and the state – the ‘public sphere’ – has come within the boundaries of human rights law, while regulation of the ‘private’ spheres of family and the relationship between individuals (both intimate and economic spheres) was left within the states’ discretion. International human rights law is still to a large extent focused on the ‘public’ sphere. This can be seen in the dominant conceptualization of human rights, the doctrine of state responsibility, and equality.⁵⁵

The result is that international protections often do not reach the private sphere abuses that women suffer most—abuses occurring within the family or between individuals.

This analysis can be imported into the refugee framework as it relates to children. The grounds for refugee status, enumerated above, come under the scope of the State’s sovereign powers—refraining from the persecution of children on account of race, religion, nationality, political opinion, or membership in a particular social group. These grounds for asylum come squarely under the Refugee Convention when the state is the persecuting actor. However, the final ground, membership in a particular social group, often involves private actors engaging in

54. Ivana Radačić, *Human Rights of Women and the Public/Private Divide in International Human Rights Law*, 3 CROATIAN YEARBOOK OF EUROPEAN LAW AND POLICY 443, 450 (2007).

55. *Id.* at 451.

acts of persecution on bases that are less well-defined than race, religion, nationality, or political opinion.

Efforts to define the parameters of protection for individuals persecuted by private actors on account of their membership in a particular social group has been the topic of significant litigation in the U.S.⁵⁶ This is due, in part, to the ambiguity around what types of private-sphere persecution—abuses occurring in relationships between families or by private actors—are intended to be protected under the Refugee Convention. Private-sphere persecution, however, is the overwhelming basis for protection cited by women and children seeking asylum in the U.S.⁵⁷

The result of the current conceptualization of asylum is that children, who often face nuanced and extraordinary levels of violence in the home, at the hands of private actors, or in personal relationships, may not be able to establish their eligibility for asylum pursuant to the existing definition. The Trump Administration's decision in the case of *Matter of AB*⁵⁸ provides a clear demonstration of the exclusion of women and children from protection under the Refugee Convention. Prior to deciding the case, then-U.S. Attorney General Jeff Sessions stated that he would use the case as an opportunity "to resolve a fundamental question: whether 'being a victim of private criminal activity,' such as intrafamily violence or gang activity, could ever fit the legal requirements for asylum."⁵⁹ In other words, the fundamental question was whether private-sphere persecution is protectable. The resulting opinion offered a clear interpretation of the Refugee Convention as excluding these types of cases from protection.

Overtuning almost 10 years of precedent, *Matter of AB* held that "[g]enerally, claims by [asylum seekers] pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum." The decision unnecessarily reopened the question of whether a woman seeking protection on account of private-sphere persecution (often in cases of dire domestic violence sometimes including rape, domestic servitude, attempted murder, etc.) can seek asylum in the United States pursuant to the definition of a refugee (adopted from the Refugee Convention of 1956). Sessions opened the decision with language clearly indicating a preference for public-sphere persecution: "the prototypical

56. See *Matter of L-E-A-*, 27 I. & N. Dec. 40 (BIA 2017); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 20 (B.I.A. 2014); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (B.I.A. 2014); *Matter of E-A-G-*, 24 I. & N. Dec. 591 (B.I.A. 2008); *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008); *Matter of C-A-*, 23 I. & N. Dec. 951 (B.I.A. 2006); *Matter of H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

57. See generally UNITED NATIONS HIGH COMM'R FOR REFUGEES (UNHCR), *WOMEN ON THE RUN: FIRST-HAND ACCOUNTS OF REFUGEES FLEEING EL SALVADOR, GUATEMALA, HONDURAS, AND MEXICO* (2015), <https://www.refworld.org/docid/56307e2a4.html> (last visited on Jan. 22, 2019) [hereinafter "WOMEN ON THE RUN"]. The author has spent over twelve years practicing U.S. immigration law and policy with a focus on unaccompanied immigrant children. Many of the details of protection-based claims for children are generally known through practice.

58. *Matter of A-B-*, 27 I. & N. Dec. 316 (B.I.A. 2018).

59. Julia Preston, *Trump Administration Wants to Shut Door on Abused Women*, POLITICO, (Apr. 17, 2018), <https://www.politico.com/magazine/story/2018/04/17/trump-administration-wants-to-shut-door-on-abused-women-218005>.

refugee flees her home because the government has persecuted her.” Ultimately, the decision declines to continue including these women—in desperate need of protection from dangerous, private actors—in the U.S. interpretation of the word “refugee.”

In Sessions’ own words, “the asylum statute does not provide redress for all misfortune.” Yet this position ignores the reality that women and children often suffer exceptional private-sphere human rights abuses.⁶⁰ The failure of the Refugee Convention to address private-sphere persecution in its protected grounds thus permits this exclusionary interpretation. This highlights the concern that the rights of children are not properly contemplated, and clearly not well-articulated, in defining the categories of individuals who should receive protection under the Refugee Convention.

3. Procedural Deficiencies with the Refugee Convention

In addition to the substantive law deficiencies, the Refugee Convention also fails to address procedural protections for children. This is evident when evaluating the procedural application of the refugee definition under U.S. law. Specifically, children seeking asylum alone are still expected to meet the same standards as adults. They must process and present all the relevant information necessary to demonstrate the elements of asylum.⁶¹ Children also bear the burden of proof, and so are *required* to testify in great detail, in an adversarial setting about the persecution, trauma, and abuses that they suffered.⁶² By treating children like adults, existing processes do not empower children to effectively present themselves for asylum.

To enable children to effectively make asylum claims, special procedures considering the unique circumstances of childhood should exist for the child refugee. Social scientists have identified special considerations when working with a child, such as the child’s stage of cognitive development or the presence of complex trauma.⁶³ Pursuant to an informed, child-appropriate approach, identifying the manners in which children present information differently and creating processes designed to account for those differences is critical to determining whether

60. See generally WOMEN ON THE RUN, *supra* note 57.

61. With the exception of the TVPRA, which requires unaccompanied alien child cases to first be processed through the Asylum Office before being re-processed in a court proceeding, children are subject to the same legal process as adults through the asylum statute. See TVPRA 2008, INA § 208; 8 CFR § 208.

62. Jeff Weiss, *Guidelines for Children’s Asylum Claims, Memorandum to Asylum Officers, Immigration Officers, and Headquarters Coordinators*, INS Office of International Affairs. (Asylum and Refugees) (Dec. 10, 1998).

63. See generally *Complex Trauma*, NATIONAL CHILD TRAUMATIC STRESS NETWORK, <http://www.nctsn.org/trauma-types/complex-trauma/effects-of-complex-trauma>; see generally *Impact of Trauma on Children*, JOURNAL OF PSYCHIATRIC PRACTICE (Mar. 2003) <https://www.ncbi.nlm.nih.gov/pubmed/15985923> [hereinafter “Impact of Trauma on Children”]; see generally *Children and Trauma*, AMERICAN PSYCHOLOGICAL ASSOCIATION, (2008) <http://www.apa.org/pi/families/resources/children-trauma-update.aspx> [hereinafter “Children and Trauma”].

the child should be entitled to refugee status and protections.⁶⁴ For example, the information processing necessary to present a case for asylum or other protective status requires the ability to pay attention to the event, to understand the event, and to remember the event.⁶⁵ Yet, children have differing abilities for processing events and information at every stage of development and a child seeking protection may not have these processing skills. The ability to effectively communicate any information will also depend on age and cultural factors.⁶⁶

Additionally, the nuanced impact of complex trauma on children further illustrates the need for carefully designed processes in determining eligibility for refugee status. Complex trauma, depending on when it occurred, can impact the neurological development of the child and can impact the ability of the child to regulate emotional responses.⁶⁷ Presentation of trauma in children may include: experiencing suspicion and guarded reaction to others; feelings of shame, anger and betrayal, depression and loss of impulse control; and extreme fear that the traumatic event will repeat itself.⁶⁸ Younger children may become more childlike in attitude, suppress thoughts and feelings to avoid reliving the traumatic event, and experience anger or a sense of meaninglessness.⁶⁹

Because U.S. adjudicators receive limited guidance on child trauma,⁷⁰ presentation consistent with the above descriptions of trauma can be misconstrued by

64. See generally NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, “Childhood Trauma: Changing Minds” (Oct. 2016), available at <https://www.ncjfcj.org/Courts-Trauma-Infographic> (last visited Jan. 25, 2019); see generally NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, Key Principles for Improving Court Practice in Juvenile Delinquency Cases, available at <https://www.ncjfcj.org/resource-library/publications/key-principles-improving-court-practice-juvenile-delinquency-cases> (last visited Jan. 25, 2019); see generally NEW YORK STATE PERMANENT COMMISSION ON JUSTICE FOR CHILDREN, (2008), <https://www.nycourts.gov/ip/justiceforchildren/PDF/PJCJC%20Handbook%20-%20Encouraging%20Child%20in%20Court.pdf>; see generally *Child Forensic Interviewing: Best Practices*, DOJ JUVENILE JUSTICE BULLETIN (Sept. 2015), <https://www.ojjdp.gov/pubs/248749.pdf> [hereinafter “DOJ CHILD FORENSIC INTERVIEWING: BEST PRACTICES”].

65. *Cognitive Development: Information Processing*, CHILD PSYCHOLOGY: A CONTEMPORARY VIEWPOINT (2018), http://higher.ed.mheducation.com/sites/0072820144/student_view0/chapter10/index.html; see also *Information Processing*, SIMPLY PSYCHOLOGY (2008), <https://www.simplypsychology.org/information-processing.html>.

66. See generally JOURNAL OF PSYCHIATRIC PRACTICE, *supra* note 63; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 63.

67. See generally JOURNAL OF PSYCHIATRIC PRACTICE, *supra* note 63; see also AMERICAN PSYCHOLOGICAL ASSOCIATION, *supra* note 63.

68. See generally Susan Somach, *Issues of War Trauma and Working with Refugees*, CENTER FOR APPLIED LINGUISTICS, (1995) <https://files.eric.ed.gov/fulltext/ED406497.pdf>.

69. Stephen Russell & Rosalie Bakken, *Development of Autonomy in Adolescence*, UNIV. OF NEBRASKA GUIDE (Feb. 2002), <http://www.basicknowledge101.com/pdf/Development%20of%20Autonomy%20in%20Adolescence.pdf>.

70. The U.S. Citizenship and Immigration Services’ only guidance on the matter explains that “symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, avoidance, or disassociation (emotionally separating oneself from an event). A child may appear numb or show emotional passivity when recounting past events of mistreatment. A child may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror

adjudicators as being insincere or lacking credibility.⁷¹ The capabilities of any given child will invariably impact their ability to present testimony, provide evidence, or otherwise participate in the asylum process. Moreover, all processes – information processing, communication, and memory – are impacted by complex trauma, and most children seeking asylum have experienced significant trauma.⁷² The realities of child development and the impact of trauma demonstrate that a child-appropriate procedural framework for evaluating refugee claims is necessary to properly evaluate a child’s eligibility for relief.

The gaps in procedural protections for child refugees abound in the U.S. system. U.S. immigration law provides no special courts to children, no special judges, no special prosecutors, and no special laws designed to offer protection.⁷³ Children are not appointed counsel, nor are they assured they will receive counsel from non-profit legal service providers.⁷⁴ None of the procedural deficiencies impacting child refugee cases are required to be remedied under the Refugee Convention, demonstrating one set of the many gaps in its protections for children’s rights and interests.

B. GAPS IN PROTECTION FROM ADVERSE POLICIES

The Refugee Convention also fails to provide adequate protection to children from adverse counter-migration policies. U.S. immigration policy illustrates the significant gaps in protection resulting from the failure of the Refugee Convention to ensure that children would be excluded from broader, adverse counter-migration policies. One example of the impact of these failures is the treatment of migrant refugee children apprehended at the U.S. border.

Adverse counter-migration policies arose in response to the trend of women and children migrating en masse to the United States and seeking protection under the Refugee Convention. Specifically, in the summer of 2014, the U.S. experienced a surge of unaccompanied immigrant children arriving at the U.S.-Mexico border. The children began arriving in record numbers “[a]ccording to the Border Patrol, apprehension of unaccompanied children increased from 16,067 in FY 2011 to 24,481 in FY 2012 and 38,833 in FY 2013. During the first eight months of FY 2014, 47,017 children were apprehended, most of them from Honduras.”⁷⁵ The children appeared to be fleeing extraordinary levels of violence in the Northern Triangle, including gang violence. UNHCR at that time reported

by retelling what happened. Inappropriate laughter or long pauses before answering can also be a sign of trauma or embarrassment.” USCIS Guidelines at 32, *supra* note 20.

71. *Id.*

72. *Id.*

73. *See generally* INA, *supra* note 45.

74. *Id.* at § 292 (explaining that respondents in immigration proceedings have the privilege of being represented by counsel but not at government expense).

75. BROOKINGS INSTITUTE, THE SURGE IN UNACCOMPANIED CHILDREN FROM CENTRAL AMERICA: A HUMANITARIAN CRISIS AT OUR BORDER (July 2, 2014), <https://www.brookings.edu/blog/up-front/2014/07/02/the-surge-in-unaccompanied-children-from-central-america-a-humanitarian-crisis-at-our-border/>.

a 712% increase in asylum applications by children in the countries neighboring Honduras, Guatemala, and El Salvador.⁷⁶

Rather than adapting detention and removal policies to facilitate the protection of this vulnerable population, the United States ramped up aggressive policies designed to deter migration. Though inconsistent with the needs and interests of children, these U.S. policies are not clearly precluded by the Refugee Convention or the Refugee Protocol adopted by the U.S.⁷⁷ The primary example of such adverse counter-migration policies is the policy and practice of parent-child border separation, which occurs predominantly at the U.S.— Mexico border. Generally, this occurs when a parent seeking asylum presents themselves to U.S. officials at a U.S. port of entry or shortly after entry into the U.S. without inspection.⁷⁸ At that point, the government has the ability to separate parents and children and send them to different detention facilities.⁷⁹ If the U.S. government makes the decision to separate, then the separation is prolonged, sometimes lasting months or years. The parents are relegated to only phone conversations with the children until each of their asylum cases is resolved.⁸⁰

Family separation is extraordinarily problematic for young children because infancy and early childhood is marked by significant development.⁸¹ By some

76. CENTER FOR AMERICAN PROGRESS, STATISTICAL ANALYSIS SHOWS THAT VIOLENCE, NOT DEFERRED ACTION, IS BEHIND THE SURGE OF UNACCOMPANIED CHILDREN CROSSING THE BORDER (July 8, 2014), <https://www.americanprogress.org/issues/immigration/news/2014/07/08/93370/statistical-analysis-shows-that-violence-not-deferred-action-is-behind-the-surge-of-unaccompanied-children-crossing-the-border/>.

77. Refugee Convention, *supra* note 2, at art. 31. While the Refugee Convention seeks to protect asylum seekers from certain adverse government policies in the text of the Convention itself, it does not go far enough to protect children from the adverse policies laid out below. Article 31(1) of the Convention sets out that “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.”

78. Family separation also occurs on the interior during apprehensions generally handled by Immigration and Customs Enforcement, those types of situations are distinct from border separations. They will not be discussed in this article. For more information on internal separations, see “Disappearing Parents: A Report on Immigration Enforcement and the Child Welfare System” published by the University of Arizona in 2011, available online at https://law2.arizona.edu/depts/bacon_program/pdf/disappearing_parents_report_final.pdf.

79. See Exec. Order No.13841, 83 Fed Reg 29435 (June 20, 2018) (“June 20th Executive Order”) (The June 20, 2018 Executive Order “Ending Family Separation” actually fails to proscribe parent-child separation. Instead, the order sets out a preference for family detention but requires separation under vague circumstances concerning the parent posing a threat to the child). For further discussion on the law surrounding parent-child separations, see *Parent-Child Border Separations Violate International Law: Why it matters and what can be done to protect children and families*, GEO. HUM. RTS. INST., Perspectives in Human Rights No. 6 (Aug. 2018) (hereinafter “Parent-Child Border Separations”).

80. *Id.*

81. There is a significant body of evidence demonstrating that parent-child border separation presents extraordinarily harmful effects for children of all ages. See generally *Parents and Caregivers are Essential to Children’s Healthy Development*, AM. PSYCHOLOGICAL ASS’N (2019), <http://www.apa.org/>

estimates, 80–90% of the child’s brain develops by age five.⁸² As a result, trauma during infancy or early childhood can be formative and have lasting developmental effects.⁸³ The trauma of parent-child separation is the result of interference with the normal course of developing attachments: “[a]ccording to attachment theory, a secure attachment is derived from the child’s appraisal of his/her mother’s (or other attachment figure’s) availability.”⁸⁴ The physical unavailability of the mother is perceived as loss⁸⁵ and can result in “insecure/disorganized attachment and subsequent mental health problems.”⁸⁶ The length of separation bears directly upon the extent of the harm.⁸⁷ The effects of separation are amplified for children under the age of two.⁸⁸ In short, rending the parent-child bond at an early age has extreme consequences for tender age children.

The policy of parent-child separation was designed by the Department of Homeland Security to deter additional migration to the United States by women and children.⁸⁹ In March of 2017, John Kelly, then White House Chief of Staff and the former Secretary of Homeland Security, explicitly contemplated using parent-child separations at the border in order to “deter” migration.⁹⁰ The U.S. government implemented this threat starting in April 2018 when the Administration began enforcing the now infamous Zero Tolerance Policy.⁹¹ That policy, issued by the Department of Justice, announced the formal prosecution of

pi/families/resources/parents-caregivers.aspx (focusing on the singularly egregious practice of separating parents from children in infancy and early childhood).

82. *Brain Development and Early Learning*, WIS. COUNCIL ON CHILD. AND FAM. Winter 2007, <http://files.eric.ed.gov/fulltext/ED526797.pdf> (explaining that “[b]y age three, 85 percent of the core structures of the brain are formed”); see also *The First Five Years*, FIRST THINGS FIRST, <https://www.firstthingsfirst.org/why-early-childhood-matters/the-first-five-years> (explaining that “the human brain, the command center of the entire body, is the only organ not fully developed at birth. At birth, the average baby’s brain is about a quarter of the size of the average adult brain. Incredibly, it doubles in size in the first year and keeps growing to about 80% of adult size by age 3 and 90%—nearly full grown—by age 5”).

83. *Early Childhood Trauma*, ATTACHMENT AND TRAUMA NETWORK, <https://www.attachmenttraumanetwork.org/attachment/> (last visited Apr. 26, 2018).

84. Kimberly Howard, et. al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, NATIONAL INSTITUTE OF HEALTH (January 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115616/>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* (“We focus on separation between birth and age two because during that period children rely on physical proximity as the primary indicator of their mother’s availability. Mothers who have left the home environment, even if available by phone, are perceived as unavailable. Maternal availability is particularly important within the first two years of life because of the infant’s limited understanding of the reasons for maternal absence and the timing of her return. As a result, experiences of separation may be particularly salient.”).

89. Danielle Diaz, Kelly, *DHS is considering separating undocumented children from their parents at the border*, CNN (March 7, 2017), <http://www.cnn.com/2017/03/06/politics/john-kelly-separating-children-from-parents-immigration-border/index.html>.

90. *Id.*

91. Jeff Sessions, *Attorney General, Memorandum for Federal Prosecutors Along the Southwest Border* (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

all individuals found in the United States in violation of the INA.⁹² Though not written into the policy itself, its collateral consequence was the *pro forma* separation of all children from their parents to carry out the prosecutions.⁹³ Family separation was said to be incidental to the Zero Tolerance Policy, but parents and children were separated in *all* cases, including cases in which the parent properly presented themselves for asylum at the border or port of entry and there were no grounds for prosecution.⁹⁴

The policy of family separation remained in widespread use until June 20, 2018, when the President issued an Executive Order promoting family detention over family separation.⁹⁵ The use of this policy resulted in the separation of 2,654 children from their parents with hundreds of children still awaiting reunification as of September 2018.⁹⁶ While the American public widely condemned the use of family separation,⁹⁷ Congress has not supported a change of law to extend protections to children from the use of harmful immigration enforcement policies. Since the surge of migrant children in 2014, Congress has only considered curtailing the limited existing available protections.⁹⁸ Rather than add due process safeguards for children, lawmakers are trying to reinstate the summary removal (removal without a hearing before an immigration judge) of certain children found within U.S. borders.⁹⁹ The inability of the United States to properly ensure protections for the refugee child indicates a clear need for the international community to develop legal norms around the impact of adverse policies on refugee children. A convention designed to protect the refugee child should clearly delineate prohibitions against the use of adverse policies impacting refugee children.

C. GAPS IN SUBSTANTIVE PROTECTION FOR REFUGEE CHILDREN FORCED INTO CRIMINAL ACTIVITY

The Refugee Convention specifically excludes from protection individuals who have committed certain grave offenses. Specifically, the Convention expressly excludes individuals that have committed crimes against peace, war crimes, or crimes against humanity.¹⁰⁰ Similarly, the United States' definition of "refugee" categorically excludes those who have "ordered, incited, assisted, or

92. *Id.*

93. Camila Domonoske & Richard Gonzales, *What We Know: Family Separation And 'Zero Tolerance' At The Border*, NAT'L PUB. RADIO (June 19, 2018), <https://www.npr.org/2018/06/19/621065383/what-we-know-family-separation-and-zero-tolerance-at-the-border>.

94. *Id.*

95. See June 20th Executive Order, *supra* note 79.

96. Arelis R. Hernandez, *Nearly 250 migrant children still separated from parents*, *ACLU report says*, THE WASH. POST (Oct. 18, 2018), <https://www.washingtonpost.com/local/immigration/>.

97. See generally David Smith & Tom Phillips, *Child separations: Trump faces extreme backlash from public and his own party*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/us-news/2018/jun/19/child-separation-camps-trump-border-policy-backlash-republicans>.

98. FIRST FOCUS, CAMPAIGN FOR CHILDREN, *Letter to Congress* (July 14, 2014), <https://campaignforchildren.org/wp-content/uploads/sites/2/2014/07/TVPRA-Letter.pdf>

99. *Id.*

100. Refugee Convention, *supra* note 2, at art. 1(F)(a).

otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹⁰¹ This is the so-called “persecutor bar.”

There is a significant lack of clarity on the application of bars to asylum and refugee status for children who have been compelled to engage in acts of criminal behavior but whose level of culpability remains unclear. Child soldiers and children pressed into service for gangs are often the most in need of protection and services, but instead typically find themselves in the most inhospitable environment when seeking protection. These children are branded criminals and kept in high security detention facilities, effectively unable to seek release from custody.¹⁰² They also face insurmountable bars to relief from deportation, notwithstanding that the crimes committed are often part and parcel of their own experience of persecution. State actors need clear and sustainable guidance for handling asylum claims for these children to avoid treating them as adults in miniature.

To properly address the needs of children in an international agreement, it is necessary to understand why treating children as “adults in miniature” is both inapt and potentially dangerous.¹⁰³ While it may not have been the intent of the Refugee Convention drafters to treat children as adults in miniature, in practice, children seeking asylum alone are subject to the same legal standard as adults. This is extremely problematic because children’s brains and abilities are fundamentally different than that of adults.¹⁰⁴ To hold children to a common legal standard ignores those fundamental differences and poses a grave risk for children.

While children pass through different developmental stages at different points in their lives, children in adolescence may be presented with the greatest risks of failing the tests of the current Refugee Convention because they often present like adults to adjudicators.¹⁰⁵ The result is that adjudicators without child-appropriate training are left with the expectation that the adolescent child before them

101. See INA, *supra* note 45, at § 1101(a)(42).

102. The 9th Circuit Court of Appeals decision in *Flores v. Sessions*, 17-55208, is being rendered meaningless as the current Office of Refugee Resettlement Director ignores Immigration Judge determinations regarding release.

103. The intention to treat children as adults in miniature may have developed inadvertently since children were not perceived as rights holders until recently. The drafters of the Refugee Convention and Protocol likely conceived of children as deriving the benefits of asylum through their parents. However, in practice, when children arrive alone seeking asylum, they are effectively treated as adults in miniature by subjecting them to the legal asylum framework constructed for adults.

104. See generally Sarah B. Johnson, et. al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, NAT’L INST. OF HEALTH (Sept. 2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/> [hereinafter “Adolescent Maturity and the Brain”].

105. DOJ Child Forensic Interviewing: Best Practices, *supra* note 64 (explaining that “[b]ecause adolescents look much like adults. . . interviewers may fail to appreciate that adolescents vary greatly in their verbal & cognitive abilities. . . Ever conscious of wanting to appear competent, adolescents may be reluctant to ask for assistance. Interviewers and investigators must guard against unreasonably high

should be able to engage in an adult-like manner.¹⁰⁶ A growing body of science, however, dispels the myth that adolescent children are “basically adults.”

In considering the potential bars to relief, medical research around the decision-making capabilities of children is particularly important. Recent studies conducted through the National Institute of Health indicate that a child’s brain continues to mature well past the age of majority.¹⁰⁷ These findings suggest that the development of the parts of the brain responsible for “higher-order cognitive processes and executive functioning . . . including planning, response inhibition, working memory, and attention” do not develop fully until the mid-20s.¹⁰⁸ The result is that undeveloped brains may demonstrate “[p]oor executive functioning [that] leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which could undermine judgment and decision making.”¹⁰⁹ This research suggests that adolescent youth may not possess the same cognitive abilities as an adult despite biological maturity.¹¹⁰ Yet, notwithstanding the modern understanding of child development, there is no clear process in place to understand and evaluate a child’s individual decision-making capacities when considering whether they should be barred from asylum eligibility under the Refugee Convention.

The persecutor bar in the Refugee Convention and U.S. immigration law fails to address the variant manner in which child liability is addressed under international law and permits state parties to the Convention to implement policies that are directly adverse to child refugees. Child soldiers, as an example, can be deemed under U.S. immigration law as falling under the persecutor bar if these children commit acts of persecution on account of a protected ground in the course of their service as combatants. Yet, “the situation of child soldiers presents one of the most compelling cases for the application of a less-stringent standard.”¹¹¹

Essentially child soldiers are treated as adults in miniature from the judicial perspective in applying this legal standard despite the fact these children were targeted based on characteristics that should be protected under the Refugee

expectations for teenage victims and should not adopt a less supportive approach or use convoluted language, which will complicate matters”).

106. *Id.*

107. Adolescent Maturity and the Brain, *supra* note 100 (stating that “[c]urrent studies demonstrate that brain structures and processes change throughout adolescence and, indeed, across the life course. . . .” The prefrontal cortex coordinates higher-order cognitive processes and executive functioning. Executive functions are a set of supervisory cognitive skills needed for goal-directed behavior, including planning, response inhibition, working memory, and attention. These skills allow an individual to pause long enough to take stock of a situation, assess his or her options, plan a course of action, and execute it. Poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which could undermine judgment and decision making.).

108. *Id.*

109. *Id.*

110. *Id.*

111. Kathryn White, *A Chance for Redemption: Revising the “Persecutor Bar” and “Material Support Bar” in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT’L L. 191, 201 (2010).

Convention—namely the child’s youth and malleability, that the child was forced to join the armed forces, and that the child’s very acts of criminality were in fact acts of persecution perpetrated upon them. Further, “[a]lthough child soldiers have overcome the bar in some cases, the government continues to raise the persecutor bar when confronted with a child soldier—particularly in cases where the children were ‘voluntarily’ recruited.”¹¹² The fact that the U.S. government seeks to determine whether the child’s involvement in combat was “voluntary” highlights the need for a universal standard for the culpability of children in criminal situations. The International Criminal Court has found the distinction between recruitment and voluntary enlistment of children inapt, at least as it relates to children under the age of fifteen, since these children are considered by the court to lack the capacity to voluntarily join the armed forces.¹¹³

The Refugee Convention further fails to protect children by failing to address child liability for criminal bars to refugee status outside of the persecutor bar. While not technically part of the persecutor bar, children with significant criminal histories can be denied asylum under the Refugee Convention and U.S. law for participation in particularly serious, non-political crimes.¹¹⁴ There is no clearer example of this trend than children fleeing forced recruitment and participation in gangs.

One recent study demonstrated that the dynamics of labor trafficking (including forced criminality) appear very similar to those of sex trafficking as traffickers exploit vulnerable people’s desperation and isolation . . . Similar to child sex trafficking, labor trafficked youth are often targeted to perform illegal tasks because of their age, vulnerability, and the perception that they will follow orders and are more easily manipulated. Yet despite the similarities to sex trafficking, many children who are forced to perform labor or services for criminal networks, once identified, are treated as criminals instead of victims.¹¹⁵

These children’s experience with forced criminality constitute the very acts of persecution that they seek to escape, and which ultimately may make them eligible for asylum in the first place. However, when their story is presented to U.S. immigration officials, they are deemed criminals, kept in a penal institution under

112. *Id.*

113. *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment, (Mar. 14, 2012).

114. *See* INA § 208(b)(2)(A)(iii) and (iv), *supra* note 45 (stating that (iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States.”).

115. CENTER FOR THE HUMAN RIGHTS OF CHILDREN, *An NGO Response to the Periodic Report of U.S. to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (submitted April 2012), <https://www.luc.edu/media/lucedu/chrc/pdfs/Alt-Report-USA-2012-Final-with-submitting-orgs-2-19-2012.pdf>.

rigorous restrictions, subjected to prolonged detention, and denied asylum for their acts.¹¹⁶ There is no customary international law standard for child criminal culpability.¹¹⁷

There is even less guidance around how these children should be treated under the Refugee Convention. As a result, in the U.S., the very conduct that constitutes acts of persecution against the child, creating the refugee experience, is used to bar the child from asylum. Gaps in protection in the legal framework mean that children cannot be fully protected under the current Refugee Convention. This is further complicated by the failure to include positive law guidance to states regarding the types of services to provide these particularly vulnerable refugee children. Those gaps are explored below.

IV. GAPS IN POSITIVE OBLIGATIONS OF THE REFUGEE CONVENTION

In addition to complications in applying the legal elements of the refugee framework to children, the Refugee Convention lacks a positive rights framework necessary to ensure that children can properly integrate and flourish in a new, and often radically different, society. The failure to create a universal framework for children leads to disparate paradigms for the provision of services in countries that have adopted positive rights regimes. The lack of proper integration of children can lead to isolation and disaffection in some refugee youth.¹¹⁸ The result of this can be devastating for children. It can also have consequences for society as a whole as these children may go on to commit crimes against their adopted States.

The Refugee Convention generally does not contemplate the creation of a positive law regime to protect the rights of refugees.¹¹⁹ The vast array of rights contained in the Convention merely ensure that the government refrains from refouling an individual who is eligible for asylum under the Convention's definition or ensuring refugees do not experience discrimination in access to public

116. Practice-based Information, *supra* note 57.

117. See generally BEIJING MINIMUM RULES FOR ADMINISTRATION JUVENILE JUSTICE § 4 (Commentary: The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially anti-social behavior. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behavior and other social rights and responsibilities (such as marital status, civil majority, etc.)).

118. See generally HAPARANDA, *Panic Attack: Confusion over immigration and crime is roiling European politics*, THE ECONOMIST (June 20, 2018), <https://www.economist.com/europe/2018/06/30/confusion-over-immigration-and-crime-is-roiling-european-politics> (generally blaming migrants for increased crime and calling for better integration of migrants and refugees).

119. The Convention requires states to ensure legally admitted refugees have access to benefits (housing, education, and "public relief") to the same extent as nationals or other legally admitted foreign-nationals in a negative rights scheme of non-discrimination. See, e.g., Refugee Convention, *supra* note 2, at art. 21-23.

benefits.¹²⁰ Any convention contemplating the rights of refugee children should contain a positive law framework, duties upon the states, to ensure that refugee children develop properly through healthy, integrative and robust child refugee programming and services.

Though the U.S. does not generally sign or ratify positive law treaties,¹²¹ there are anecdotes from the European experience that demonstrate gaps in positive obligations toward the protection of refugee children. For example, one European report explains that the lack of uniformity in child refugee services among EU member nations creates difficulties for refugee children by failing to create a consistent experience as they proceed through the migration and asylum process.¹²² Children, in need of complex integration services at all times during the resettlement process, receive disparate treatment depending on which EU country receives them, which social service agency provides services, and in which stage of the asylum process that they find themselves.¹²³ Disparate treatment across countries, systems, and stages of the asylum process is also evidenced in the limited access to educational and transitional opportunities available to refugee children.

Recent research demonstrates that refugee children have disparate access to educational opportunities and transition services necessary to succeed in an educational setting throughout EU member states.¹²⁴ Successful refugee resettlement already entails significant risk “due to unsafe living conditions . . . years of insecurity with uncertain status, multiple moves, . . . or social exclusion.”¹²⁵ These gaps in refugee services and programming can lead to a disparate ability to properly integrate or thrive in a new setting. Education is widely known as “the key to socio-economic success and for overcoming disadvantages in European society.”¹²⁶

120. See generally The Refugee Convention, *supra* note 2.

121. See, e.g., CEDAW or ICESCR, *supra* note 7.

122. Kevin Byrne, *Migrant, refugee or minor? It matters for children in Europe*, FORCED MIGRATION REVIEW (Feb. 2017), <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/resettlement/byrne.pdf> (“[B]ecause EU provisions and safeguards for children are spread across different, often disconnected, directives and regulations, children in host countries can find themselves subject to a diverse and inconsistent set of national laws, policies and entitlements at different stages of the asylum and migration process, although their needs, interest and rights remain the same throughout.”); see also, COUNCIL OF EUROPE, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, http://www.echr.coe.int/Documents/Convention_ENG.pdf (noting that various provisions of the ECHR are designed to address the treatment of refugees (among other migrants) located in the territory of state parties to the ECHR).

123. *Id.* (stating that “states’ duty to assure the effective protection of children implies a responsibility to adopt special measures and safeguards to that end but migrant and refugee children’s differential entitlements to services based on their legal status leave many of them at risk”).

124. Claudia Koehler, *Continuity of learning for newly arrived refugee children in Europe*, NESET, <http://nesetweb.eu/wp-content/uploads/2016/02/Refugee-children.pdf> (last visited Jan. 25, 2019) [*hereinafter* “Continuity of Learning”].

125. U.N. Expert Group Meeting, UNDESA *Refugees and Social Integration*, at pg. 8, May 15-16, 2018, https://www.un.org/development/desa/family/wp-content/uploads/sites/23/2018/05/Robila_EGM_2018.pdf.

126. Continuity of Learning, *supra* note 123, at 4.

The failure to implement a positive law regime is extremely problematic in light of the well-documented proposition that refugee children have significant needs. As made clear in the UNCHR guidelines, positive law regimes should be enacted remembering that:

Children are vulnerable. They are susceptible to disease, malnutrition and physical injury.

Children are dependent. They need the support of adults, not only for physical survival, particularly in the early years of childhood, but also for their psychological and social well-being.

Children are developing. They grow in developmental sequences, like a tower of bricks, each layer depending on the one below it. Serious delays interrupting these sequences can severely disrupt development.¹²⁷

Given the well-established basic needs of refugee children, there is a demand for a variety of complex services to ensure proper integration into their host communities. If those needs are not met, there can be very real consequences for the children and for their adopted States.

Some refugee children who failed to properly integrate commit acts of terrorism against their adopted States.¹²⁸ The failure of States to provide holistic services, uniquely designed to meet the special needs of refugee children is a starting point for determining whether it is possible to prevent the disaffection of a refugee child. This is all the more critical when understanding that the inability of states to ensure proper integration can be used as a political tool to undermine the entire international refugee program. Take President Trump's statements implicating the use of refugee programming as a Trojan Horse for terrorists: "[i]n his Executive Order of 27 January 2017, U.S. President Donald J. Trump claimed that 'numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes since September 11 2001 . . . including foreign nationals who entered the United States through the refugee resettlement program.'"¹²⁹ When refugee children fail to properly integrate, their actions are used as the basis upon which to scrutinize the entire system. Integration of refugee youth is a gap that must be addressed to properly protect children and to prevent others from dismantling the entire existing refugee paradigm.

127. UNHCR Guidelines on Protection and Care, *supra* note 20.

128. INFOMIGRANTS, *Experts warn child refugees being recruited into terrorist groups* (May 12, 2017), <http://www.infomigrants.net/en/post/1872/experts-warn-child-refugees-being-recruited-into-terrorist-groups>.

129. OPEN DEMOCRACY, *Refugees: the Trojan horse of terrorism?* (June 5, 2018), <https://www.opendemocracy.net/can-europe-make-it/jeff-crisp/refugees-trojan-horse-of-terrorism>.

V. RECOMMENDATIONS & CONCLUSION

The purpose of this Article is to highlight gaps in protection under the Refugee Convention as it relates to children. By evaluating the deficiencies in the refugee definition, the lack of appropriate procedural protections, and the absence of positive obligations upon States, it is clear that the Refugee Convention is failing the refugee child. More than half of the world's refugee population are children,¹³⁰ and more must be done to ensure that international norms support protection of this unique and vulnerable group.

This Article by no means contains an exhaustive list of the gaps in refugee protection afforded to children under international refugee law. Each State party to the Refugee Convention and Protocol has nuanced issues with the application of refugee law to children through their respective domestic law frameworks. To truly understand the scope of the gaps in protection, it is necessary to undertake a comprehensive analysis of identifiable gaps. This can be done by engaging in a comparative analysis of the gaps in protection under various state parties to the Convention. For example, evaluating the gaps in substantive and positive law in EU states, as compared to Canada, the United States, and Australia. A comprehensive review of the deficiencies of the Refugee Convention as it relates to children will provide a starting point for understanding what more should be done to protect children.

Once the gaps in protection have been identified, a panel of interdisciplinary stakeholders should be convened to discuss the best practices available for addressing the existing gaps in protection. Stakeholders should come from disciplines including, but not limited to, child development experts in both medical and mental health fields; legal experts in the areas of child migration, human rights, and domestic immigration law; government officials tasked with developing and carrying out strategies relating to child refugees; juvenile law experts in the fields of juvenile justice and child welfare; social science experts in the areas of anthropology, sociology, or comparable fields who study refugee children; and non-profit service providers for child refugee populations. The panel of stakeholders would be tasked with developing best practice solutions to existing gaps while identifying ideal formulations for future iterations of a refugee protocol relating to children.

In the end, there may be no remedial measures available to properly address the existing gaps in the protection of refugee children. If this were the case, then the final step would be to create a refugee protocol for children. Efforts to draft a Refugee Protocol for children could take place under the rubric of either a Protocol to the Refugee Convention or an additional Protocol to the Convention on the Rights of the Child. In any event, the new document must be designed to create new language *defining a refugee child*, addressing appropriate procedural standards for children, proscribing certain policy-making that is adverse to the child, and developing positive obligations for state parties to ensure the well-being and development of refugee children around the world.

130. UNHCR Figures at a Glance, *supra* note 6.