

**BEST INTERESTS OF THE CHILD  
IN REFUGEE STATUS DETERMINATION**

University of Lapland  
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### **Abstract:**

This thesis investigates how the best interests of the child, as outlined in Article 3(1) of the United Nations Convention on the Rights of the Child, should be taken into account in refugee status determinations (RSD) conducted by states under the Convention Relating to the Status of Refugees. Utilizing doctrinal legal research, the study analyzes relevant articles of both Conventions through general treaty interpretation rules and human rights-specific interpretative techniques. The research relies predominantly on official guidance from the United Nations Refugee Agency and the Committee on the Rights of the Child, supplemented by case law.

The study concludes that the best interests of the child must be integrated into the RSD process in two distinct ways: by ensuring that the substantive assessment of the child's refugee claim is child-sensitive and by making the RSD process child-friendly through procedural and evidentiary safeguards. A child-sensitive interpretation of the refugee definition in Article 1 A (2) of the Refugee Convention emphasizes the child's age, maturity, specific needs and vulnerabilities. The procedural and evidentiary safeguards highlight the necessity for a flexible and considerate approach to make a child's voice heard in the process.

Overall, the thesis provides a detailed framework for applying the best interests of the child in refugee status determination within the confines of existing international law. By making the best interests of the child a primary consideration in refugee status determination, states can uphold the fundamental rights of children and contribute to a more just and humane refugee protection system.

**Key words:** best interests of the child, refugee status determination, international law, refugee law, human rights, children's rights

X The thesis does not contain personal data other than those of the author.

**Contents**

**References ..... V**

**Abbreviations.....XVIII**

**1 Introduction ..... 1**

1.1 Background, Previous Research and Purpose of the Study ..... 1

1.2 Research Question, Method and Structure of the Study ..... 5

**2 Interpretation of the Conventions ..... 8**

2.1 Conventions and their Supervisors ..... 8

2.1.1 *Refugee Convention and UN Refugee Agency*..... 8

2.1.2 *Convention on the Rights of the Child and Committee on the Rights of the Child*..... 14

2.2 Rules of Interpretation ..... 16

2.2.1 *General Rules of Treaty Interpretation* ..... 16

2.2.2 *Special Interpretative Techniques Characteristic to Human Rights* ..... 20

**3 Refugee Status Determination..... 22**

3.1 Criteria for Determining Refugee Status ..... 22

3.2 Children as Asylum Applicants ..... 27

**4 Best Interests of the Child ..... 30**

4.1 Meaning and Scope of Article 3(1) ..... 30

4.2 Best Interests Assessment and Determination ..... 33

4.3 Procedural Safeguards ..... 36

**5 Best Interests of the Child in Refugee Status Determination..... 39**

5.1 Application of the Child’s Best Interests to the Refugee Status Determination..... 39

5.2 Child-Sensitive Assessment of Eligibility for Refugee Status ..... 42

5.2.1 *Well-Founded Fear and Persecution of Children* ..... 42

5.2.2 *Convention Grounds* ..... 50

5.2.3 *Internal Flight or Relocation Alternative* ..... 55

5.2.4 *Exclusion from Refugee Status* ..... 59

5.3	Procedural and Evidentiary Safeguards.....	62
<b>6</b>	<b>Conclusions .....</b>	<b>69</b>

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## Abbreviations

BIP	Best Interests Procedure
CRC	United Nations Committee on the Rights of the Child
CRIA	child-rights impact assessment
ECOSOC	United Nations Economic and Social Council
ESCR	economic, social and cultural rights
EU	European Union
FGM	female genital mutilation
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IRC	International Rescue Committee
NGO	non-governmental organization
OHCHR	Office of the High Commissioner for Human Rights
RSD	refugee status determination
UASC	unaccompanied and separated children
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNCRC	United Nations Convention on the Rights of the Child
UNDP	United Nations Development Programme
UNECA	United Nations Economic Commission for Africa
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFPA	United Nations Population Fund
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHCR ExCom	Executive Committee of the High Commissioner's Programme
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
UNREF	United Nations Refugee Fund

UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

# 1 Introduction

## 1.1 Background, Previous Research and Purpose of the Study

The *United Nations (UN) Convention relating to the Status of Refugees (Refugee Convention)*<sup>1</sup> defines refugee as someone 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 – –, is unable or, owing to such fear, is unwilling to return to it”.<sup>2</sup> Today, there are 36 million refugees around the world and the number of the most vulnerable ones among them, children,<sup>3</sup> amounts to nearly half of this disaster.<sup>4</sup> Arriving to foreign countries accompanied by their parents or, in some heart-breaking cases, unaccompanied or separated,<sup>5</sup> these children are in need of acute international protection.

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<sup>1</sup> The 1951 Convention and its 1967 Protocol relating to the Status of Refugees (presented in more detail in section 2.1.1 of this study) are cornerstone instruments of refugee law, a branch of international law that establishes standards for refugee protection worldwide (UNHCR Help, Frequently asked questions, Rights and duties, *What is refugee law?*). International law (also known as public international law or law of nations), on the other hand, is a set of legal rules, norms and standards that govern the conduct of sovereign states and other entities legally recognized as international actors (Shaw 2024).

<sup>2</sup> Article 1 A (2) of the Refugee Convention. Although the Article starts by stating that the term “refugee” shall apply to any person who “[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear...”, these mentions have become less relevant due to the expansion of the scope of the Refugee Convention (discussed later in section 2.1.1 of this study). Article 1 A (2) includes also a clarification in case a person has more than one nationality stating that “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”.

<sup>3</sup> According to Article 1 of the United Nations Convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

<sup>4</sup> Children are dramatically overrepresented in refugee statistics: although they constitute less than a third of the world’s population, children accounted for 41 % of the refugees in 2022. With the Russian Federation’s invasion in Ukraine creating the fastest and one of the largest displacement crisis since the Second World War, an additional two million refugee children have been recorded to have fled for their safety. For the number of refugees worldwide, see UNHCR, *Refugee Data Finder* (2023); for child-specific figures, see UNICEF, *Child displacement* (2023); for information on Ukrainian refugee numbers, see UNHCR, *Global Trends: Forced Displacement in 2022* (2023); and for the data on Ukrainian refugee children, see UNICEF, *Two million refugee children flee war in Ukraine in search of safety across borders* (2022).

<sup>5</sup> The UN Refugee Agency, the international supervisory organization for the Refugee Convention (presented in more detail in section 2.1.1 “Refugee Convention and UN Refugee Agency” of this study) has defined unaccompanied children as “children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so”. Separated children, in turn, “are those separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives”. Separated children may, therefore, be accompanied by other adult family members or caregivers. An abbreviation “UASC” may be used when referring to both of these groups (unaccompanied and separated children). For the definitions, see UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, pp. 10 and 12.

However, in the eyes of refugee law, children fleeing war, violence and persecution are often invisible.<sup>6</sup> Although the definition of a refugee presented in the beginning clearly applies to every individual disregarding their age, the lack of child-specific provisions might have contributed to the problem observed by the United Nations High Commissioner for Refugees (*UNHCR*, or the *UN Refugee Agency*): the traditional interpretation of the Convention is adult-centric with states' asylum procedures failing to take into account the special needs and circumstances of the children.<sup>7</sup> Over the years, this treatment of children primarily as asylum seekers<sup>8</sup> and only secondly as children has resulted in many of the children's claims for refugee protection being incorrectly assessed, or even completely overlooked.<sup>9</sup> With countries currently tightening their asylum systems and not offering exemptions to children in these reformed border procedures, the position of refugee children seems even more threatened and the promotion of child-friendly approaches to migration more distant than ever.<sup>10</sup>

The former Assistant High Commissioner for Protection with the UNHCR, Erika Feller, has said that many asylum systems “legitimate the automatic repatriation of children, without resort to established protections, such as best interests of the child determinations”.<sup>11</sup> The *United Nations Convention on the Rights of the Child (UNCRC)*, a Magna Carta for protection of children, establishes in its Article 3(1) that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or

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<sup>6</sup> Pobjoy 2017, p. xv (series editor's preface).

<sup>7</sup> UNHCR, *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* (2009), para. 1; Feller 2010, p. 3.

<sup>8</sup> “Asylum seeker” is a general term used when referring to a person who is seeking international protection. In some countries, it is used as a legal term when speaking of someone who has applied for refugee status and is waiting for a final decision on their application. It shall be noted that not all asylum seekers will be recognized as refugees as receiving the refugee status requires meeting the criteria of the international legal definition of a refugee found in the Refugee Convention. Also, a positive decision on an international protection application does not mean that the applicant has become a refugee: recognition of refugee status is merely declaratory, confirming the person to be a refugee, whereas fulfilling the criteria contained in Article 1A(2) of the Refugee Convention makes the person instantly a refugee. Due to this technicality, an asylum claim needs to be examined in a fair procedure before sending the asylum seeker back to their country of origin. For the definition of asylum seeker (and refugee), see UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 17–18.

<sup>9</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 1.

<sup>10</sup> For instance, the European Union (EU) adopted the Pact on Migration and Asylum in April 2024 as a new set of rules to manage migration on its borders (see Micinski 2024 and European Commission, *Pact on Migration and Asylum: A common EU system to manage migration*). Over 50 non-governmental organizations (NGOs) have criticized the Pact in an open letter for its human rights risks, inter alia for normalizing “the arbitrary use of immigration detention, including for children and families” along the borders (see Picum, *Over 50 NGOs pen eleventh-hour open letter to EU on human rights risks in Migration Pact* (2023)). Together with the NGOs, UNICEF has called the EU for effective measures to guarantee the safety and security of refugee and migrant children (see UNICEF, *Children and the EU Migration and Asylum Pact* (2023)). However, the EU is not the only one attempting to raise the bar for seeking asylum: the United States' Biden administration is also planning to impose new restrictions on asylum seekers (see Wiessner 2023).

<sup>11</sup> Feller 2010, p. 3.

legislative bodies, the best interests of the child shall be a primary consideration”. Despite the principle of the best interests of the child being applicable to all children under the jurisdiction of a state regardless of their citizenship or immigration status,<sup>12</sup> in practice, the best interests of the child are not always assessed to the sufficient extent in the asylum procedure.<sup>13</sup> In light of this finding and at a time when the number of children in need of international protection is at an all-time high, it is both substantial and riveting to study such gap in international protection of children seeking refugee protection. Therefore, the study will analyze the relationship between the best interests of the child as established in Article 3(1) of the UNCRC and the refugee status determinations<sup>14</sup> conducted in states on the basis of the international protection granted under the Refugee Convention.

The existing academic studies on the rights of the child and international refugee law are recent and limited in number. Child’s right to asylum has been assessed through case law in the book *Child Refugee Asylum as a Basic Human Right: Selected Case Law on State Resistance* (2018) by Sonja Grover, and the international and regional frameworks for the treatment of asylum-seeking children have been discussed in *Protecting Migrant Children: In Search of Best Practice* (2018), a hardback edited by Mary Crock and Lenni Benson. Focusing more on the influence of the Convention on the Rights of the Child on international refugee law, Samantha Arnold addressed the problem of the invisibility of refugee children in 2019 by constructing a children’s rights approach to the interpretation of the Refugee Convention in her book *Children’s Rights and Refugee Law: Conceptualising Children within the Refugee Convention*. The interpretative aid of the UNCRC in the case of refugee children has also been examined in another noteworthy publication, Jason Pobjoy’s book *The Child in International Refugee Law*

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<sup>12</sup> Article 2(1) of the UNCRC on non-discrimination provides that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”. In addition, Article 22 of the UNCRC explicitly states that “States Parties shall take 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 and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”.

<sup>13</sup> Parsons 2010, p. 5. See also CRC, *2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, pp. 20–21.

<sup>14</sup> Refugee Status Determination (RSD) refers to the legal or administrative procedure through which governments determine whether an individual seeking international protection qualifies as a refugee under applicable international, regional, or national law. This process is crucial for enabling refugees to exercise their rights under international law. While the primary responsibility for conducting RSD rests with states, the UNHCR may undertake this function pursuant to its mandate in cases where a state is not a signatory to the 1951 Refugee Convention or lacks a fair and efficient national asylum system. See UNHCR, *Refugee Status Determination* and footnote 48 of this study.

(2017), which analyzes the jurisprudence of common law jurisdictions to understand the relationship between international refugee law and international law on the rights of the child. The rights recognized in the UNCRC in relation to protection of refugee children have also been analyzed in few articles.<sup>15</sup>

The concept of the best interests of the child has been discussed extensively in previous research. Key publications devoted to studying the interpretation of the principle include *The Best Interests of the Child*, a book edited by Philip Alston from 1994, *The best interests of the child – A dialogue between theory and practice* (2016), a book edited by Milka Sormunen<sup>16</sup> including the texts of 21 different writers, and *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child*, a book by Michael Freeman from 2007.<sup>17</sup> But when it comes to assessing the interaction between the child's best interest and the international protection offered to children in the Refugee Convention, existing studies become more difficult to find. The relevance of the best interests of the child in determining a child's need for international protection has been addressed only in a couple of book chapters: "Protection and 'The Best Interests of the Child' – The Convention on the Rights of the Child" of Jane McAdam's publication *Complementary Protection in International Refugee Law* (2007), "The Convention on the Rights of the Child as a Complementary Source of Protection" in Pobjoy's book and "The best interests of the child assessment with recently arrived refugee children" by Carla van Os in Sormunen's book. However, none of these academic contributions to child refugee law provide a concrete analysis on how the best interests of the child should be taken into account in the refugee status determination process.

This study aims to compensate for the missing guidance by interpreting the best interests of the child in the context of asylum claims made by children or which children are part of in accordance with the UNCRC and the Refugee Convention. While it must be emphasized that the best interests of the child constitute a flexible principle on purpose that is thus determined on a case-

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<sup>15</sup> See *The Rights of Refugee Children and the UN Convention on the Rights of the Child* (2019) by Jeanette Lawrence, Agnes Dodds, Ida Kaplan and Maria Tucci, and *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* (2005) by Christoph Bierwirth.

<sup>16</sup> See also Sormunen's doctoral dissertation from 2021, in which she analyzed the concept of the best interests of the child in domestic, European and international human rights practice.

<sup>17</sup> See also, e.g., *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (2002), a book written by Claire Breen, *Are 'Best Interests' a Pillar or a Problem for Implementing the Human Rights of Children?* (2016), a critical article by Nigel Cantwell, and *The Best Interest Principle Within Article 3(1) of the United Nations Convention on the Rights of the Child* (2019), a short article from Mary George and Noor Aziah Mohd Awal.

by-case basis,<sup>18</sup> there is clear value in clarifying the otherwise somewhat ambiguous concept of the best interests of the child and its implications in the situation of asylum-seeking children within the limits of current international law. In the following section, the exact research questions forming the basis of this study as well as the applied method of research and the structure of the study will be presented.

## 1.2 Research Question, Method and Structure of the Study

The purpose of this thesis is to provide an answer to the main research question, “how should the best interests of the child as codified in Article 3(1) of the UNCRC be taken into account in the context of determining a child’s refugee status under the Refugee Convention?”. While exploring the answer, the study follows the method of doctrinal legal research. Also known as “traditional” or “theoretical legal research”, this dominant research method in legal field pursues to find out the law in a specific issue using an in-depth analysis of the legal doctrine: it studies existing laws, possible related case law and various authoritative legal materials on some particular matter. With its jurisprudential foundation in legal positivism<sup>19</sup>, doctrinal legal research is considered to be “research in law” rather than “research about law”. By applying the doctrinal methodology, this study verifies prevailing knowledge on the best interests of children seeking refugee status.<sup>20</sup>

Answers to the research questions are derived from the sources of international law listed in Article 38(1) of the Statute of the International Court of Justice (*ICJ*)<sup>21</sup>: the formal sources, which entail international conventions, international custom and general principles of law<sup>22</sup>, as

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<sup>18</sup> CRC, *General comment No. 14 (2013)*, para. 32.

<sup>19</sup> The core beliefs of legal positivism are that all laws are made and set (“posited”) by humans and that the law is the noticeable phenomenon of legislation, custom and judgments issued by courts and other judicial institutions. Legal positivism understands the validity of rules of law to be based on their formal legal statuses, not on their relations to morality or other external factors: laws are those which have been validly made by the acknowledged legislative bodies and are not derived from sources outside the law, such as morality, religion, or human dignity. Therefore, the main aspect of legal positivism is the distinction between the validity of law and morality. For more information, see Cryer– Hervey – Sokhi-Bulley 2011, pp. 37–41.

<sup>20</sup> See Kharel 2018, pp. 1–5.

<sup>21</sup> The ICJ was established under the Charter of the United Nations (Chapter XIV, Articles 92–96). The Statute of the Court is annexed to the Charter.

<sup>22</sup> Contrary to treaties, international custom and general principles of international law formalize universal legal standards that states clearly and consistently consider binding on themselves without the need for codification. More precisely, international custom legalizes united practices between states that have come to be regarded as obligations, whereas general principles of international law are usually domestic standards found in the legal culture of a majority of states. For more information, see Hathaway 2005, pp. 17–18, 25–28.

well as the so-called “subsidiary means for the determination of rules of law”<sup>23</sup>, comprising of judicial decisions and the teachings of the most highly qualified publicists of the various nations.<sup>24</sup> For the most part, however, the study uses the official sources such as guidelines and general comments published by the UN Refugee Agency and the Committee on the Rights of the Child (*CRC*), the official supervisors of the Refugee Convention and the UNCRC respectively, due to lack of legal literature on this specific matter. Although such instruments are considered legally non-binding and non-enforceable on states, they provide valuable guidance in understanding and interpreting the content of the relevant treaties – and hence in determining the best interests of children seeking refugee status.<sup>25</sup>

A few exclusions to the scope of study shall be made. First and foremost, as the research questions are answered based on the Refugee Convention and the UNCRC, all regional agreements are left outside the scope of this study on the UN system. Secondly, as regards the interpretation of the treaties, the questions concerning the interpretive differences between the different authentic linguistic versions of the Refugee Convention and the UNCRC are not considered in this thesis, but only the English versions of these agreements are to be used.<sup>26</sup> Thirdly, the thesis does not explore the supplementary Best Interests Procedure led by the UNHCR in case a state is unable to implement best interests procedures,<sup>27</sup> but rather maps the obligations imposed on states regarding how the best interests of the child should be taken into account when deciding on the child’s refugee status. Fourthly, it shall be mentioned that there has been research on the possibility to engage the best interests of the child as an independent source of protection when

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<sup>23</sup> Such sources are considered material sources in the sense that they do not constitute international law, but only evidence of it, leaving the law to three formal sources (conventions, custom and general principles). See Grant 2010, p. 11.

<sup>24</sup> Article 38(1) of the Statute of the ICJ sets forth that “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59 [of the Statute], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”. Although not stated to be an enumeration of sources of international law, the Article has become an undisputed listing of such sources. See Grant 2010, p. 11.

<sup>25</sup> The UNHCR and the Committee on the Rights of the Child, as well as the official guidance published by both bodies, are further presented in section 2.1 “Conventions and their Supervisors” of this study. The same section also provides a more extensive review of the legal nature of such sources.

<sup>26</sup> See the end of the Refugee Convention stating “[d]one at Geneva - - in a single copy, of which the English and French texts are equally authentic” and Article 54 of the UNCRC stating that “[t]he original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic”. Due to linguistic limitations as well as the limitations set for the length of a master’s thesis, a comparison of different language versions is excluded from this study.

<sup>27</sup> For more information on this UNHCR case management framework for asylum-seeking and refugee children, see UNHCR, *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*.

the child is not eligible for protection under the Refugee Convention.<sup>28</sup> However, in this study, the interest lies in the interplay between the two Conventions as together they offer the most solid ground of protection for asylum-seeking children.

As a final exclusion, it shall be noted that since the purpose of this work is to outline a common framework in the field of public international law for the interpretation of the best interests of the child in states' refugee status determinations, this thesis analyzes judicial decisions only to the extent that they have been raised as examples in the viral guidelines published by the UN Refugee Agency and the CRC. A thorough analysis of state practice is excluded for the simple reason that the parties of multilateral treaties in general, and of multilateral human rights treaties in particular, often seek to minimize the practical effect of their international refugee and human rights law commitments when applying the treaties nationally.<sup>29</sup> Therefore, judicial decisions are only reviewed and referenced when they provide additional information validated by the UNHCR or the CRC on the application of the best interests of the child in the context of children seeking refugee status.

In order to know how the best interests of the child should be applied in the refugee status determinations conducted in states parties of the UNCRC and the Refugee Convention, the second chapter of the study begins by presenting both Conventions and their official supervisors, as well as the main interpretative rules of international law applied to these treaties. After setting the interpretation standards, the study proceeds to examine the criteria for determining refugee status of a child under the Refugee Convention and the position of children as asylum applicants in the RSD process in the third chapter. Turning to the UNCRC, the fourth chapter will enlighten the content of the best interests of the child under its Article 3(1). The fifth chapter, the heart of this study, provides a description on the application of the best interests of the child in the refugee status determination and states' obligations arising from it. Finally, the conclusions in the sixth chapter will summarize the results of this study and answer the research question on how the best interests of the child should be taken into account in the refugee status determinations conducted by states.

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<sup>28</sup> See, for example, Pobjoy 2017, pp. 196–238; McAdam 2007, pp. 173–196.

<sup>29</sup> Hathaway 2005, p. 68.

## 2 Interpretation of the Conventions

### 2.1 Conventions and their Supervisors

#### 2.1.1 *Refugee Convention and UN Refugee Agency*

When governments are unable or unwilling to protect their own citizens, other countries have to step in to ensure that the human rights of these people fleeing and seeking safety at the borders of foreign countries are respected. The protection of the basic rights of such refugees, also known as “international protection”, is governed by the 1951 United Nations Convention relating to the Status of Refugees and its 1967 *Protocol relating to the Status of Refugees*. True to its time, the Refugee Convention focused initially on protecting the 65 million<sup>30</sup> European refugees who had left their homes due to the tragedies of the Second World War: the definition of a refugee enclosed in Article 1 A (2) of the Convention pertains to individuals who were forced to flee and seek refuge “[a]s a result of events occurring before 1 January 1951”.<sup>31</sup> Pursuant to Article 1 B (1), states were required to declare whether they would limit the definition to events within Europe or extend it to events elsewhere as well.<sup>32</sup> However, as new refugee crises emerged globally in the following years, the scope of the Convention needed to be expanded. As an answer to this, states negotiated the Protocol relating to the Status of Refugees to remove the temporal and geographical restrictions set for obtaining the refugee status,<sup>33</sup> amending the

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<sup>30</sup> For the number of the people displaced by the Second World War, see Imperial War Museums and UNHCR, *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action*, p. 13.

<sup>31</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 15–16.

<sup>32</sup> Article 1 B (1) of the Refugee Convention states that “the words “events occurring before 1 January 1951” in [Article 1 A (2)] shall be understood to mean either (a) “events occurring in Europe before 1 January 1951”; or (b) “events occurring in Europe or elsewhere before 1 January 1951”; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention”. Article 1 B (2) offers that “[a]ny Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification”. Although 25 states in total have previously opted for a narrower definition, today, only three states (Congo, Madagascar and Turkey) out of the 146 states parties to the Convention limit the definition of a refugee to events occurring in Europe (see p. Janmyr 2021, 194; United Nations Treaty Collection, Status of Treaties, CHAPTER V Refugees and Stateless Persons, 2. *Convention relating to the Status of Refugees*).

<sup>33</sup> In its Article 1(2), the Protocol changed the definition of a refugee to mean any person fulfilling the conditions set out in Article 1 A (2) of the Refugee Convention “as if the words “As a result of events occurring before 1 January 1951 and...” and the words “...as a result of such events”, in article 1 A (2) were omitted”. However, despite the Protocol being set to apply without any geographic limitations, the Protocol keeps the validity of such limitations made by states already parties to the Convention in its Article 1(3) (“The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article I B (I) (a) of the Convention, shall, unless extended under article I B (2) thereof, apply also under the present Protocol”).

Convention to protect universally all persons fleeing persecution. Together, the Refugee Convention and its Protocol form today the core of the international protection system of refugees.<sup>34</sup>

With its 146 states parties,<sup>35</sup> the Refugee Convention builds the foundation of international refugee law:<sup>36</sup> it defines who is considered a “refugee” in international law and outlines the rights and protection standards of refugees.<sup>37</sup> The Convention also underpins the work of the Office of the United Nations High Commissioner for Refugees, which is a subsidiary organ of the United Nations General Assembly (UNGA). The UNHCR was established as of January 1951 with the *Statute of the Office of the United Nations High Commissioner for Refugees* (further referred to as *the Statute*) to ensure the protection of refugees and work in cooperation with governments to provide solutions to their plight.<sup>38</sup> Created to serve the same purpose of solving Europe’s refugee problem as the Refugee Convention, the new UN Refugee Agency was originally given three years to complete its work.<sup>39</sup> After extending its mandate numerous times throughout the 20<sup>th</sup> century in the face of new refugee crises,<sup>40</sup> finally in 2003, the United

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<sup>34</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 15–16; UNHCR, About UNHCR, *The 1951 Refugee Convention*, Common questions: What is the difference between the 1951 Convention and its 1967 Protocol?

<sup>35</sup> United Nations Treaty Collection, Status of Treaties, CHAPTER V Refugees and Stateless Persons, 2. *Convention relating to the Status of Refugees*. In comparison, the Protocol relating to the Status of Refugees has been ratified by 147 states (United Nations Treaty Collection, Status of Treaties, CHAPTER V Refugees and Stateless Persons, 5. *Protocol relating to the Status of Refugees*). Although the Protocol stands independent of the Convention, by acceding to it, states parties “undertake to apply articles 2 to 34 inclusive of the Convention to refugees” (Article 1(1) of the Protocol). However, most states have chosen to reaffirm the centrality of both of these documents to the international refugee protection system by acceding to both the Convention and the Protocol. For more information, see UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 16–17.

<sup>36</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, p. 16.

<sup>37</sup> UNHCR, About UNHCR, *The 1951 Refugee Convention*.

<sup>38</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 16, 41; According to paragraph 1 of the Statute, “[t]he United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities”.

<sup>39</sup> UNHCR, About UNHCR, *History of UNHCR*; paragraph 13 of the Statute states that “[t]he High Commissioner shall be elected by the General Assembly on the nomination of the Secretary-General - - for a term of three years, from 1 January 1951”. Following the election of the High Commissioner, “[t]he High Commissioner shall appoint, for the same term, a Deputy High Commissioner” (para. 14) and “the staff of the Office of the High Commissioner shall be appointed by the High Commissioner” (para. 15 section a).

<sup>40</sup> UNHCR, About UNHCR, *History of UNHCR*; see the resolutions 57/186, 52/104, 47/104, 42/108, 37/196, 32/68, 2957 (XXVII), 2294 (XXII), 1783 (XVII), 1165 (XII) and 727 (VIII) adopted by the UNGA on the *Continuation of the Office of the United Nations High Commissioner for Refugees* for five years at a time. The prolongations of the mandate of the UNHCR were made based on statements included in paragraphs 5 (“The General Assembly shall review, not later than at its eighth regular session, the arrangements for the Office of the High Commissioner with a view to determining whether the Office should be continued beyond 31 December 1953”) and 13 of the Statute (“The terms of appointment of the High Commissioner shall be proposed by the Secretary-General and approved by the General Assembly”).

Nations General Assembly decided to prolong the mandate of the UNHCR to continue “until the refugee problem is solved”.<sup>41</sup>

According to the Statute, the work of the High Commissioner should be non-political, humanitarian and social in character (paragraph 2) and follow the policy directives given to it by the General Assembly or the UN Economic and Social Council (*ECOSOC*)<sup>42</sup> (para. 3). The detailed functions of the High Commissioner have been defined in paragraph 8 of the Statute and in numerous resolutions adopted later on by both the General Assembly and the Economic and Social Council.<sup>43</sup> The Statute stipulates that the High Commissioner shall, first and foremost, promote conclusion and ratification of international refugee conventions (such as the Refugee Convention and its Protocol), supervise their application and propose amendments thereto (section a). The High Commissioner shall also promote the admission of refugees to the territories of states (section d). In addition, the High Commissioner is expected to enter into special agreements with governments to undertake measures which improve the situation of refugees and reduce their number (section b). Furthermore, the High Commissioner is mandated to, among other things, obtain information from states regarding the number and conditions of refugees in their territories and the laws and regulations applicable to them there (section f).

The cooperation between the UNHCR and states has also been emphasized in the Refugee Convention. Under Article 35(1) of the Refugee Convention, the state parties of the Refugee Convention are obliged to cooperate with the UNHCR in the exercise of its functions and they shall in particular facilitate its duty of supervising the application of the provisions of the Refugee Convention. As the High Commissioner is expected to report its findings annually to the General Assembly through the ECOSOC (para. 11 of the Statute), the contracting states of the

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<sup>41</sup> See UNGA Resolution 58/153, para. 9 in which the General Assembly “[d]ecides to remove the temporal limitation on the continuation of the Office of the High Commissioner contained in its resolution 57/186 and to continue the Office until the refugee problem is solved”.

<sup>42</sup> The Economic and Social Council is one of the six main organs of the UN and is in charge of the progress in the three aspects of sustainable development: economic, social and environmental. The UN Charter established the ECOSOC back in 1945 and ever since the Council has been an important connector and coordinator between the General Assembly and all the subsidiary bodies and UN entities dedicated to work towards sustainable development. For more information on the ECOSOC, see United Nations Economic and Social Council, *About Us*.

<sup>43</sup> UNHCR, *Statute of the Office of the United Nations High Commissioner for Refugees with an Introductory Note by the Office of the United Nations High Commissioner for Refugees* (2010), p. 2. The resolutions can be found from the UN Refugee Agency’s website UNHCR, *United Nations General Assembly*. Through such resolutions, the General Assembly and ECOSOC have over the years expanded the UNHCR’s areas of responsibility to functions and groups not covered by the original Statute: the UNHCR has been requested to provide international protection also to stateless persons, internally displaced people and returnees (refugees who have returned home voluntarily). Therefore, the competency of the UN Refugee Agency is nowadays considerably broader than at the time its mandate was first given (UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, p. 42).

Refugee Convention shall provide the Office of the High Commissioner with information and statistical data regarding the implementation of the Refugee Convention and the condition of refugees in their countries, as well as laws, regulations and decrees which are in force there and concern refugees (Article 35(2)).<sup>44</sup>

However, the drafting parties of the 1951 Refugee Convention refused to grant the future international supervisory agency of the Convention any power to defend the realization of refugees' rights in the states parties of the upcoming treaty. Instead, the UNHCR was given the general authority to supervise the application of the Convention, leaving the states ultimately responsible for ensuring the compliant treatment of refugees.<sup>45</sup> In the absence of a specific monitoring mechanism similar to the treaty bodies established for other United Nations human rights treaties,<sup>46</sup> the UNHCR has developed several ways to carry out its supervisory role of the Refugee Convention.<sup>47</sup> The supervisory functions of the Agency largely accepted and indeed expected by states parties include, inter alia, monitoring state practice and reporting on it, as well as making representations to governments and other relevant actors on international protection concerns and following up such interventions.<sup>48</sup> As part of its advocacy role and supervisory responsibilities, the UN Refugee Agency is also entitled to issue public statements and legal

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<sup>44</sup> The Protocol relating to the Status of Refugees also contains a corresponding text on the cooperation of the national authorities with the UN in its Article 2.

<sup>45</sup> Hathaway 2005, pp. 628, 992.

<sup>46</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, p. 44; Takahashi 2002, p. 53. There are altogether ten human rights treaty bodies that have been created to monitor the implementation of all the other major human rights treaties: (i) the *Human Rights Committee*, (ii) the *Committee on Economic, Social and Cultural Rights*, (iii) the *Committee on the Elimination of Racial Discrimination*, (iv) the *Committee on the Elimination of Discrimination against Women*, (v) the *Committee against Torture*, (vi) the *Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, (vii) the *Committee on the Rights of the Child* (presented in more detail in section 2.1.2 “Convention on the Rights of the Child and Committee on the Rights of the Child” of this study), (viii) the *Committee on the Protection of the Rights of All Migrant Workers and Members of their Families*, (ix) the *Committee on the Rights of Persons with Disabilities*, and (x) the *Committee on Enforced Disappearances*. These committees are independent expert bodies that promote interstate accountability by reviewing periodic reports submitted to them by states (except the Subcommittee on Prevention of Torture). In addition, eight of the committees also have the mandate to consider complaints from aggrieved individuals (OHCHR, Treaty Bodies, *What treaty bodies do*). The lack of such committee acting as an agent for enforcing the rights established under the Refugee Convention has thus been considered “a failure of the international community” (Hathaway 2005, pp. 13, 628).

<sup>47</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, p. 44.

<sup>48</sup> The UNHCR has the right to intervene, submit its observations and advise national authorities in asylum or refugee status determination procedures. The UNHCR also provides guidance and comments for governments and parliaments on draft legislation and administrative decrees which affect refugees and asylum seekers. Thus, despite the limitations of the Agency's legal mandate, there is no doubting the vital role of the UNHCR in promoting respect for the rights of refugees in the world. See Feller – Türk – Nicholson 2003, pp. 668–669; Türk 2013, pp. 50–52.

positions on international refugee law matters, which leads us to the official guidance published by this UN Agency on the proper application of the provisions of the Refugee Convention.<sup>49</sup>

One of the documents issued by the UNHCR to guide states parties' government officials, judges and practitioners is the "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (further referred to as the *Handbook*).<sup>50</sup> First issued in 1979, the Handbook has ever since been used as an important source of soft law<sup>51</sup> in several court decisions.<sup>52</sup> The UHCR also issues authoritative guidance on topical questions in refugee law via its "Guidelines on International Protection"<sup>53</sup> and other policy documentation<sup>54</sup>, and intervenes and makes submissions to quasi-judicial institutions and courts through its amicus curiae briefs, statements and letters.<sup>55</sup> Regarding children, the UNHCR has published various guidance, but the most significant UNHCR documents to be studied here that address the best interests of the child in the context of refugee status determination are the "2021 UNHCR Best Interests Procedure (BIP) Guidelines: Assessing and Determining the Best Interests of the Child" and "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" from 2009.<sup>56</sup>

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<sup>49</sup> See Türk 2013, p. 52; Feller – Türk – Nicholson 2003, p. 669.

<sup>50</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (hereafter "*Handbook*") (2019), p. 9.

<sup>51</sup> The term "soft law" refers to quasi-legal instruments, such as declarations, guidelines, decisions and resolutions of international organizations, that possess no legal force and have therefore non-binding effect on states regarding the matters they address (see Druzin 2016). However, soft law principles and rules are usually followed by states in practice, but the application of these sources may not be widespread or consistent enough to establish their status as customary international law or as general principles of law (Doebbler 2018, "soft law" on p. 488). The use of the concept of soft law aims to distinguish its rules from the classic rules of international law, the binding legal regulations and obligations known as "hard law" (Bouchet-Saulnier 2015).

<sup>52</sup> Türk 2013, pp. 52–53. For courts' decisions, see, for example, United Kingdom House of Lords, *Opinions of the Lords of Appeal for Judgment in the Cause R v Asfaw (Appellant) (On Appeal from the Court of Appeal (Criminal Division))* (2008), para. 13; United States Supreme Court, *INS v. Cardoza-Fonseca* (1987), footnote 22; Federal Court of Australia, *Rezaei v Minister for Immigration and Multicultural Affairs* (2001), para. 50.

<sup>53</sup> So far, the UNHCR has published thirteen Guidelines, which complement and update the Handbook and which should be read in combination with it. From this series, Guidelines No. 8 on "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" are of particular importance to this study.

<sup>54</sup> To better protect and care for refugee children, the UNHCR adopted a global comprehensive "Policy on Refugee Children" in 1993 to guide the work of the UNHCR staff (and, as hoped in the policy, also "the endeavours of others concerned with refugee children, such as Governments"). The policy addresses the specific protection and assistance needs of refugee children and sets the human rights of the child, in particular his or her best interests, as one of the guiding principles.

<sup>55</sup> Edwards 2013, p. 173; Feller – Türk – Nicholson 2003, p. 668.

<sup>56</sup> It is important to note that the *Guidelines on International Protection No. 8* have been primarily utilized in this thesis, as they specifically and thoroughly address the best interests of the child in refugee status determination. In

The UNHCR handbooks and guidelines constitute an important source of soft law on the evolving and dynamic interpretation and application of the Refugee Convention. However, as such soft law instruments always represent statements on behalf of an agency that promotes refugee rights with no power to enforce compliance, it is clear that there is no consensus on their legal value in every case. Despite this, the official UNHCR documents are often the only sources available to function as gap-fillers and provide guidance on the interpretation of otherwise somewhat ambiguous or obscure provisions of the Convention. In addition, the UNHCR's competency to progressively develop international law and standards in relation to persons of concern has been widely accepted by states, and the Agency's advocacy function together with its issuance of public statements are well recognized as key means of international protection.<sup>57</sup> As UNHCR policy documents represent advice from the experts of a UN organization to all state parties uniformly and equitably, the study highly values them and follows their "soft enforcement" example on how the Convention should be interpreted and applied in states acting in good faith and in respect of human rights.

The UNHCR's governing body is the Executive Committee of the High Commissioner's Programme (*UNHCR ExCom*), established by the ECOSOC pursuant to paragraph 4 of the Statute.<sup>58</sup> The Executive Committee has over 100 member states<sup>59</sup> "with a demonstrated interest in, and devotion to, the solution of the refugee problem".<sup>60</sup> The UNHCR ExCom is mainly responsible for advising the High Commissioner on its international protection functions and for reviewing and approving all financial and administrative matters of the Agency.<sup>61</sup> In order to advance a common understanding of and further develop international refugee law, the Executive Committee also issues "Conclusions on International Protection" as a result of the consensus reached in its discussions. These Conclusions are often consulted by governments,

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contrast, the *2021 UNHCR BIP Guidelines* extend beyond this scope, establishing a comprehensive case management framework for asylum-seeking and refugee children. Consequently, the 2021 BIP Guidelines are referenced to a limited extent in this study, only when they provide new or supplementary information on refugee status determination and state obligations related to ensuring the best interests of the child in that process.

<sup>57</sup> See Türk 2013, pp. 50–53.

<sup>58</sup> To be more specific, the ECOSOC established first an Advisory Committee on Refugees in 1951 with its Resolution 393 (XIII) B. The Advisory Committee was then reconstituted in 1955 to be known as the United Nations Refugee Fund (UNREF) Executive Committee with ECOSOC Resolution 565 (XIX), adopted pursuant to the General Assembly Resolution 832 (IX). Finally, the latter was replaced by the Executive Committee of the High Commissioner's Programme in 1958 in accordance with the General Assembly Resolution 1166 (XII) and ECOSOC Resolution 672 (XXV).

<sup>59</sup> UNHCR ExCom, *Composition for the period October 2023–October 2024*. All the member states meet annually for the ExCom's plenary session, but between annual sessions, the Standing Committee is convened for smaller meetings to continue the work (UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, p. 44).

<sup>60</sup> UNGA Resolution 1166 (XII), para. 5.

<sup>61</sup> See *ibid.*, paras. 5(a)–(f) for the terms of reference to the UNHCR ExCom.

ministries and parliamentarians in the process of law and policy development, but also national and regional courts refer to them on a regular basis as they succeed in being persuasive, authoritative soft law sources. Although not formally binding, the ExCom's Conclusions are considered to offer international legal expertise on refugee matters and are therefore also used in this study to support the comprehension on the Refugee Convention and its application.<sup>62</sup>

### **2.1.2 Convention on the Rights of the Child and Committee on the Rights of the Child**

Guarding the welfare of children for over 30 years, the United Nations Convention on the Rights of the Child represents the first universal treaty in human rights history committed to the protection of childhood and the promotion of children's rights.<sup>63</sup> At the same time, it is also the most universally accepted human rights treaty with 196 states having ratified it since its adoption in 1989.<sup>64</sup> With its significant acceptance, the UNCRC bounds states to respect and enforce nationally the most comprehensive description of children's rights. The Convention can also be characterized as the first international instrument in the world to grant children "a seat at the table of international law" as it recognizes children to be individual rights-holders.<sup>65</sup>

The specific human rights treaty body offering its expertise in the interpretation of the Convention on the Rights of the Child and its protocols is the Committee on the Rights of the Child. Established by the Convention in February 1991 "[f]or the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention"<sup>66</sup>, the Committee consists of 18 independent human rights experts who have been elected for a four-year term by the states parties to act as the members of the most authoritative

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<sup>62</sup> UNHCR – Inter-Parliamentary Union, *A guide to international refugee protection and building state asylum system. Handbook for Parliamentarians N. 27, 2017*, pp. 32, 44, 255.

<sup>63</sup> Fottrell 2000, p. 1. Although the UNCRC is an invaluable instrument in international child law, its legislative history includes two declarations worth mentioning that at their time addressed the need to protect children: the 1924 *Declaration of the Rights of the Child* (also known as the *Geneva Declaration*), which was adopted by the former League of Nations and which is considered the first international human rights document to expressly acknowledge children's rights, and the expanded 1959 *Declaration of the Rights of the Child*, which was proclaimed by the UNGA and included some additional principles. For a more thorough review of the history of children's rights, see OHCHR, *Legislative History of the Convention on the Rights of the Child* (2007).

<sup>64</sup> The United States of America is the only nation that has not ratified the UNCRC. For the status of ratifications, see United Nations Treaty Collection, Status of Treaties, CHAPTER IV Human Rights, 11. *Convention on the Rights of the Child*.

<sup>65</sup> See Pobjoy 2013, p. 136.

<sup>66</sup> Article 43 of the Convention on the Rights of the Child, para. 1 ("For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided").

monitor of states' compliance with the UNCRC.<sup>67</sup> In accordance with the guidelines set out in Articles 44–45 of the Convention regarding the Committee's functions, the CRC reviews reports<sup>68</sup> submitted to it by states parties on the measures adopted at national level to enforce the implementation of children's rights and makes suggestions and general recommendations on the basis of the information received.<sup>69</sup>

In addition to giving guidance on the implementation of the UNCRC on a state-by-state basis, the general recommendations may also be introduced to all the states parties at once in the form of so-called “general comments”.<sup>70</sup> The general comments can be (i) official interpretations of specific articles of the UNCRC, (ii) explanations of general issues related to the Convention, such as reporting obligations, or (iii) recommendations on thematic issues related to children the Committee finds important to address. General comments reflect the Committee's experience from examining states parties' reports and enhance the understanding of the rights of the child in the UN framework.<sup>71</sup>

Although considered non-legally binding, general comments constitute a legitimate soft law source for reading the Convention as they represent the views of the most authoritative body monitoring the Convention. Therefore, the interpretations made by the CRC on the articles of

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<sup>67</sup> According to paragraph 2 of Article 43 of the Convention on the Rights of the Child, “[t]he Committee shall consist of eighteen experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.” Paragraphs 3–5 of Article 43 describe the nominations of candidates and the conduct of elections in more detail. Paragraph 6 states that “[t]he members of the Committee shall be elected for a term of four years” and that “[t]hey shall be eligible for re-election if renominated” with the exception that “[t]he term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting”. The last paragraphs 7–12 of Article 43 concern the replacement of a Committee member (para. 7), the rules of procedure (para. 8), the election of the Committee's officers (para. 9), the place and duration of the Committee's annual meetings (para. 10), the provision of staff and facilities (para. 11) and the emoluments of the Committee members (para. 12).

<sup>68</sup> According to the first paragraph of Article 44, “States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized [in the Convention] and on the progress made on the enjoyment of those rights (a) [w]ithin two years of the entry into force of the Convention for the State Party concerned; (b) [t]hereafter every five years”. Paragraphs 2 and 3 of the same Article further address the contents of these reports, and in case the CRC is in need of more information on the implementation of the Convention, it may request it from states parties pursuant to paragraph 4. Furthermore, paragraph 6 of Article 44 requires states parties to “make their reports widely available to the public in their own countries”.

<sup>69</sup> Section (d) of Article 45 states that “[t]he Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties”. See also OHCHR, Committee on the Rights of the Child, *Introduction to the Committee*.

<sup>70</sup> OHCHR, Committee on the Rights of the Child, *General Comments*.

<sup>71</sup> Verheyde – Goedertier 2006, pp. 39–40; OHCHR, Treaty Bodies, *General Comments*.

the Convention should play a key role in clarifying the scope and state obligations arising from the rights enshrined.<sup>72</sup> Among the 26 general comments adopted by the CRC to date,<sup>73</sup> the General comment No. 14 from 2013 on the right of the child to have his or her best interests taken as a primary consideration will provide particularly crucial assistance in this study for determining the elements of the best interests of the child.<sup>74</sup> Other general comments are also referenced as needed.

## 2.2 Rules of Interpretation

### 2.2.1 General Rules of Treaty Interpretation

The fundamental framework for the interpretation of all international treaties can be found in Articles 31–33 of the *Vienna Convention on the Law of Treaties (VCLT)*. The 1969 VCLT, “a treaty on treaties”, is one of the most significant agreements created under the flag of the United Nations. In addition to codifying the rules on the interpretation of treaties, it establishes the norms governing everything related to making treaties between the states from the conclusion and entry into force of a treaty to the termination or suspension of the operation of a treaty. However, the VCLT together with its set of interpretation rules can seldom be applied as a series of provisions of an international agreement since the Articles of the VCLT are only binding on the 116 states parties to the convention and have no retroactive effect.<sup>75</sup> Instead, the rules laid down in the VCLT are certainly applied in their capacity as customary international law between states since both states<sup>76</sup> themselves and international courts and tribunals<sup>77</sup> seem to

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<sup>72</sup> See Verheyde – Goedertier 2006, pp. 40–41.

<sup>73</sup> OHCHR, Committee on the Rights of the Child, *General Comments*.

<sup>74</sup> The issuance of the CRC’s General Comment on the matter took over two decades, which can be understood as an indication of the complex and challenging aspects related to the matter (Cantwell 2016, p. 64), but also as a sign of a careful review on the current state of the best interests of the child in international law. Therefore, the General Comment has been referenced in many recent publications as a relevant legal analysis to be embraced: see, for example, Ruggiero 2022, pp. 24–26; Beltman et al. 2016, pp. 677–678.

<sup>75</sup> Article 4 of the VCLT states that “the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States”.

<sup>76</sup> See e.g.: the International Court of Justice, *Case concerning sovereignty over Pulau Ligitan and Pulau Sipadan* (2002), para. 37; the International Court of Justice, *Case concerning Kasikili/Sedudu Island* (1999), para. 18; and the Permanent Court of Arbitration, *Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention* (2003), para. 81. For more examples, see footnote 20 in Linderfalk 2007.

<sup>77</sup> See e.g.: the International Court of Justice, *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide* (2007), para. 160; the European Court of Human Rights, *Grand Chamber Decision as to the Admissibility of Application no. 52207/99* (2001), para. 55; the Appellate Body of the World Trade Organization, *Japan – Taxes on Alcoholic Beverages* (1996), pp. 10–12; and the Iran-United States Claims Tribunal, *Case No. A/18* (1984), para. 31. For more examples, see footnote 22 in Linderfalk 2007.

agree on the identical nature of the aforementioned VCLT Articles 31–33 with the rules of treaty interpretation recognized as state practice.<sup>78</sup>

When defining the scope and content of both the UNCRC and the Refugee Convention, the relevant guidelines to consider are contained in Article 31 of the VCLT. According to the so-called “general rule of interpretation” found in its first paragraph, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The interpretation of treaties thus encompasses three types of interpretation: (i) literal, which stresses the words ordinary meaning, (ii) systematic, which emphasizes the context of the treaty, and (iii) teleological, which gives weight to the object and purpose of the treaty.<sup>79</sup> In other words, any valid interpretation of a treaty in the field of international law should take into account not only the words used in the treaty, but also the intention of the parties when drafting it and the aims of the agreement in question.<sup>80</sup>

In the context of the UNCRC, the purpose of the treaty to be construed from the Preamble of the Convention and to be given weight to in the interpretation of the treaty is safeguarding the human rights of children throughout the world. At the same time, the existence of the UNCRC confirms the need to extend particular legal protection and care to the children.<sup>81</sup> The object of the Refugee Convention, then again, lies in protecting refugees globally through states’ cooperation and guaranteeing all refugees the widest possible exercise of the fundamental rights and freedoms<sup>82</sup> as recognized in both the *Charter of the United Nations* (1945) and the *Universal*

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<sup>78</sup> Linderfalk 2007, pp. 6–7; Klabbers 2010, p. 24.

<sup>79</sup> Sepúlveda et al. 2004, p. 47.

<sup>80</sup> Shaw 2017, p. 707.

<sup>81</sup> The Preamble mentions that states parties have agreed on the Convention on the Rights of the Child “[c]onsidering that - - recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. The Preamble also mentions other instruments where “the need to extend particular care to the child has been stated”. Children’s need for particular legal protection and care is also referenced in Preamble stating that states parties bear “in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth””.

<sup>82</sup> The Preamble of the Refugee Convention states that the contracting parties have agreed on the Convention “[c]onsidering that the United Nations has - - manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of [the] fundamental rights and freedoms”. In addition, states have considered in the Preamble “that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement”. The need for states’ cooperation has been affirmed in the following part of Preamble, reading “[c]onsidering 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”.

*Declaration of Human Rights* (1948).<sup>83</sup> These goals are aimed at by implementing the express rights of refugees established in the Refugee Convention and the state responsibilities stemming from them. Altogether, the object and purpose of both of these Conventions can be summed up to be the protection of human beings and their rights.

The second paragraph of the VCLT Article 31 instructs other agreements and instruments related to the treaty to be taken into account in the interpretation in addition to the text of the treaty (including its Preamble and annexes). In the case of the UNCRC, three optional protocols have been anchored to the Convention: the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (2000), the *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* (2000) and the *Optional Protocol to the Convention on the Rights of the Child on a communications procedure* (2011). On the contrary, the Refugee Convention has been supplemented with only one protocol: the Protocol relating to the Status of Refugees from 1967, which removes the temporal and geographical restrictions set for obtaining the refugee status in the original Convention, extending the application of the Convention's definition of a "refugee" to protect universally each person fleeing conflict and persecution. Other agreements made between the states parties in connection with the conclusion of the treaty and thus to be taken into account in the interpretation of the document include the Final Act of the conference which adopted the Refugee Convention.<sup>84</sup> States parties' commitments taken in it may therefore be invoked to interpret the official text of the Convention.<sup>85</sup>

Furthermore, Article 31(3) adds that any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (lit. a), any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (lit. b) and any relevant rules of international law applicable in the relations between the parties of the treaty (lit. c) shall also be taken into account in the interpretation. This draws

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<sup>83</sup> The UN Charter affirms in its Article 1(3) that one of the purposes of the United Nations is "[t]o achieve international co-operation in - - promoting and encouraging respect for human rights and for fundamental freedoms for all". The source of UN member states' express pledge to promote these rights and freedoms is found in Articles 55 and 56: Article 55 states that the UN shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all" (section c) and Article 56 continues that "[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55". The Universal Declaration of Human Rights contains the same pledge in its Preamble: "Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms".

<sup>84</sup> *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*.

<sup>85</sup> Hathaway 2005, p. 53.

attention to numerous guidelines and handbooks issued by the official interpreters of the Conventions presented earlier in section 2.1 of this study. In relation to the interpretation of the Refugee Convention, subsequent agreements between the parties to be taken into consideration also include the *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, which contains the acknowledgments and affirmations made by all states parties on the fiftieth anniversary of the Refugee Convention in 2001.

The fourth paragraph of the same Article 31 describes that “[a] special meaning shall be given to a term if it is established that the parties so intended”. Thus, an exception to the interpretation giving wordings their ordinary meaning is possible based on concrete proof, but the starting point of interpretation shall be to focus on the ordinary meaning of terms. It should also be noticed that in order to confirm the meaning of the Conventions’ terms otherwise left “ambiguous or obscure”, Article 32 of the VCLT states that in such case the supplementary means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion may be consulted. Same applies if the application of the general rule of interpretation “leads to a result which is manifestly absurd or unreasonable”. In this study, interest is, indeed, paid also to the preparatory work of both the UNCRC and the Refugee Convention to elucidate the meaning and goals of their provisions. The analysis of the historical intentions of the drafters is, however, tempered by the guideline established in the practice of the International Court of Justice: treaties must be interpreted and applied within the framework of the prevailing legal system rather than being part of the legal system in force the at the time of adopting the text. Hence, an interpretation contrary to the *travaux préparatoires* may be justifiably correct.<sup>86</sup>

Article 33 of the VCLT, which is the last interpretive rule set forth in the Convention, addresses the interpretation of treaties authenticated in two or more languages: according to its first paragraph, a treaty is equally authoritative in each of its official languages unless the treaty itself provides otherwise or the parties have agreed on prevalence of a particular text in case of divergence.<sup>87</sup> With this in mind, “the terms of the treaty are presumed to have the same meaning in each authentic text” (Article 33(3)) and following the rule of interpretation laid down in the fourth paragraph, a difference of meaning emerged in comparing the authentic texts shall be removed by applying the rules of treaty interpretation established in Articles 31 and 32 of the VCLT (except in situations where a particular language version of the treaty prevails over

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<sup>86</sup> Sepúlveda et al. 2004, p. 48.

<sup>87</sup> In addition, other than authenticated language versions of the treaty text shall be considered authentic if the treaty so provides or the parties so agree (Article 33(2)).

others). If these Articles do not resolve the discrepancy, the fourth paragraph continues to provide that then the meaning which best reconciles the texts considering the object and purpose of the treaty will be adopted. However, as stated in the introduction of this study, the only versions of the Conventions interpreted here are the English ones. This leaves all linguistic comparison out of the scope of this research.

### **2.2.2      *Special Interpretative Techniques Characteristic to Human Rights***

Children's rights and refugee law do not operate in isolation but are both understood to be part of international human rights law. Built upon the principles enshrined in the Universal Declaration of Human Rights, the Convention on the Rights of the Child sets forth the human rights specifically recognized for children.<sup>88</sup> The Refugee Convention, in contrast, is understood to be a "remedial or palliative branch of human rights law" with its specific purpose being ensuring the basic rights of those whose rights have not been protected in their own country.<sup>89</sup>

Besides the traditional rules of the VCLT not being unequivocal, the interpretation of human rights treaties requires also that their specific characteristics<sup>90</sup> are taken into account and thus their interpretation should always be subject to some special techniques.<sup>91</sup> The first one of these interpretative techniques to be applied in this study, the principle of effectiveness, requires an interpreter to read human rights provisions so that they are also significant in real life with an actual impact on peoples' lives, rather than being merely theoretical or illusory.<sup>92</sup> Therefore, the application of the effectiveness rule requires all the terms of the UNCRC and the Refugee Convention to be interpreted in a way that makes their safeguards practical.<sup>93</sup>

The second special interpretive approach characteristic for the practice of human rights treaty bodies and international courts interpreting human rights treaties is the evolutive interpretation. Also known as dynamic or evolutionary interpretation, this method reminds the interpreter to give a treaty the character of a living instrument and to interpret its terms accordingly by taking

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<sup>88</sup> See Alston 1994, p. 1.

<sup>89</sup> Hathaway 2005, p. 5.

<sup>90</sup> Human rights treaties' "special characteristics" include their nature as instruments the parties of which do not have individual interests but only a common one. Thus, there is no reciprocal exchange of rights under such treaties. Other aspects distinguishing human rights treaties from the rest of international agreements are their capacity to protect the rights of individuals who do not themselves make parties to these documents, and to bind states to various obligations towards each person within their jurisdiction and not towards other contracting states. For further information on the specific object and purpose of human rights treaties, see Sepúlveda et al. 2004, p. 48.

<sup>91</sup> Sepúlveda et al. 2004, p. 47.

<sup>92</sup> Moeckli 2016, pp. 7–8.

<sup>93</sup> Sepúlveda et al. 2004, p. 49.

into account the developments made in law and society. This way, the interpretation also in the contexts of the UNCRC and the Refugee Convention is more protective of individuals.<sup>94</sup>

The third and final rule of interpretation applied in the study of the UNCRC and the Refugee Convention is the rule of autonomous interpretation.<sup>95</sup> In the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights has explained the autonomous interpretation to imply that the terms of international human rights treaties have autonomous meanings, which signifies that their terms cannot be interpreted as they would be in accordance with national laws of a state party. On the close relationship of the autonomous interpretation with the evolutive interpretation technique, the Court added that as human rights treaties are live instruments, their terms should be adaptable to the societal developments and no article should be construed to limit the enjoyment or exercise of any rights or freedoms recognized in domestic laws of a state party or in other treaties to which the state is a party.<sup>96</sup> In addition to the Inter-American Court of Human Rights, the European Court of Human Rights has also emphasized the importance of giving an autonomous meaning to the terms of European human rights law in its interpretation.<sup>97</sup>

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<sup>94</sup> Moeckli 2016, p. 8–9; Sepúlveda et al. 2004, p. 50.

<sup>95</sup> Sepúlveda et al. 2004, pp. 50–51.

<sup>96</sup> Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), paras. 146–147.

<sup>97</sup> See McBride 2021, p. 10 and the European Court of Human Rights, *Case of Anheuser-Busch Inc. v. Portugal* (2007), para. 63. For more information on the autonomous interpretation by the European Court of Human Rights, see Trykhlil – Lemak 2022.

## 3 Refugee Status Determination

### 3.1 Criteria for Determining Refugee Status

A child qualifies as a refugee under the Refugee Convention immediately after meeting the criteria outlined in the definition. Therefore, recognizing a child's refugee status does not create their status but rather acknowledges it.<sup>98</sup> The Convention's provisions for defining a refugee are divided into three parts: "inclusion", "cessation" and "exclusion" clauses. The inclusion clauses (Articles 1 A (1)–(2) and 1 B, which completes Article 1 A (2)) establish the requirements that an individual must meet to qualify as a refugee, serving as the positive foundation for refugee status determination. Conversely, the cessation and exclusion clauses have a negative function. The cessation clauses (Articles 1 C (1) to (6)) delineate the circumstances in which a refugee loses their refugee status.<sup>99</sup> They are rooted in the idea that international protection granted to a person should cease when it is no longer needed or justified. Thus, a person's status as a refugee is retained unless they fall under one of the cessation clauses. The exclusion clauses (Articles 1 D, E and F), then again, specify the conditions under which an individual is excluded from the protection of the Refugee Convention, even if they meet the positive criteria set by the inclusion clauses.<sup>100</sup>

Article 1 A (1)<sup>101</sup> of the inclusion clauses addresses statutory refugees, referring to individuals recognized as refugees under international agreements predating the Convention. However, these agreements have largely become irrelevant, making a detailed discussion of them impractical. Therefore, the general definition of a refugee contained in Article 1 A (2) is the most relevant when determining the refugee status of a child.<sup>102</sup> As presented in the introduction of this study, it establishes refugee as someone who "owing to well-founded fear of being

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<sup>98</sup> UNHCR, *Handbook* (2019), para. 28.

<sup>99</sup> To put it shortly, Article 1 C states that the Convention shall cease to apply to a person that, (1) has voluntarily re-availed himself of the protection of the country of his nationality; (2) has voluntarily reacquired his nationality; (3) has acquired a new nationality, and enjoys the protection of the country of his new nationality; (4) has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; (5) can no longer continue to refuse to avail himself of the protection of the country of his nationality; or (6) is able to return to the country of his former habitual residence.

<sup>100</sup> UNHCR, *Handbook* (2019), paras. 30–31, 111–112.

<sup>101</sup> According to Article 1 A (1), the term "refugee" shall apply to any person who: "(1) [h]as been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization". In addition, the Article states that the "[d]ecisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of [Article 1 A (2)]".

<sup>102</sup> UNHCR, *Handbook* (2019), paras. 32–34.

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 - -, is unable or, owing to such fear, is unwilling to return to it". These criteria for refugee status are briefly elaborated below.

The phrase "well-founded fear of being persecuted" is central part of the definition. As fear is a subjective experience, determining refugee status mainly involves assessing the statements made by the applicant rather than judging the conditions in their country of origin. However, qualifying fear as "well-founded" includes both subjective and objective aspects: it indicates that refugee status is not solely determined by the individual's mindset but also requires objective substantiation of their circumstances.<sup>103</sup> For the subjective element, it is crucial to assess the applicant's personality and credibility, along with scrutinizing their personal and familial history, membership in a specific racial, religious, national, social, or political group, their interpretation of the situation, and their personal experiences. In terms of the objective element, the applicant's statements must be assessed within the context of the conditions in their country of origin. Generally, the applicant's fear is deemed well-founded if they can reasonably prove, that remaining in their country has become intolerable due to reasons specified in the refugee definition, or that returning there would be similarly intolerable.<sup>104</sup>

Arising from the expression "owing to well-founded fear of being persecuted", the above-described fear must be the primary reason for seeking asylum. "Fear" encompasses both individuals who have been subject to persecution and individuals who seek asylum to evade the threat of persecution.<sup>105</sup> For "persecution", there exists no definition universally agreed upon. Nonetheless, it can be deduced from Article 33<sup>106</sup> of the Refugee Convention that any threat to life or freedom of the person based on race, religion, nationality, political opinion or membership of a particular social group constitutes persecution. In addition, determining what constitutes

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<sup>103</sup> Ibid., paras. 37–38.

<sup>104</sup> Ibid., paras. 40–42.

<sup>105</sup> Ibid., paras. 41, 45.

<sup>106</sup> Article 33 includes the core principle of *non-refoulement*. In accordance with paragraph 1 of this prohibition or expulsion or return ("refoulement") under the Convention, "[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". Paragraph 2 provides that "[t]he benefit of the - - provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country". For more information on the principle, see OHCHR, *Technical note: The principle of non-refoulement under international human rights law* (2018).

persecution relies on the specific details of each case. Persecution may entail severe violations of human rights, as well as other forms of significant harm or unbearable situations, evaluated in consideration of the views, emotions, and psychological state of the asylum seeker. In certain instances, discrimination can also constitute persecution when the anticipated or experienced treatment results in substantially harmful outcomes for the applicant.<sup>107</sup>

The refugee definition recognizes both state and non-state actors of persecution.<sup>108</sup> The reason for the well-founded fear of persecution by such actor must be at least one of the grounds listed in Article 1 A (2): race, religion, nationality, membership of a particular social group or political opinion. From these grounds, “race” should be interpreted broadly to include discrimination of various ethnic groups.<sup>109</sup> Persecution based on “religion” can manifest in many forms, such as imposing significant discriminatory measures on individuals for practicing their religion or being part of a specific religious community. The persecution ground “nationality” should not solely be interpreted as “citizenship” as it also encompasses belonging to an ethnic or linguistic group and may involve hostile attitudes and actions directed towards such minorities.<sup>110</sup> A “particular social group” typically consists of individuals who share similar backgrounds, customs, or social standings. Membership in such a group may be the cause of persecution due to distrust in the group’s allegiance to the government, or because the political beliefs, history or economic involvement of its members, or the mere existence of the group itself, is seen as a hindrance to government policies.<sup>111</sup> As regards the last ground, an applicant may demonstrate a fear of persecution due to his or her political opinions that differ from those of the government and are therefore not accepted by the authorities. This requires that such views have either been noticed by the authorities or are ascribed to the applicant by them.<sup>112</sup>

It should be noted that the applicants themselves might not always realize which specific reasons under the Refugee Convention are behind their fear of persecution. However, it is not their responsibility to specify these grounds in detail. Instead, it is the duty of the examiner conducting the refugee status determination to investigate the facts, assess the grounds for the feared

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<sup>107</sup> UNHCR, *Handbook* (2019), paras. 51–52, 54; UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked* (2006), para. 14.

<sup>108</sup> UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1(A)2 of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002), para. 19.

<sup>109</sup> UNHCR, *Handbook* (2019), paras. 66, 68.

<sup>110</sup> *Ibid.*, paras. 72, 74.

<sup>111</sup> *Ibid.*, paras. 77–78.

<sup>112</sup> *Ibid.*, para. 80

persecution, and ensure their alignment with the definition of the Refugee Convention. Additionally, persecution grounds often overlap, with multiple factors affecting one individual. For instance, a political opponent of the government of the country of origin might also belong to a religious or national group, which can be relevant in evaluating their well-founded fear.<sup>113</sup>

The persons excluded from refugee status can be categorized into three groups: firstly, those already under United Nations protection or assistance (Article 1 D); secondly, those not deemed to require international protection (Article 1 E); and thirdly, those considered undeserving of international protection (Article 1 F).<sup>114</sup> In practice, Article 1 D<sup>115</sup> mainly pertains to a specific subset of refugees, namely Palestinians displaced due to the 1948 or 1967 Arab-Israeli conflicts, who receive aid from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).<sup>116</sup> Article 1 E,<sup>117</sup> then again, excludes from refugee status individuals who already enjoy more extensive protection than what the Refugee Convention offers in a country other than their country of origin where they have established regular or permanent residency and hold a status comparable to citizenship.<sup>118</sup>

The exclusion clauses in Article 1 F are the most relevant in majority of the refugee status determinations of children. It stipulates that the Refugee Convention “shall not apply to any person with respect to whom there are serious reasons for considering that: (a) [h]e has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) [h]e has committed a serious non-political crime outside the country of refuge prior to his admission to that

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<sup>113</sup> Ibid., paras. 66–67.

<sup>114</sup> Ibid., para. 140.

<sup>115</sup> Article 1 D paragraph 1 orders that “[the Refugee] Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance”. However, paragraph 2 mentions that “[w]hen such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of [the Refugee] Convention”.

<sup>116</sup> UNHCR, *Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian Refugees* (2009), para. 1. However, as advised by the *Revised Note’s* paragraph 2, this should not be understood to imply that Palestinian refugees can never receive international protection under the inclusion criteria of the Refugee Convention: in accordance with paragraph 2 of Article 1 D, if UNRWA’s protection has ended (and Articles 1 C, 1 E and 1 F are not applicable), the person in question qualifies for the benefits of the Refugee Convention in case his or her position has not been definitively settled in accordance with the relevant resolutions adopted by the UNGA.

<sup>117</sup> Article 1 E demands that “[the Refugee] Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country”.

<sup>118</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003), para. 9.

country as a refugee; (c) [h]e has been guilty of acts contrary to the purposes and principles of the United Nations”. The authority for determining the applicability of these exclusion clauses lies with the state where the applicant is seeking recognition of their refugee status. To invoke Article 1 F, it suffices to demonstrate “serious reasons for considering” that one of the acts outlined in the provision has been committed. Hence, formal evidence of past criminal prosecution is not necessary. Nevertheless, given the significant implications of exclusion for the individual involved, a restrictive interpretation of these clauses is essential.<sup>119</sup>

Among the numerous international instruments providing direction on the scope of the “crimes against peace, war crimes and crimes against humanity” mentioned in Article 1 F (a),<sup>120</sup> the most detailed definitions for these crimes are contained in the 1945 Charter of the International Military Tribunal (annexed to the “London Agreement”).<sup>121</sup> According to Article 6 (a) of the Charter, crimes against peace include “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”. War crimes, then again, are considered to be “violations of the laws or customs of war”, covering acts such as “murder, ill-treatment or deportation to slave labour or for any other purpose, of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity” (Article 6 (b)). And lastly, Article 6 (c) establishes “murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated” as crimes against humanity.

Article 1 F (b) excludes those who have committed “a serious non-political crime”. This classification excludes minor offenses and actions that impede the lawful exercise of human rights. The assessment of the seriousness of a specific offence should be based on international standards, with the following aspects to be considered: the type of crime, the actual harm caused, the

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<sup>119</sup> UNHCR, *Handbook* (2019), para. 149. See also UNHCR ExCom, *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection No. 103 (LVI) - 2005*, para. (d).

<sup>120</sup> UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (2003), para. 10. For a complete list of such international instruments, see Annex VI of the UNHCR, *Handbook* (2019).

<sup>121</sup> UNHCR, *Handbook* (2019), para. 150.

legal procedures employed for prosecuting the crime, the severity of the punishment, and whether the majority of jurisdictions would regard it as a serious offense. Consequently, crimes such as murder and armed robbery are considered serious offences, but petty theft is not. Additionally, in order to be excluded from refugee status, such serious crime must have been committed outside the country of refuge prior to the person's admission to that country as a refugee and must be deemed "non-political", meaning that other motives such as personal interests or financial gain are the primary focus of the crime.<sup>122</sup>

Lastly, Article 1 F (c) is designed to broadly encompass actions contrary to the purposes and principles of the United Nations that may not be entirely addressed in the first two exclusion clauses of the article. The purposes and principles of the UN have been determined in the Preamble, Article 1<sup>123</sup> and Article 2<sup>124</sup> of the UN Charter. They articulate fundamental values that should regulate the interactions among member states and with the international community at large. This suggests that, for a person to have engaged in actions against these principles, they must have held a position of authority within a member state and played a significant role in enabling their state to contravene these values. However, there are scarcely any precedents on the application of this clause. Given its broad nature, its application should also be cautious.<sup>125</sup>

### **3.2 Children as Asylum Applicants**

A few words should be said about the position of children as asylum applicants in the refugee status determination. In general, the unique conditions of children seeking asylum through independent refugee status applications are not thoroughly comprehended, and children continue to be overlooked in national refugee status determination processes. A refugee status claim of

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<sup>122</sup> UNHCR, *Guidelines on International Protection No. 5* (2003), paras. 14–15.

<sup>123</sup> To put it shortly, Article 1 of the UN Charter states that the purposes of the UN are: "1. [t]o maintain international peace and security"; "2. [t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; "3. [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; and "4. [t]o be a centre for harmonizing the actions of nations in the attainment of these common ends".

<sup>124</sup> In summary, Article 2 mentions seven principles of the UN in the following order: sovereign equality of all member states; fulfillment of obligations assumed by the members in accordance with the Charter in good faith; settlement of international disputes in a peaceful manner; prohibition of the use of force in international relations; members' assistance to the UN; maintaining international peace and security through ensuring that non-member states act in accordance with the UN principles; and non-interference by the UN in matters which are essentially within the domestic jurisdiction of any state.

<sup>125</sup> UNHCR, *Handbook* (2019), paras. 162–163. See also UNHCR, *Guidelines on International Protection No. 5* (2003), para. 17.

a child is more prone to being disregarded when the child is accompanied by a family member. Under these circumstances, the child's status might be viewed as subordinate to the family unit rather than being acknowledged as an independent asylum-seeker with distinct rights and interests. Consequently, the child's claim is typically regarded as indistinguishable from that of the accompanying family member. This occurs notwithstanding potential evidence indicating that the child is individually at risk of harm. In fact, there is a higher probability of the child's claim being evaluated autonomously when the child arrives unaccompanied or separated.<sup>126</sup>

Nevertheless, the UNHCR has established that children, irrespective of their age or whether they are accompanied, unaccompanied, or separated, have right to lodge an independent refugee claim.<sup>127</sup> Even in their early childhood, a child can be regarded the principal asylum applicant.<sup>128</sup> However, in such situations, the child may encounter difficulty in expressing their claim for refugee status with the same proficiency as adults, thus necessitating specialized assistance to effectively communicate their case. Ultimately, the parent, caregiver, or other designated representative of the child will need to undertake a more substantial responsibility in ensuring that all pertinent facets of the child's claim are thoroughly presented.<sup>129</sup> Similarly, parents, extended family members, or community members who are legally or customarily responsible for a child seeking asylum must provide appropriate guidance to such child who has arrived in the country of refuge accompanied by them. This guidance should facilitate the child's understanding on the exercise of his or her rights during the refugee status determination process in alignment with the child's evolving capacities.<sup>130</sup>

Where parents or caregivers apply for asylum due to concerns about persecution affecting their child, the child usually becomes the principal asylum applicant, even if accompanied by his or her parents. In such situations, similar to the manner in which a child can acquire refugee status

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<sup>126</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 2; Pobjoy 2017, pp. 44–45.

<sup>127</sup> UNHCR, *Technical Guidance: Child Friendly Procedures* (2021), p. 35.

<sup>128</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 8. See also the case referenced by the UNHCR in relation to this in footnote 16 of the *Guidelines*: High Court of Australia, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs* (2000), where the court found that the appellant, a 3½ years-old boy, was “entitled to have his own rights determined” and that “[h]e is not for all purposes subsumed to the identity and legal rights of his parents”, at para. 78.

<sup>129</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 2, 8. See also UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994), pp. 97–103.

<sup>130</sup> See UNHCR, *Guidelines on International Protection No. 8* (2009), para. 8. This is in accordance with Article 5 of the UNCRC, which states that “States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”.

through his or her parent's recognition as a refugee, a parent can likewise be conferred derivative status contingent upon the refugee status of their child.<sup>131</sup> In instances where both the parent(s) and the child possess distinct assertions for refugee status, it is advisable that each claim undergoes individual assessment. However, if the child's experiences are perceived as integral to the parent's claim rather than being assessed independently, it is crucial to also evaluate the claim from the child's perspective.<sup>132</sup>

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<sup>131</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 9; UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation* (2009), para. 11. See also UNHCR ExCom, *Conclusion on the Protection of the Refugee's Family No. 88 (L) – 1999*, para. (b)(iii).

<sup>132</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 9. See also, for instance, the following case referenced by the UNHCR in relation to this in footnote 21 of the *Guidelines*: New Zealand Refugee Status Appeals Authority, *Refugee Appeal Nos. 76250 & 76251* (2008), where the assessment of the appellant's refugee status also included an analysis on her one-year-old daughter's safety and status, at paras. 45–46, 50, 52, 58.

## 4 Best Interests of the Child

### 4.1 Meaning and Scope of Article 3(1)

From its 41 articles, Article 3(1) of the UNCRC on the best interests of the child sets out one of the fundamental values and general principles under the Convention.<sup>133</sup> According to the provision, the best interests of the child shall be a primary consideration in all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration offers guidance from the Committee on the Rights of the Child on the interpretation of this quite broadly formulated Article. As reported in it, the expression “primary consideration” implies that the best interests of the child may not be regarded equally alongside all other factors, the rationale being the unique circumstances of children: their dependence, immaturity, legal position, and frequently, “voicelessness”. The CRC instructs also that the words “all actions concerning children” should be understood to include not only “decisions, but also all acts, conduct, proposals, services, procedures and other measures” directly or indirectly affecting children.<sup>134</sup> In addition, the CRC remarks that the obligation to consider the best interests of the child in all such actions should be understood to apply comprehensively throughout a state’s government, parliament, administration and judiciary.<sup>135</sup>

The nature of Article 3(1) mandates state parties to uphold and execute the right of the child to have his or her best interests evaluated and considered as the foremost priority, and imposes a significant obligation on states to undertake all essential, measured and tangible actions to fully enforce the right.<sup>136</sup> Children have fewer opportunities than adults to advocate effectively for

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<sup>133</sup> CRC, *General comment No. 14 (2013)*, para. 1. It shall be added that even before the Convention on the Rights of the Child was adopted, the concept of the best interests of the child was already recognized in the 1959 Declaration of the Rights of the Child (para. 2) and the Convention on the Elimination of All Forms of Discrimination against Women (Articles 5(b) and 16(1)(d)).

<sup>134</sup> CRC, *General comment No. 14 (2013)*, paras. 17, 19.

<sup>135</sup> *Ibid.*, para. 25; CRC, *General comment No. 5 (2003)*, para. 12.

<sup>136</sup> CRC, *General comment No. 14 (2013)*, paras. 13, 36. The implementation of the child’s best interests and the states’ obligations related are also supported by a few other articles in the Convention. Article 4 of the UNCRC supports the implementation of the provision by establishing that states parties are under an obligation to take “all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the - - Convention” within their jurisdictions. Equally, Article 42 demands that states parties “undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike”. Furthermore, as covered earlier in section 2.1.2 of this study, states parties are, in the end, under an obligation to report on the measures they have adopted to give effect to the rights of the Convention and on the progress made on the enjoyment of the rights in accordance with Article 44.

their own interests and thus Article 3(1) ensures that those participating in making decisions concerning a child or children are particularly mindful of the child's or children's interests and emphasize what serves them best.<sup>137</sup> In fact, the child's best interests is not only a right or principle, but also guides decision-making process concerning a child or children as a rule of procedure. Therefore, the full application of the child's best interests requires taking into account all these three different dimensions of the concept: the best interests of the child (a) as a substantive right, (b) as a fundamental, interpretative legal principle, and (c) as a rule of procedure. To understand the legal impact of the provision in determining the best interests of a child seeking refugee protection, these three dimensions of the concept will be presented next.<sup>138</sup>

As regards the first dimension, the Committee has underlined that the best interests of the child mean the right of the child to have their best interests evaluated and prioritized whenever decisions involving them, either individually or collectively as a group of children, are being deliberated and various interests are being balanced. Through this impact, the child's best interests establish an inherent duty for states parties, which is to be directly applied and may be invoked before any court of law. The second role of Article 3(1) as a legal principle means that the child's best interests act also as a guiding rule in interpretation: the CRC has noted when a legal provision allows for multiple interpretations, the one that best promotes the child's best interests should be adopted. The third and last aspect of the child's best interests as a rule of procedure, then again, requires that the decision-making process encompasses an evaluation of the possible effects of the decision to a child or children, both positive and negative, whenever such decisions affecting a certain child, a group of children or children in general will be taken. In addition, the CRC demands that procedural safeguards are in place when evaluating the child's best interests and the reasoning of the final decision demonstrates that the right has truly been taken into consideration. Consequently, states parties must articulate how the right has been upheld when making the decision, detailing what factors have been deemed in the child's best interests, the criteria employed, and how these interests have been balanced against other factors, whether they pertain to broader policy issues or individual circumstances.<sup>139</sup>

The CRC has established that the objectives of applying the best interests principle lie (i) in guaranteeing that children are able to fully and effectively enjoy all the rights granted to them in the Convention, and (ii) in ensuring the holistic i.e. "physical, mental, spiritual, moral,

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<sup>137</sup> See CRC, *General comment No. 14 (2013)*, paras. 37, 39.

<sup>138</sup> See *ibid.*, para. 6.

<sup>139</sup> *Ibid.*

psychological and social” development of the child.<sup>140</sup> Therefore, Article 3(1) should be interpreted in conjunction with the entirety of the UNCRC, encompassing all the rights it safeguards.<sup>141</sup> In light of this, the principle of the best interests of the child is closely linked to other three general principles of the UNCRC relevant in the interpretation and implementation of the rights of the child: the right to non-discrimination established in Article 2,<sup>142</sup> the right to life, survival and development in Article 6,<sup>143</sup> and the right to be heard in Article 12.<sup>144</sup> Therefore, when evaluating and deciding what is in the child’s best interests, states must ensure thorough respect for these rights. The CRC has noted that the correct application of the best interests of the child hinges especially on fulfilling the criteria set out in Article 12: the evaluation of a child’s best interests should encompass honoring the child’s entitlement to freely express his or her opinions and appropriate consideration must be given to these opinions in all matters affecting him or her.<sup>145</sup>

As regards international refugee protection, the CRC has affirmed that the scope of actions undertaken by “administrative authorities” covers decisions concerning asylum, meaning that decisions on children’s refugee statuses must be evaluated and directed by the child’s best interests.<sup>146</sup> As the express wording of Article 3(1) of the UNCRC makes the best interests principle applicable not only to actions where a decision impacts a child directly, but also to actions where the child is indirectly impacted by a decision, the best interests of the child can be engaged both in situations where a child has independently deposited a claim for international protection and where the international protection granted to the child depends on the asylum

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<sup>140</sup> Ibid., para. 4 and footnote 2; CRC, *General Comment No. 5 (2003)*, para. 12.

<sup>141</sup> Pojoy 2017, p. 228. According to the interpretation of the CRC, all the rights granted in the UNCRC are in the best interests of the child (CRC, *General comment No. 14 (2013)*, para. 4).

<sup>142</sup> See footnote 12 of this study for the content of Article 2(1). Paragraph 2 of Article 2 prescribes that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members”.

<sup>143</sup> Article 6 declares that “States Parties recognize that every child has the inherent right to life” (para. 1) and that “States Parties shall ensure to the maximum extent possible the survival and development of the child” (para. 2).

<sup>144</sup> In accordance with Article 12, “States Parties shall 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” (para. 1). “For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law” (para. 2).

<sup>145</sup> See CRC, *General comment No. 14 (2013)*, paras. 41–43.

<sup>146</sup> Ibid., para. 30.

decision of his or her parents. In light of this, the best interests principle has a crucial role in offering additional safeguard for children who seek refugee status.<sup>147</sup>

The following section 4.2 will present the general framework and observations on the elements to be evaluated and balanced when assessing and determining the child's best interests.<sup>148</sup> After that, section 4.3 will outline the child-friendly procedural safeguards which must be established and adhered to in states to guarantee the proper effectuation of the child's right to have his or her best interests taken as a primary consideration.<sup>149</sup> After showing how the best interests of the child affect decisions in general, chapter 5 will finally examine the application of the child's best interests in refugee status determinations, attempting to prescribe and explain in detail how the best interests of the child must be taken into account in such procedures and what is awaited from states.<sup>150</sup>

## 4.2 Best Interests Assessment and Determination

The CRC has compiled a list of example elements for decision-makers to consider when assessing and determining the child's best interests.<sup>151</sup> These elements to be taken into account (not in a hierarchical order) include: (i) the child's views, (ii) the child's identity, (iii) preservation of the family environment and maintaining relations, (iv) care, protection and safety of the child, (v) situation of vulnerability, (vi) the child's right to health, and (vii) the child's right to education.<sup>152</sup> However, attention shall be paid to the fact that the elements within the best-interests evaluation might contradict when examining a particular case and its conditions. For instance, the respect for the child's right to family and the requirement to protect the child from all forms of physical and mental violence by his or her parents may sometimes be in conflict. In such instances, the elements must be balanced against one another to determine the course

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<sup>147</sup> Pobjoy 2017, p. 196.

<sup>148</sup> CRC, *General comment No. 14 (2013)*, para. 52.

<sup>149</sup> *Ibid.*, para. 85. In doing this, the study will use the *General comment No. 14 (2013)* from the CRC as it provides the most extensive summary on the best interests assessment and determination obligations imposed on states in relation to Article 3(1). The *2021 UNHCR Best Interests Procedure Guidelines* do not provide any new or additional information in this regard but are valuable in determining the applicability of the child's best interests to refugee status determination later in the study.

<sup>150</sup> See CRC, *General comment No. 14 (2013)*, para. 11 where the CRC states that the General Comment provides "a framework for assessing and determining the child's best interests", but it does not, however, "attempt to prescribe what is best for the child in any given situation at any point in time".

<sup>151</sup> *Ibid.*, para. 50. In the same paragraph, the CRC has noted that while all the elements listed should be considered and weighed in each case, the fact that the list is not exhaustive suggests the opportunity to extend the consideration beyond them and take into account additional aspects that are pertinent to the particular case of an individual child (or a group of children).

<sup>152</sup> See CRC, *General comment No. 14 (2013)*, pp. 13–17.

of action that best serves the child's interests.<sup>153</sup> In the following paragraphs, each of these elements will be presented shortly.

The first element, the child's views, emanates from the previously discussed Article 12 of the Convention and the right granted to children in it to express their views freely in all matters affecting them. A decision that disregards or inadequately considers the child's opinions in accordance with his or her age and level of maturity undermines the child's ability to impact the determination of what is in his or her best interests. The child's young age or vulnerable situation, such as disability or migrant status, does not negate their right to express their views nor diminishes the significance accorded to their opinions. In order for the children in such circumstances to be able to take fully part in the determination of their best interests, special actions to provide these children with the necessary support should be taken to ensure that they can exercise their rights equally.<sup>154</sup>

Children are unique individuals necessitating due consideration of diversity in determining their best interests. Article 8 of the UNCRC emphasizes the obligations of states parties "to respect the right of the child to preserve his or her identity". This "identity" of the child, the second element to be recognized, consists of attributes such as gender, sexual orientation, nationality, religious affiliations, cultural heritage, and personality traits. While children universally share foundational needs, the manifestation of these needs is contingent upon a myriad of individual, physical, societal, and cultural features, including children's evolving capacities. Hence, the preservation of the child's identity warrants due respect and acknowledgment in the best-interests assessment of the child.<sup>155</sup>

As regards the third element, the Committee notes that the assessment and determination of the child's best interests must contemplate the preservation of the child's family environment. Securing family unity and refraining from separating family members from each other constitute key imperatives of the child protection efforts, which apply also to the potential separation of a child from his or her parents in the asylum procedure or the decisions on family reunification<sup>156</sup>

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<sup>153</sup> Ibid., para. 81.

<sup>154</sup> Ibid., paras. 53–54.

<sup>155</sup> Ibid., para. 55.

<sup>156</sup> Family reunification is addressed in two separate Articles of the UNCRC. Article 10(1) provides that "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" and that "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". Article 22(2), in turn, obliges states parties to "provide - - co-operation in any efforts

in the case of unaccompanied or separated children.<sup>157</sup> The UNCRC protects the family unity in several ways: the Preamble states that the family is “the fundamental group of society and the natural environment for the growth and well-being of - - children”, the child’s right to preserve his or her family relations is guaranteed in Article 8(1) and the child’s right not to be subjected to arbitrary or unlawful interference with his or her family life is safeguarded in Article 16. In accordance with Article 5, the term “family” should be understood to cover parents in an extensive way (whether biological, adoptive or foster ones) and, if applicable, also the extended family members and community members as defined by local customs.<sup>158</sup> In terms of possible separation, Article 9 mandates that states must prevent the separation of a child from his or her parents against their will, unless such separation is necessary for the best interests of the child. Given the serious effects of such measure on the child, separation should be used only when considered necessary with no other options left, such as when the child is at risk of immediate harm, and the authorities should guarantee the child’s right “to maintain personal relations and direct contact with both parents on a regular basis”, unless it is against the child’s best interests (Article 9(3) of the UNCRC).<sup>159</sup>

Fourth element requires states to take into account that the decision ensures the child “such protection and care as is necessary for his or her well-being” (Article 3(2) of the UNCRC). The well-being of children should be interpreted in a comprehensive way to encompass not only their fundamental material, physical, educational, and emotional needs but also their requirements for affection and safety. Consideration of the child’s safety is based on the right of the child to be protected “from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” (Article 19). In addition, children must have protection, inter alia, from economic, sexual and other exploitation, as well as child labor, drug use and armed conflicts (Articles 32–39). Assessing the child’s current safety and well-being is essential when making a decision guided by the best-interests

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by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations - - to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family”. The same paragraph continues by stating that “[i]n cases where no parents or other members of the family can be found, the [refugee] child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason”.

<sup>157</sup> CRC, *General comment No. 14 (2013)*, paras. 60, 66.

<sup>158</sup> *Ibid.*, para. 59.

<sup>159</sup> *Ibid.*, para. 61.

approach. At the same time, the precautionary principle also necessitates evaluating potential future risks, harm, and other consequences the decision might bring on the child's safety.<sup>160</sup>

Another crucial element to be acknowledged is the child's situation of vulnerability. The UNCRC cherishes this in its Preamble by referencing the 1924 Declaration on the Rights of the Child, stating "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". However, the best interests of a child facing a particular vulnerable situation, such as being an asylum seeker, will differ from those of other children in similar situations. Authorities and decision-makers must consider the unique types and levels of vulnerability each child may experience.<sup>161</sup>

The last two important elements to consider restate two particular rights inherent to all children under the Convention: the child's right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, as assured in Article 24, and the child's right to education, as underlined in Article 28. Accordingly, the health status of the child and potential treatment options could factor into a comprehensive evaluation of the child's best interests when making other consequential decisions. Regarding the right to education, it is noteworthy to highlight that access to quality education, encompassing early childhood, non-formal and informal educational opportunities, without financial burden, is always prioritized as being in the child's best interests. Thus, any decisions regarding measures or actions involving a particular child must align with this right.<sup>162</sup>

### **4.3 Procedural Safeguards**

In addition to the elements to be considered when assessing and determining the child's best interests, the CRC has identified procedural safeguards to assure the proper implementation of the child's best interests in decision-making. These safeguards are intended to ensure adherence to formal processes that are child-friendly.<sup>163</sup> Such guarantees created by the best interests of the child in its role as a rule of procedure are: (i) the right of the child to express his or her views, (ii) legal representation, (iii) establishment of facts, (iv) qualified professionals, (v) time

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<sup>160</sup> Ibid., paras. 71, 73–74.

<sup>161</sup> Ibid., paras. 75–76.

<sup>162</sup> Ibid., paras. 78–79.

<sup>163</sup> Ibid., paras. 85, 87.

perception, (vi) legal reasoning, (vii) mechanisms to review or revise decisions, and (viii) child-rights impact assessment (CRIA).<sup>164</sup>

To establish a child-friendly process, it is essential to engage in communication with children, enabling their meaningful participation in the determination of their best interests. Therefore, giving a child a possibility to express his or her views must be guaranteed also as a procedural safeguard. This includes explaining the process and its potential outcomes to the child. If a representative, such as a parent, gathers information from the child, they must accurately convey the child's views.<sup>165</sup> However, when formal assessments and determinations of the child's best interests are being conducted in courts or similar bodies, children must always have appropriate legal representation. The provision of legal representation is imperative especially when a child becomes involved in an administrative or judicial process where the child's best interests are determined, but conflicts arise between the child and his or her guardian or other representative of the child's views.<sup>166</sup>

Procedural safeguards include also obtaining the pertinent facts and information of the case from the child by qualified experts and verifying and analyzing such gathered data to conduct an accurate assessment of the child's best interests. Qualified professionals are in fact a procedural safeguard themselves. The impact of each potential solution on the child must be assessed with regard to the child's individual traits and needs. This can only be effectively accomplished if done by professionals specialized in children's and youth's development and psychology, ensuring the process is safe and child-friendly.<sup>167</sup>

Children and adults perceive the passage of time differently: delays or prolonged decision-making can significantly impact children. Thus, it is recommended that states' domestic processes affecting children are conducted on a priority basis and expedited. Furthermore, to show that the child's right to have their best interests evaluated and prioritized has been honored, any decision regarding a child, a group of children or children in general must provide reasoning and explanation on how their best interests have been assessed and balanced in the decision-making, as noted earlier in this study. In instances where the decision deviates from the views expressed by the child in the case, the rationale behind such a discrepancy should be explained and all considerations that contributed to the different outcome comprehensively delineated.

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<sup>164</sup> Ibid., pp. 18–20.

<sup>165</sup> Ibid., paras. 89–90.

<sup>166</sup> Ibid., para. 96.

<sup>167</sup> Ibid., paras. 92, 94.

This is to prove that, notwithstanding the result, the best interests of the child remained a primary consideration throughout the decision-making process.<sup>168</sup>

When a decision affecting a child or children is finally made, there should be a possibility for appeal or review of the decision. States are required to institute appeal and review mechanisms within their legal frameworks for situations where a decision concerning a child or children appears to deviate from the appropriate process of evaluating and determining their best interests. These mechanisms must be communicated to the child and made accessible either directly to them or through their legal representative.<sup>169</sup>

The last procedural safeguard example by the CRC guarantees that the child's best interests are a primary consideration in governmental decision-making. The child-rights impact assessment or CRIA is a procedure designed to forecast the potential effects of proposed policies, laws, regulations, budgets, or other administrative decisions on children and their rights. The CRIA should be guided by the principles outlined in the UNCRC and its Optional Protocols, but the assessment itself could incorporate input from, for instance, NGOs and academics. The result of the assessment should yield suggestions for changes and enhancements, and these should be accessible to the public.<sup>170</sup>

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<sup>168</sup> Ibid., paras. 93, 97.

<sup>169</sup> Ibid., para. 98.

<sup>170</sup> Ibid., para. 99.

## 5 Best Interests of the Child in Refugee Status Determination

### 5.1 Application of the Child's Best Interests to the Refugee Status Determination

Even though there is generally no disagreement on the applicability of Article 3(1) to children seeking international protection, Article's relevance has mainly been recognized in the form of procedural guarantees and the appropriate treatment of a child or children in and following a refugee status determination process. However, the child's best interests may also be relevant in the substantive determination of a child's *de facto* eligibility for international protection.<sup>171</sup> This perspective to obligations arising from Article 3(1) is frequently ignored by states,<sup>172</sup> regardless of the best interests concept being applicable to "all actions concerning children".<sup>173</sup> In its General comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, the CRC has stated the obligation to take the best interests of the child as primary consideration shall be respected "during all stages of the displacement cycle".<sup>174</sup>

However, in its 2021 UNHCR BIP Guidelines, the UN Refugee Agency has emphasized that the refugee status determination should not be viewed as making a decision for a child in the sense that it would be about choosing among various options, such as suitable solutions, but rather as establishing whether the child in fact meets the criteria for refugee status. The refugee status is purely declaratory in nature, and a child's eligibility for international protection is thus adjudicated based on factual and legal determination of his or her situation only.<sup>175</sup> In this regard, states are justified in remarking that the principle of the best interests of the child does not supersede or alter the definition of a refugee when assessing whether the child qualifies for international protection. The UNCRC's assertion that decision-makers should prioritize interpretations that best serve the child's best interests when legal provisions allow multiple interpretations should not be construed to imply that the best interests principle modifies or replaces the defining criteria outlined in the Refugee Convention.<sup>176</sup> Consequently, the question on

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<sup>171</sup> Pobjoy 2017, p. 197.

<sup>172</sup> See CRC, *2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, p. 20, where the Committee on the Rights of the Child observed states' migration policies and found that the best interests of the child are conspicuous by their absence in decision-making on migration, including when deciding on international protection applications.

<sup>173</sup> Article 3(1) of the UNCRC.

<sup>174</sup> CRC, *General comment No. 6 (2005)*, para. 19.

<sup>175</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, p. 58.

<sup>176</sup> Pobjoy 2017, p. 198.

whether it would be in the child's best interests to have a refugee status is unrelated to the refugee status determination.<sup>177</sup>

How should the best interests of the child enshrined in Article 3(1) of the UNCRC be respected in refugee status determination then? While the best interests principle does not have an altering effect on the definition of a refugee, this limitation does not make the principle irrelevant to interpreting the Refugee Convention's definition. When interpreting the components of the refugee definition, the principle should be viewed as shaping the norm rather than creating a new one.<sup>178</sup> The UNHCR has advised in its BIP Guidelines that within the refugee status determination procedures, the child's best interests must be considered in two distinct ways: first, the RSD procedure should make the child's best interests a primary consideration when assessing the child's eligibility for international protection, and second, the RSD process itself should be child-friendly and tailored to the child's age, level of maturity and individual needs through the establishment of procedural and evidentiary safeguards.<sup>179</sup>

The first way implements the best interests of the child by incorporating them as a primary consideration and giving them due weight within the assessment of a child's eligibility for refugee status. This entails considering, *inter alia*, the criteria for refugee status from the child's perspective, the potential harm to the child upon return to his or her country of origin, and the suitability of internal flight or relocation alternatives.<sup>180</sup> In addition, since decisions on the application of the exclusion clauses for denying international protection should be made as part of the RSD procedure,<sup>181</sup> the best interests of child shall guide the decision-making in these situations too. According to the UNHCR, the consideration of the best interests of the child must be documented in written decisions.<sup>182</sup>

The second way, making the RSD process child-friendly, involves ensuring, for example, that the personnel who carries out the determination and works with children in need of international protection is adequately trained. It is essential to consistently seek the child's views throughout the process in accordance with the child's right to express those views freely and be heard in all matters affecting the child, although the child's capability for interviews must be assessed before conducting any. Furthermore, the provision of information related to the process must

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<sup>177</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, p. 58.

<sup>178</sup> Pobjoy 2017, p. 198.

<sup>179</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, p. 59.

<sup>180</sup> *Ibid.*

<sup>181</sup> UNHCR, *Guidelines on International Protection No. 5* (2003), para. 31.

<sup>182</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, p. 59.

be presented to the child in a child-friendly manner and any information concerning the child must be handled with the strictest confidentiality. Child-friendly RSD process protects the child also by arranging the presence of a supportive adult or guardian for him or her and guarantees that the child gets independent legal representation throughout the process. Moreover, deadlines and appeals processes are encouraged to be adjusted as needed in the case of a child applicant.<sup>183</sup>

The above-mentioned measures are examples of the means through which it can be ensured that both ways of considering the best interests of the child within the RSD procedures are being appropriately implemented. Thus, states can also be required to take other measures to implement the spirit of the child's best interests into the RSD procedure. In light of this, the following sections will delve deeper into the two ways presented in order to establish a greater understanding on the realization of the best interests of the child in the state's RSD procedure. First, section 5.2 will discuss the child-sensitive assessment of eligibility for refugee status. The section will evaluate from a child's perspective both the "well-founded fear of being persecuted" (subsection 5.2.1) and the grounds of persecution (5.2.2.) noted in the criteria for refugee status in Article 1 A (2) of the Refugee Convention. The same section will also study the concept of an internal flight or relocation alternative (5.2.3), understood to stem from either "well-founded fear of being persecuted" clause, or the "unable or - - unwilling to avail himself of the protection of that country" clause of the refugee definition.<sup>184</sup> Last subsection 5.2.4 will consider the application of the clauses in Article 1 F of the Refugee Convention for excluding the eligibility for refugee status in the case of a child. Finally, section 5.3 will enlighten how the RSD process should be made child-friendly through procedural and evidentiary safeguards.

The UNHCR has reminded that young and vulnerable persons may be at heightened risk of becoming victims of persecution. As a result, it shall be noted that even though the subsequent interpretations consider a child to be a person under 18 years of age, there may be exceptional situations where assessing a refugee claim from a child applicant's perspective is pertinent, even if the applicant has already turned 18 years or is slightly older. This could be particularly relevant if the persecution has impeded the applicant's development, and their psychological maturity still resembles that of a child.<sup>185</sup>

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<sup>183</sup> Ibid.

<sup>184</sup> See UNHCR, *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1(A)2 of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees* (2003), para. 3.

<sup>185</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 7.

## 5.2 Child-Sensitive Assessment of Eligibility for Refugee Status

### 5.2.1 *Well-Founded Fear and Persecution of Children*

A child-sensitive application of the refugee definition has been addressed in the 2009 “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” of the UNHCR. These guidelines reflect the general guidelines of international law by basing on, inter alia, the previous policies developed by the UNHCR and its ExCom, the guidelines of the Committee on the Rights of the Child, OHCHR and UNICEF, as well as national asylum instructions and case law. According to the guidelines, adopting a perspective that is sensitive to children and their specific needs when interpreting the Refugee Convention does not imply that children seeking international protection are inherently granted refugee status. In line with the Convention’s criteria, the child applicant must demonstrate that he or she has a well-founded fear of facing persecution due to reasons such as race, religion, nationality, membership of a particular social group or political opinion.<sup>186</sup>

The principle of the best interests of the child necessitates evaluating the persecutory harm from the child’s viewpoint. This can involve examining the impact of the harm to the child’s rights or interests. While the harm encountered by children may be comparable or identical to that of adults, children’s experience of such harm may differ from adults’. Mistreatment or threats that might not constitute persecution for an adult applicant could reach that threshold in the case of a child.<sup>187</sup> Lack of maturity, vulnerability, underdeveloped coping skills, dependency, different developmental stages and limited capacities can significantly influence the child’s experience or fear of the harm. Particularly in cases where the harm experienced or feared falls between harassment and a threat to life or freedom, it may be essential to consider the personal circumstances of the child as well as his or her age when determining whether the harm rises to the level of persecution. In order to accurately gauge the severity of the actions and their effects on

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<sup>186</sup> Ibid., para. 4.

<sup>187</sup> Ibid., paras. 10, 15. See also the case referenced by the UNHCR in relation to this matter in footnote 24 of the *Guidelines*: High Court of Australia, *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs* (2000), where the court stated that “[w]hat may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child”, at para. 79.

a child, a thorough examination of each case is necessary, with the persecution threshold being tailored to the specific needs of the child.<sup>188</sup>

In its General comment No. 6, the Committee on the Rights of the Child has confirmed that taking into account and paying special attention to child-specific forms and manifestations of persecution, as well as motives for it, is imperative in interpreting the refugee definition in an age and gender-sensitive manner.<sup>189</sup> Additionally, the UN Refugee Agency has reflected that aspects such as children's rights, developmental stage of the child, familiarity and/or recollection of conditions in his or her country of origin, and vulnerability should be taken into consideration in national RSD procedures to ensure the proper application of the refugee status eligibility criteria.<sup>190</sup>

Both objective and subjective elements play a key role in determining whether the child applicant has a "well-founded fear of being persecuted".<sup>191</sup> Conducting an accurate assessment of the possible persecution faced by the child calls for a timely analysis and understanding of the child's circumstances in his or her country of origin. This includes ascertaining the child protection services available to the child. Erroneous status determination may result if the claim of a child applicant is denied based on presumptions that perpetrators would disregard or not perceive child's views as significant threats.<sup>192</sup>

A child may manifest its fear in a way different from an adult.<sup>193</sup> It is possible that a child might be unable to articulate the fear as expected or, on the contrary, exaggerates it.<sup>194</sup> In such cases, the authorities conducting the RSD must assess the risk faced by the child with a greater regard to objective elements, irrespective of the fear expressed by him or her.<sup>195</sup> This entails

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<sup>188</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 15.

<sup>189</sup> CRC, *General comment No. 6* (2005), para. 74.

<sup>190</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), pp. 2–3 and para. 8.6.

<sup>191</sup> UNHCR, *Handbook* (2019), paras. 38, 217.

<sup>192</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 11.

<sup>193</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), para. 8.6.

<sup>194</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 11.

<sup>195</sup> See UNHCR, *Handbook* (2019), para. 217. See also the case referenced by the UNHCR in relation to this matter in footnote 26 of the *Guidelines on International Protection No. 8* (2009): Federal Court of Canada, *Yusuf v. Canada* (1991), where the court concluded that "I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.", at para. 5.

considering evidence from diverse sources, encompassing information specific to the child and from their country of origin.<sup>196</sup>

The conditions of the child's parents and other members of the family, including their circumstances in the child's country of origin, must also be assessed in the RSD procedure of the child.<sup>197</sup> Children typically do not depart from their country of origin autonomously. Instead, they are usually dispatched by their parents or primary caregivers.<sup>198</sup> If the asylum seeker is an unaccompanied child and there is evidence suggesting that the parents want their child to be outside his or her country of origin due to well-founded fear of persecution, it can be assumed that the child shares such fear.<sup>199</sup> Similarly, in the case of an accompanied child whose parent or caregiver has a well-founded fear of their child being persecuted, it may be reasonable to infer that the child shares such apprehension, even if he or she does not overtly articulate or experience it.<sup>200</sup> In instances where the will of the parents of the unaccompanied child cannot be determined reliably, or the will is uncertain or contradicts with the child's will, the examiner must decide on the "well-foundedness" of the child's fear based on all available information. This may require giving the asylum seeker the benefit of the doubt.<sup>201</sup>

In practice, the persecution referred to in the criteria for refugee status can appear in the case of children as (i) child-related persecution or (ii) child-specific persecution. Regarding child-related manifestations of persecution, the UN Refugee Agency has noted that psychological harm could be particularly salient to consider when assessing a child's asylum claim. Children tend to be more anguished by hostile environments, may be inclined to perceive implausible threats as real, and can be deeply affected by unfamiliar surroundings. Furthermore, traumatic experiences can linger in a child's memory and increase his or her susceptibility for further harm in the future.<sup>202</sup>

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<sup>196</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 11.

<sup>197</sup> UNHCR, *Handbook* (2019), para. 218.

<sup>198</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), para. 8.9.

<sup>199</sup> UNHCR, *Handbook* (2019), para. 218.

<sup>200</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 11. See also the case referenced by the UNHCR in relation to this matter in footnote 27 of the *Guidelines*: Federal Court of Canada, *Canada (Minister of Citizenship and Immigration) v. Patel* (2008), where the court found that "[w]here a [child] claimant is not competent, whether by age or disability, and the evidence establishes an objective basis for his fear, it is sufficient that the designated representative establish a subjective fear in his role as designated representative (*in loco parentis*), or that the subjective fear be inferred from the evidence", at para. 33.

<sup>201</sup> UNHCR, *Handbook* (2019), para. 219; UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), para. 8.9.

<sup>202</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 16.

Moreover, children exhibit heightened sensitivity to actions directed at their immediate family members. Incurring harm upon a child's family or relative can contribute to generating well-founded fear in the child.<sup>203</sup> For instance, a child may develop a well-founded fear of persecution, even if he or she was not the immediate target of the harm, if the child has been a witness of violence against, or the disappearance or killing of his or her parent or other individual upon whom the child relies. Other examples of situations where the child's experience could qualify as persecution are the compelled separation of a child from his or her parents as a result of discriminatory custody regulations or the detention of the child's parent or both parents.<sup>204</sup>

Children may also become the target of child-specific forms of persecution, which are affected by their young age, immaturity and vulnerability. The fact that the asylum applicant is a child can be a key determinant in the type of harm endured or feared. This may arise because the purported persecution targets only children or disproportionately impacts them, or because it violates specific rights afforded to children.<sup>205</sup> In its *Conclusion on Children at Risk*<sup>206</sup>, the UNHCR's Executive Committee has recommended that states, UNHCR and other relevant agencies and partners work in cooperation to "[d]evelop child and gender-sensitive national asylum procedures, where feasible, - - and consider an age and gender-sensitive application of the 1951 Convention through the recognition of child-specific manifestations and forms of

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<sup>203</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 17. See also UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), para. 8.8.

<sup>204</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 17. The CRC has also confirmed that persecution of kin may justify granting the refugee status to the child if such act is related to one of the Refugee Convention grounds. For this statement, see CRC, *General comment No. 6 (2005)*, para. 74. See also the case referenced by the UNHCR in relation to this matter in footnote 36 of the *Guidelines: New Zealand Refugee Status Appeals Authority, Refugee Appeal Nos. 76226 and 76227* (2009), where the former judicial body found that the unjustified deprivation of custody rights from the mother was deemed significant enough for her young daughter to meet the threshold of "being persecuted", at para. 112. In the same breath, the authority stated that the Iranian custody law behind such decision established "a system for the determination and enforcement of custody which is based on political and religious justifications as opposed to the best interests of the child, thereby violating Article 3 of the Convention of the Rights of the Child".

<sup>205</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 18.

<sup>206</sup> The term "children at risk" refers to children who are at heightened risk due to their exposure to "risks in the wider protection environment" and/or "risks resulting from individual circumstances". Children at risk comprise unaccompanied and separated children, alongside other children facing or having experienced, for example, discrimination, violence, exploitation or abuse. Paragraph (c) of the UNHCR ExCom's *Conclusion on Children at Risk No. 107 (LVIII) – 2007* contains a non-exhaustive compilation of risk categories.

persecution, including under-age recruitment,<sup>207</sup> child trafficking<sup>208</sup> and female genital mutilation<sup>209</sup>.<sup>210</sup> These child-specific manifestations and forms of persecution have also been confirmed by the Committee on the Rights of the Child.<sup>211</sup>

In addition to the child-specific forms of persecution recognized and listed by the UNHCR ExCom, other examples of such persecution can be derived from child-specific rights. As the application of the child's best interests aims to guarantee the full and effective enjoyment of all the rights enshrined in the UNCRC, a modern and child-sensitive understanding of persecution condemns a wide range of children's rights violations.<sup>212</sup> Familial and domestic violence

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<sup>207</sup> International humanitarian law forbids the recruitment and involvement of children under 15 years of age in hostilities, regardless of whether the armed conflict is international (Article 77(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*) or non-international (Article 4(3)(c) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*). Article 38(3) of the UNCRC reiterates this obligation. However, there is an increasing consensus supporting a total prohibition on the recruitment and use of children under 18 years old in armed conflicts. According to the UNHCR, forcibly recruiting or enlisting children under 18 for direct participation in hostilities within state armed forces constitutes persecution. This also applies when a child faces the risk of being forcibly re-recruited or punished for evading forced recruitment or deserting the state's armed forces. Likewise, the recruitment of any child under 18 by non-state armed groups is regarded as persecution. See further UNHCR, *Guidelines on International Protection No. 8* (2009), pp. 10–11.

<sup>208</sup> In accordance with Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, “[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons””. Child trafficking constitutes a grave infringement of numerous fundamental children's rights and, as such, qualifies as persecution. These rights encompass the right to life, survival and development (Article 6 of the UNCRC), the right to protection from all forms of violence, including sexual exploitation and abuse (Articles 19 and 34), and the right to protection from child labor (Article 32), abduction, sale and trafficking (Article 35). See further UNHCR, *Guidelines on International Protection No. 8* (2009), pp. 12–13. See also UNHCR's *Guidelines on International Protection No. 7* (2006), which are equally pertinent to a child's asylum claim.

<sup>209</sup> Female genital mutilation (FGM) means “all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons” (OHCHR et al., *Eliminating Female Genital Mutilation: An Interagency Statement* (2008), p. 1). All forms of FGM are recognized as harmful practices that infringe upon a broad spectrum of children's rights, including the right to life (Article 6 of the UNCRC), the right to protection from torture, and cruel, inhuman or degrading treatment (Article 39), the right to protection from physical and mental violence (Article 19), and the right to the highest attainable standard of health (Article 24) (UNHCR, *Guidelines on International Protection No. 8* (2009), p. 13). For further information on FGM in relation to the refugee status determination, see UNHCR, *Guidance Note on Refugee Claims relating to Female Genital Mutilation* (2009).

<sup>210</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (g)(viii).

<sup>211</sup> CRC, *General comment No. 6 (2005)*, paras. 59, 74. The CRC highlighted in para. 59 that “under-age recruitment (including of girls for sexual services or forced marriage with the military) and direct or indirect participation in hostilities constitutes a serious human rights violation and thereby persecution, and should lead to the granting of refugee status where the well-founded fear of such recruitment or participation in hostilities is based on “reasons of race, religion, nationality, membership of a particular social group or political opinion” (art. 1(A)2, 1951 Refugee Convention”. In addition to under-age recruitment, the CRC confirmed in para. 74 that “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”.

<sup>212</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 18, 13.

against children (forbidden in Article 19 of the UNCRC),<sup>213</sup> forced or underage marriage (Article 24(3)),<sup>214</sup> hazardous or forced child labor (Article 32–33),<sup>215</sup> forced prostitution and child pornography (Article 34)<sup>216</sup> are all examples of child-specific forms of persecution. The UNHCR has suggested that child-specific forms of persecution also extend to violations of children’s rights to survival and development (Article 6(2)), as well as serious discrimination faced by children who were born outside coercive family planning regulations and by stateless children in consequence of the loss of citizenship and attendant rights.<sup>217</sup>

The UNHCR has suggested that the most common forms of child-specific persecution include also the violations of economic, social and cultural rights (*ESCR*), which can be found both in the 1966 *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the UNCRC.<sup>218</sup> *ESCR* are considered fundamental to the child’s right to survival and development,<sup>219</sup> and according to the UNHCR, a breach of a child’s economic, social, or cultural right may constitute persecution if the essential core aspects of such right are not fulfilled. For example, the deprivation of a street child’s right to an adequate standard of living (encompassing access to food, water, and housing as recognized in Article 11 of the *ICESCR* and Article 27 of the UNCRC) could result in an untenable situation that jeopardizes the child’s development and survival. Likewise, the denial of medical care, which is a violation of the child’s right to access health care services (as stipulated in Article 12 of the *ICESCR* and Article 24 of the UNCRC),

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<sup>213</sup> According to Article 19(1), “States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from 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”.

<sup>214</sup> Article 24(3) states that “States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children”.

<sup>215</sup> Article 32(1) recognizes “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development”. Article 33 orders states to “take all appropriate measures - - to prevent the use of children in the illicit production and trafficking of such substances”.

<sup>216</sup> In accordance with Article 34, states are bound to “protect the child from all forms of sexual exploitation and sexual abuse” by taking “all appropriate national, bilateral and multilateral measures”.

<sup>217</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 18.

<sup>218</sup> Article 2 of the *ICESCR* states that “[e]ach State Party to the - - Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the - - Covenant by all appropriate means, including particularly the adoption of legislative measures”. The corresponding obligation in the UNCRC can be found in its Article 4, which informs that states shall undertake all appropriate legislative, administrative, and other measures for implementing the *ESCR* recognized in the Convention “to the maximum extent of their available resources and, where needed, within the framework of international co-operation”.

<sup>219</sup> See CRC, *General comment No. 7 (2005): Implementing Child Rights in Early Childhood*, where the CRC stated that “the right to survival and development can only be implemented in a holistic manner, through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment, education and play”, at para. 10.

especially when the child is afflicted with a life-threatening illness, could qualify as persecution.<sup>220</sup> Persecution may also be demonstrated through the cumulative effect of multiple less severe violations.<sup>221</sup> For instance, this may occur when children with disabilities or stateless children are denied access to birth registration, subsequently resulting in their exclusion from the rights to education (Article 13 of the ICESCR and Article 22 of the UNCRC), health care and other services, such as social security (Article 9 of the ICESCR and Article 26 of the UNCRC).<sup>222</sup>

Discriminatory measures may constitute persecution when they result in significantly detrimental consequences for the affected child.<sup>223</sup> Children who are orphaned, abandoned, rejected by their parents, or otherwise deprived of adult care and support, and are fleeing domestic violence can be especially vulnerable to such discrimination. Although it is evident that not all discriminatory actions resulting in the deprivation of ESCR necessarily amount to persecution, it is imperative to evaluate the impact of such actions on each individual child. For instance, considering the fundamental significance of education and the substantial consequences that a denial of this right may have for a child's future, considerable harm could result if a child is systematically deprived of access to education.<sup>224</sup> Societal norms may not permit education for girls,<sup>225</sup> or attending school may become intolerable for the child because of harm experienced based on racial or ethnic factors.<sup>226</sup>

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<sup>220</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 18, 34–35. See also the case referenced by the UNHCR in footnote 82 of the *Guidelines*: Refugee Review Tribunal of Australia, *RRT Case No. N94/04178* (1994), where the Tribunal found that there was “a real chance that the Applicant will be denied access to - - medical treatment in [country of nationality] because of his HIV status” and therefore held that “the Applicant's fear of persecution is well-founded”.

<sup>221</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 35. See also UNHCR, *Handbook* (2019), para. 53.

<sup>222</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 35.

<sup>223</sup> *Ibid.*, para. 36. See also UNHCR, *Handbook* (2019), para. 54.

<sup>224</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 36. See also the case referenced by the UNHCR in footnote 86 of the *Guidelines*: Refugee Review Tribunal of Australia, *RRT Case No. V95/03256* (1995), where the Tribunal stated that “discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution” at para. 47.

<sup>225</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 36. See also the case referenced by the UNHCR in footnote 87 of the *Guidelines*: Federal Court of Canada, *Ali v. Minister of Citizenship and Immigration* (1996), where the judge stated that “[e]ducation is a basic human right and I direct the Board to find that [the applicant, a 9 year-old girl from Afghanistan,] should be found to be a Convention refugee”.

<sup>226</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 36. See also, for instance, the following cases in which it was established that the bullying and harassment of children at school constituted persecution (referenced by the UNHCR in footnote 88 of the *Guidelines*): Immigration and Refugee Board of Canada, *Decision VAI-02828, VAI-02826, VAI-02827 and VAI-02829* (2003) and Refugee Review Tribunal of Australia, *RRT Case No. N03/46534* (2003).

Although persecution typically stems from actions carried out by the authorities of a country,<sup>227</sup> the persecutor in the case of a refugee child is often a non-state actor, such as an armed group, a criminal organization, parent(s) or guardian(s), or community or religious figure. In such instances, the determination of the child's eligibility for international protection must assess the well-foundedness of his or her fear through questioning whether the child's state of origin is unable or unwilling to protect him or her from persecution.<sup>228</sup> The adequacy of the state's efforts to protect the child from the perpetrators must be evaluated individually for each case: the assessment of the measures taken by the state to combat persecutory actions will rely on the legal system in force criminalizing and sanctioning persecution, as well as the state authorities' effective conduct of investigation, identification of the perpetrators and appropriate punishing for persecution. Therefore, the mere enactment of laws condemning acts of persecution against children in the state of origin does not alone substantiate the dismissal of a child's refugee status claim.<sup>229</sup>

A child's chances of receiving protection from the country of origin also rely on the capacity and readiness of the child's parents, caregiver or guardian to assert rights and seek protection for the child. This may mean lodging complaints with law enforcement, administrative bodies, or public service agencies. On the other hand, in situations where the child is unaccompanied or orphaned, or where his or her parent, caregiver or guardian is the persecutor, such protection may not be forthcoming. Children may find themselves more easily disregarded or not taken seriously by the authorities, who may, vice versa, lack the necessary skills to communicate with and understand the needs of children. Moreover, a child may be unable to approach law enforcement officials due to their young age or express their fears or grievances in a manner similar to adults.<sup>230</sup> Taking such child's heightened sensitivity into account in the RSD determination is important for the consideration of the child's best interests. However, since the refugee law is meant to be a back-up source of protection,<sup>231</sup> the child's failure to demonstrate the lack of state protection in his or her country of origin puts refugee status assessors in a difficult position. Availability of effective protection in the country of nationality would normally mean that the person is not a refugee and in need for international protection. Therefore, the crucial

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<sup>227</sup> UNHCR, *Handbook* (2019), para. 65; UNHCR, *Guidelines on International Protection No. 1* (2002), para. 19.

<sup>228</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 37. Article 3(2) of the UNCRC obliges states parties to ensure the child such protection and care as is necessary for his or her well-being and to take all appropriate legislative and administrative measures to this end.

<sup>229</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 37–38; UNHCR, *Guidelines on International Protection No. 1* (2002), para. 11.

<sup>230</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 39.

<sup>231</sup> Hathaway – Foster 2003, p. 358.

part is assessing whether there is a ground based on well-founded fear of the child for refusing it.<sup>232</sup>

### 5.2.2 *Convention Grounds*

The eligibility for international protection requires that the well-founded fear of persecution is connected to any of the five grounds (or more) outlined in Article 1 A (2) of the Refugee Convention: race, religion, nationality, membership of a particular social group or political opinion. As in the refugee status determination of an adult, it is essential to establish such link also in the case of a child seeking international protection. It is adequate for the Convention ground to be a pertinent factor in the persecution, but it does not have to be the sole or primary cause.<sup>233</sup> For example, a Chinese boy born contrary to China's one-child policy might face systematic discrimination due to his supposed political views, membership in the particular social group of family, or affiliation with the "hei haizi"<sup>234</sup> social group. Likewise, a young Sudanese girl might face the threat of female genital mutilation due to factors such as her race, nationality, gender, or age.<sup>235</sup>

The interpretation and application of the five Convention grounds have resulted in particular challenges for children seeking refugee protection. A child-sensitive interpretation of the causal connection to a Convention ground requires that a refugee status assessor considers a Convention ground even if the applicant has not explicitly invoked it.<sup>236</sup> Even though the child may not fully comprehend the reason he or she is at risk of being targeted and therefore may not be able to express his or her views in the same way as older children or adults, the child has the same right to have his or her best interests assessed.<sup>237</sup>

Before analyzing the Convention grounds in the context of asylum-seeking children, one foundational principle shall be presented. Satisfying the requirement that a child applicant demonstrates a nexus between a Convention ground and the risk of being persecuted involves

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<sup>232</sup> See UNHCR, *Handbook* (2019), para. 100.

<sup>233</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 40.

<sup>234</sup> The term "hei haizi" or "black children" is used when referring to the unregistered children in China who were born outside the government's one-child family planning policy which started in 1980 and ended in 2016. See Immigration and Refugee Board of Canada, *China: Treatment of "illegal," or "black," children born outside the one-child family planning policy; whether unregistered children are denied access to education, health care and other social services (2003-2007)*; Pletcher 2024.

<sup>235</sup> Pobjoy 2017, p. 165.

<sup>236</sup> Ibid.

<sup>237</sup> See CRC, *General comment No. 14 (2013)*, para. 44.

recognizing that the child does not necessarily need to possess the specific racial, religious, national, political, or social characteristic themselves. It is adequate if the characteristic is attributed to him or her by the potential persecutor. In essence, the nexus criterion is fulfilled equally by the risk associated with an imputed identity as it is by the risk stemming from the actual identity of the child.<sup>238</sup>

Regarding the first set of grounds – “race”, “nationality”, or ethnicity – the UNHCR has highlighted their frequent association with children’s asylum claims across various contexts. Policies that withhold the right to nationality or birth registration from children of specific races or ethnicities,<sup>239</sup> or those that restrict access to education or healthcare based on ethnic background, are encompassed within this category. Likewise, this Convention ground applies to policies seeking to separate children from their parents due to their racial, ethnic, or indigenous heritage. For instance, sexual violence, trafficking, or recruitment into armed groups targeted systematically towards girls from ethnic minorities can be examined within the scope of the Convention’s “race” ground.<sup>240</sup>

Persecution based on the second ground, “religion”, may manifest itself similarly for children as it does for adults: a child’s religious beliefs or refusal to adhere to them can expose the child to persecution.<sup>241</sup> Establishing such Convention ground does not require the child to actively practice the religion: it suffices that the child is viewed as embracing specific religious beliefs or affiliating with a religious group, for instance, due to the religious convictions of the child’s parents.<sup>242</sup> In reality, children have minimal influence over their religious affiliation or observance. A child can have a well-founded fear of persecution on the basis of religion if, for example, they fail to conform to their assigned religious role or refuse to adhere to religious norms and subsequently face punishment.<sup>243</sup>

Persecution stemming from a child’s defiance of assigned gender norms may also fall under the Convention ground of “religion”. This affects girls in particular, and adolescent girls, for

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<sup>238</sup> Pobjoy 2017, p. 165.

<sup>239</sup> The right to nationality and birth registration have been laid down in Article 7 of the UNCRC. The first paragraph of the Article requires that a child “shall be registered immediately after birth and shall have - - the right to acquire a nationality”. Before the adoption of the UNCRC, the Universal Declaration of Human Rights recognized such rights in its Article 15 stating that “[e]veryone has the right to a nationality” (para. 1) and “[n]o one shall be arbitrarily deprived of his nationality” (para. 2).

<sup>240</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 41.

<sup>241</sup> *Ibid.*, para. 42.

<sup>242</sup> See UNHCR, *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (2004), paras. 9–10, 31.

<sup>243</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 43.

instance, may be coerced into performing traditional tasks of female slavery, or providing sexual services. Girls may also be subjected to practices such as female genital mutilation or face punishment for perceived honor-related offences in the name of religion.<sup>244</sup> In alternative situations, children, regardless of gender, may be intentionally singled out for recruitment into armed groups or the armed forces or the military forces of a state driven by religious or associated ideologies.<sup>245</sup>

Children's claims to refugee status have predominantly been assessed within the framework of the third Convention ground, "membership of a particular social group".<sup>246</sup> Although the most critical ground for children attempting to establish eligibility for refugee status,<sup>247</sup> "membership of a particular social group" is at the same time the most nebulous, controversial ground with the least clarity.<sup>248</sup> According to the UNHCR, a particular social group refers to individuals who possess a shared characteristic aside from their risk of being persecuted, or who are seen as a collective by society. This characteristic typically pertains to traits that are inherent, unalterable, or essential to one's identity, beliefs, or the practice of their human rights.<sup>249</sup>

Being a child has a significant impact on a person's identity, both in societal perception and from the child's perspective. Children also share numerous common characteristics, such as innocence, immaturity, susceptibility to influence, and developing capabilities. Although age is technically not an inherent nor permanent trait as it constantly changes, being a child effectively constitutes an unchangeable characteristic at any given moment. A child cannot separate themselves from their age to evade the feared persecution, and thus the child's age can be a reason for persecution under the Convention ground "membership of a particular social group".<sup>250</sup> The eventual aging of the child is inconsequential to the identification of a particular social group,

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<sup>244</sup> UNHCR, *Guidelines on International Protection No. 6* (2004), para. 24.

<sup>245</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 44.

<sup>246</sup> *Ibid.*, para. 48.

<sup>247</sup> Pobjoy 2017, p. 172.

<sup>248</sup> See UNHCR, *Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1(A)2 of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (2002), para. 1; Foster 2012, p. 2.

<sup>249</sup> UNHCR, *Guidelines on International Protection No. 2* (2002), para. 11.

<sup>250</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 49. See also the case referenced by the UNHCR in relation to this matter in footnote 98 of the *Guidelines*: United Kingdom Asylum and Immigration Tribunal, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department* (2007), where the former tribunal concluded that "the risk of severe harm to the appellant - - would be as a result of his membership of a group sharing an immutable characteristic [i.e. age] and constituting, for the purposes of the Refugee Convention, a particular social group", at para. 7.

as it is determined based on the circumstances presented in the asylum claim.<sup>251</sup> Similarly to the recognition of “women” as a particular social group in various legal systems, “children” or some subgroup of children can be identified as a particular social group.<sup>252</sup>

Social groups can also be identified on the basis that the children have experienced some common socially constructed incident, such as an abuse, abandonment, impoverishment or internal displacement. Therefore, various groupings of children can form the basis of a refugee status claim under the Convention ground “membership of a particular social group”.<sup>253</sup> The UNHCR has acknowledged groups such as abandoned children, disabled children, orphans, and children born in defiance of coercive family planning policies or from illegal marriages, sometimes referred to by the term “black children”.<sup>254</sup> Among the notable social groupings are children living on the streets,<sup>255</sup> children affected by HIV/AIDS,<sup>256</sup> and children recruited or exploited by armed forces or factions,<sup>257</sup> all potentially facing persecution due to their association with such

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<sup>251</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 49. See also the cases referenced by the UNHCR in relation to this matter in footnote 98 of the *Guidelines*: United States Board of Immigration Appeals, *Matter of S-E-G-, et al.* (2008), where the board found that “the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable”, on pp. 583–584; and Immigration and Refugee Board of Canada, *Decision V99-02929* (2000), where the board stated that “[t]he child’s vulnerability arises as a result of his status as a minor. His vulnerability as a minor is an innate and unchangeable characteristic, notwithstanding that the child will grow into an adult”, on p. 6.

<sup>252</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 50. See also the case referenced by the UNHCR in relation to this matter in footnote 99 of the *Guidelines*: United States Board of Immigration Appeals, *In re Fauziya Kasinga* (1996), where a group of “young women” who were members of a certain tribe in northern Togo, Africa, and who had not been subjected to female genital mutilation, as practiced by that tribe, and who opposed the practice, were recognized as a “particular social group” within the definition of the term “refugee”, on p. 357.

<sup>253</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 49, 50.

<sup>254</sup> *Ibid.*, para. 50. See also, for example, the following case referenced by the UNHCR in relation to “black children” in footnote 101 of the *Guidelines*: Refugee Review Tribunal of Australia, *RRT Case No. 0901642* (2009), where the former tribunal found that there was a real risk “that the applicant [would] suffer discrimination of sufficient seriousness as to amount to persecution because of her membership of a particular social group of unregistered children, or “black children””, at para. 73.

<sup>255</sup> See, for instance, the following case referenced by the UNHCR in footnote 105 of the *Guidelines on International Protection No. 8* (2009) confirming that children living and/or working on the streets may be considered “a particular social group”: United Kingdom Asylum and Immigration Tribunal, *LQ (Age: Immutable Characteristic) Afghanistan v. Secretary of State for the Home Department* (2007), where the tribunal concluded that the applicant’s fear of being persecuted as an orphan and a street child “would be as a result of his membership of a group sharing an immutable characteristic and constituting, for the purposes of the Refugee Convention, a particular social group”, at para. 7.

<sup>256</sup> This means both children who are HIV-positive themselves and children whose parent or other relative is HIV-positive. The status of the children belonging to this “social group” is by and large unchangeable, and when facing persecution because of their status, these children may also be considered a particular social group under the Refugee Convention. See UNHCR, *Guidelines on International Protection No. 8* (2009), para. 52(ii) and for further information, CRC, *General comment No. 3 (2003): HIV/AIDS and the Rights of the Child*.

<sup>257</sup> When children are specifically targeted for recruitment or exploitation by armed forces or groups, they may constitute a “particular social group” by virtue of their inherent and immutable age, alongside societal recognition

social groups.<sup>258</sup> The applicant’s family could also be deemed to constitute a pertinent social group.<sup>259</sup>

The affiliation of the applicant with a child-specific social group may persist beyond childhood. Even when the primary characteristic of that identity, namely the applicant’s young age, is no longer relevant, the repercussions of prior membership in a particular social group may endure. For example, a shared experience in the past may represent an immutable and retrospective characteristic, thus substantiating the recognition of groups such as “former child soldiers”<sup>260</sup> or “trafficked children”<sup>261</sup> as regards the apprehension of potential future persecution.<sup>262</sup>

The application of the fourth and last Convention ground, “political opinion”, also extends beyond the asylum claims of adults. A claim for refugee protection on the basis of political opinion suggests that the applicant has or is presumed to have viewpoints that are not endorsed by the authorities or society in the applicant’s state of origin and that critique unquestioned policies, traditions or methods in force there. Determining whether a child is able to hold a political opinion is a matter of factual assessment, contingent upon evaluating the child’s maturity, developmental stage, educational background, and capacity to express those perspectives. For a child-sensitive RSD process to come true, it is crucial to understand that children can engage in political activism and espouse specific political opinions autonomously from adults, which may subject them to persecution. As an illustration, children might engage in activities such as

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of them as a group. Similar to adults, a child who avoids conscription, deserts, or rejects association with an armed entity might be seen as expressing a political stance, thereby potentially satisfying the connection to the fourth Convention ground of “political opinion”. See UNHCR, *Guidelines on International Protection No. 8* (2009), para. 52(iii). See also UNHCR, *Handbook* (2019), paras. 169–171; UNHCR, *Guidelines on International Protection No. 6* (2004), paras. 25–26.

<sup>258</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 52.

<sup>259</sup> *Ibid.*, para. 50. See also the case referenced by the UNHCR in relation to this matter in footnote 102 of the *Guidelines*: United States Court of Appeals for the Ninth Circuit, *Rosalba Aguirre-Cervantes a.k.a. Maria Esperanza Castillo v. Immigration and Naturalization Service* (2001), where the court confirmed the membership of a family to clearly be “an immutable characteristic, fundamental to one’s identity” (at para. B[4]), and highlighted that the evidence of the case demonstrated that the goal of the family’s father “was to dominate and persecute members of his immediate family” (at para. C[7]).

<sup>260</sup> See the case referenced by the UNHCR in relation to former child soldiers in footnote 103 of the *Guidelines on International Protection No. 8* (2009): United States Court of Appeals for the Third Circuit, *Lukwago v. Ashcroft* (2003), where the court stated that “membership in the group of former child soldiers who have escaped LRA [Lord’s Resistance Army] captivity fits precisely within the BIA’s [Board of Immigration Appeals] own recognition that a shared past experience may be enough to link members of a “particular social group””, on p. 27.

<sup>261</sup> UNHCR, *Guidelines on International Protection No. 7* (2006), para. 39. See also the case referenced by the UNHCR in relation to trafficked children in footnote 104 of the *Guidelines on International Protection No. 8* (2009): Refugee Review Tribunal of Australia, *RRT Case No. N02/42226* (2003), where the tribunal found the applicant to have “a well-founded fear for reason of her membership of a particular social group, Uzbekistani women forced into prostitution abroad who are perceived to have transgressed social mores”, on p. 12.

<sup>262</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 51.

joining demonstrations, serving as messengers, distributing leaflets, or participating in revolutionary activities.<sup>263</sup>

On the other hand, it should be noted that authorities or non-state actors may attribute the views or ideas of adults, such as parents, to children. This could occur even if the child is incapable of describing political opinions or actions of their parent, including in situations where the parent is intentionally concealing such information to protect their child. Under such conditions, it is advisable to examine these cases not solely within the context of political opinion, but also in relation to the ground concerning membership of a particular social group, namely the family.<sup>264</sup>

The grounds of (attributed) political opinion and religion often intersect in children's asylum claims. In some cultures, the societal expectations placed on women and girls may be linked to the regulations of the state or the official religion. The authorities or other persecutors may view a girl's deviation from these expectations as a departure from certain religious doctrines or practices. Simultaneously, such non-conformity could be construed as espousing a dissenting political standpoint that challenges entrenched power dynamics.<sup>265</sup>

### **5.2.3      *Internal Flight or Relocation Alternative***

In international law, individuals facing threats are not obliged to explore all remedies within their own country of origin before seeking asylum elsewhere. In other words, asylum is not regarded as the final recourse. However, when assessing the refugee claim of a child and determining his or her eligibility for refugee status, the possibility of internal flight or relocation may be examined. Considering an internal flight or relocation alternative requires taking into account the individual circumstances of the child applicant and the conditions in the country of origin where the internal flight or relocation is proposed.<sup>266</sup>

The necessity to consider internal relocation arises when the fear of persecution is confined to a particular area of the country, beyond which the perceived threat cannot manifest. In practice, this does not apply to situations where the feared persecution originates from or is supported by state's authorities, as they are presumed to exert control across the entire country.<sup>267</sup> In the

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<sup>263</sup> Ibid., para. 45.

<sup>264</sup> Ibid., para. 46.

<sup>265</sup> UNHCR, *Guidelines on International Protection No. 1* (2002), para. 26.

<sup>266</sup> UNHCR, *Guidelines on International Protection No. 4* (2003), paras. 2, 4.

<sup>267</sup> Ibid., para. 13.

assessment of a child's refugee status claim, wherein a well-founded fear of persecution on a Convention ground has been substantiated in a specific region of the country of origin, an evaluation of the possibility for internal flight or relocation comprises two aspects: (i) an analysis on the pertinence of such an inquiry, and (ii) an analysis on the reasonableness of any suggested region for relocation.<sup>268</sup> The consideration of the best interests of the child shall guide both the relevance and reasonableness analyses.<sup>269</sup>

Similar to adults, considering an alternative location within the child's country of origin is relevant only if the proposed area of relocation is "practically, safely, and legally accessible" to the child.<sup>270</sup> When the threat of persecution arises from local or regional entities within a country, the possibility of internal relocation becomes relevant only if there is substantial evidence indicating that the persecuting authority's influence is confined to its own area and there are specific circumstances explaining the inability of the country's government to intervene in the localized harm.<sup>271</sup> In cases where the child fears persecution by a non-state actor, key considerations should include an evaluation of the persecutor's motives, their capacity to pursue the child in the suggested area of relocation, and the extent of protection provided by state's authorities to the child in that region. Effective and lasting protection provided by an authority with complete control over the land and its inhabitants in the relocation area must be ensured.<sup>272</sup> The absence of adequate protection from the part of the state in one region may imply a broader inability or unwillingness to safeguard the child's protection elsewhere. This might be particularly relevant in cases of gender-based persecution, such as female genital mutilation.<sup>273</sup>

Besides the absence of a fear of persecution in the proposed internal flight or relocation area, it must also be deemed reasonable for the child to move there. The "reasonableness test" is tailored to an individual child and considers whether it would be reasonable for the child to relocate to the suggested area despite his or her fear of facing persecution in some other part of the country. Therefore, the decision does not hinge on the actions expected of a "hypothetical

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<sup>268</sup> *Ibid.*, para. 7.

<sup>269</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 53.

<sup>270</sup> See UNHCR, *Guidelines on International Protection No. 4* (2003), para. 7. An area does not qualify as an internal flight or relocation alternative if: (i) there exist barriers to accessing the area that are not reasonably surmountable, such as fluctuating war fronts; (ii) the refugee claimant would need to traverse the original region of persecution to reach the proposed new location; or (iii) the claimant lacks the legal right to travel to, enter, and remain in the proposed area (*ibid.*, paras. 10–12).

<sup>271</sup> *Ibid.*, para. 14.

<sup>272</sup> *Ibid.*, para. 17.

<sup>273</sup> See *ibid.*, para. 15.

reasonable person”.<sup>274</sup> The assessment of the reasonableness of relocation alternative includes questioning whether the claimant can live relatively normally within the country in question without encountering excessive difficulties. This involves evaluating the specific situation of the child applicant, considering both the potential for additional psychological distress stemming from previous persecution and the likelihood of the child to find the new area to be safe and secure. In addition, protection of human rights and potential for financial sustenance in the new location area are relevant to consider before relocating the child.<sup>275</sup> It shall be noted that a location suggested for relocation that might be reasonable for an adult may not meet the reasonableness criteria and be appropriate when the asylum applicant is a child. When determining whether the internal relocation alternative is in the best interests of the child, the assessment of the potential dangers and the feasibility of a suggested relocation area should thoroughly consider factors such as the child’s age, sex, health, abilities to manage stress and adversity, family situation and relationships, and language abilities as well as his or her ethnic, cultural, political and religious considerations.<sup>276</sup>

In cases involving unaccompanied children, careful consideration must be given to the reasonableness of proposed internal relocation. If children lack familial support upon returning and are expected to live independently with no sufficient assistance on the part of the state, internal flight or relocation expectation is not reasonable. What might be considered a minor inconvenience in the case of an adult could pose significant hardship for a child, especially without any familial or social support network.<sup>277</sup> In such situations, internal flight or relocation arrangements could potentially infringe upon children’s fundamental human rights, including the right to life, survival and development (Article 6 of the UNCRC), as well as the right to be free from

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<sup>274</sup> Ibid., paras. 22–23.

<sup>275</sup> See *ibid.*, paras. 7, 24–25.

<sup>276</sup> See UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 54–55; UNHCR, *Guidelines on International Protection No. 4* (2003), para. 25.

<sup>277</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 56. See also the case referred to by the UNHCR in relation to this in footnote 112 of the *Guidelines*: Federal Court of Canada, *Elmi v. Minister of Citizenship and Immigration* (1999), where the judge found that “the hardship suffered by a child sent to an unfamiliar place, without the support of an adult and without the prospect of a livelihood is -- commensurate with [the] cited examples of undue hardship”, at para. 14.

inhuman treatment (Articles 37 and 39).<sup>278</sup> Ultimately, an unreasonable internal flight or relocation alternative may contravene the principle of the best interests of the child.<sup>279</sup>

If the sole alternative for relocating an asylum-seeking child means placing him or her in institutional care, a thorough evaluation must be undertaken regarding the quality of care, health services, and educational opportunities offered, along with consideration of the future prospects for children who grew up in such institutions.<sup>280</sup> Furthermore, it is essential to assess how orphans and other institutionalized children are treated and perceived both socially and culturally in the country of origin. If they are likely to face social stigma, bias, or mistreatment, the suggested relocation place can be unreasonable for the child.

The introduction of the relocation concept should not impose any additional burden of proof on child asylum applicants. The standard practice remains in force, stipulating that the burden of proving an assertion lies with the party making it.<sup>281</sup> Therefore, the decision-maker carries the responsibility of demonstrating that an assessment of relocation is pertinent to the specific case. If deemed relevant, the onus is on the party advocating for the relocation to specify the new suggested area and furnish evidence supporting its reasonableness as an alternative in the child's case.<sup>282</sup> Procedural fairness necessitates ensuring that the child is clearly and sufficiently informed of the alternative being under deliberation.<sup>283</sup> Furthermore, the child must also have the opportunity to present his or her views on (a) why considering an internal relocation is irrelevant, and (b) in case deemed relevant, why the suggested new area would not be reasonable for the child to relocate to.<sup>284</sup>

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<sup>278</sup> See also the case referenced by the UNHCR in footnote 113 of the *Guidelines*: European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (2006), which was about the return of an unaccompanied five-year old girl. At paragraph 66 of the judgment, the Court stated that it was “struck by the failure to provide adequate preparation, supervision and safeguards for her deportation”, concluding further in paragraph 69 that such “conditions was bound to cause her extreme anxiety and demonstrated such a total lack of humanity towards someone of her age and in her situation as an unaccompanied minor as to amount to inhuman treatment”.

<sup>279</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 56.

<sup>280</sup> *Ibid.*, para. 57. See also ICRC et al., *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004), where it was noted that that institutional care “should be viewed as a last resort” since “[r]esidential institutions can rarely offer the developmental care and support a child requires and often cannot even provide a reasonable standard of protection”, on p. 46

<sup>281</sup> UNHCR, *Guidelines on International Protection No. 4* (2003), para. 33. See also UNHCR, *Handbook* (2019), para. 196.

<sup>282</sup> See UNHCR, *Guidelines on International Protection No. 4* (2003), para. 34.

<sup>283</sup> See Feller – Türk – Nicholson (2003), p. 419, para. 7.

<sup>284</sup> See UNHCR, *Guidelines on International Protection No. 4* (2003), para. 35.

#### 5.2.4 *Exclusion from Refugee Status*

Taking into account the special vulnerability children, the clauses for excluding the eligibility for refugee status in Article 1 F of the Refugee Convention must always be approached and applied with heightened caution when the asylum applicant is a child. Especially for young children, these clauses may not be applicable whatsoever.<sup>285</sup> Not making distinction between adult and child asylum seekers,<sup>286</sup> Article 1 F may only be invoked against a child if he or she has attained the age of criminal responsibility and has the mental capacity to be deemed accountable for the alleged crime.<sup>287</sup> According to Article 40 of the UNCRC, states are encouraged to define a minimum age for criminal liability.<sup>288</sup> If such age has been set in the child's country of origin, the state cannot deem a child below this minimum age as having committed a crime that warrants exclusion.<sup>289</sup>

For children beyond the specified age threshold or in jurisdictions lacking such an age limit, it remains essential to assess the individual child's maturity to ascertain if they possessed the requisite mental capacity to be held accountable for the offense in question under Article 1 F. Generally, younger children are more likely presumed to lack such mental capacity at the pertinent time.<sup>290</sup> The evaluation of mental capacity becomes especially critical in cases where the age threshold is at the lower end of the spectrum, but it also holds relevance in situations where documentation on the child's age is unavailable and there is uncertainty regarding whether the child meets or exceeds the age for criminal accountability.<sup>291</sup>

If there exist implications that the child's actions could lead to exclusion of international protection, a three-step assessment process must be conducted.<sup>292</sup> Firstly, the acts under scrutiny must be evaluated against the grounds for exclusion, considering their nature and the specific circumstances surrounding them. Secondly, applying Article 1 F entails confirming in each

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<sup>285</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 59.

<sup>286</sup> *Ibid.*, para. 60.

<sup>287</sup> UNHCR, *Guidelines on International Protection No. 5* (2003), para. 28.

<sup>288</sup> Article 40(3) and its subparagraph (a) state that "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law".

<sup>289</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses* (2003), para. 91. The minimum age for criminal responsibility varies across legal systems, spanning from 7 years to older ages. If the age at which the child can be held criminally accountable is higher in his or her country of origin compared to the host country, this should be considered in advantageous for the child (UNHCR, *Guidelines on International Protection No. 8* (2009), para. 60 and footnote 120).

<sup>290</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses* (2003), para. 91.

<sup>291</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 61.

<sup>292</sup> *Ibid.*, para. 62.

instance whether the child either committed an offence falling under one of the sub-clauses in Article 1 F or aided in committing one in a way that establishes the child’s criminal accountability for the offence. Thirdly, if individual responsibility is confirmed, an evaluation is needed to ascertain whether the repercussions of being excluded from refugee status align with the severity of the committed act.<sup>293</sup>

Several aspects are crucial in analyzing how exclusion clauses apply to criminal acts carried out by children. When assessing individual accountability for acts that could lead to exclusion, the evaluation of the individual’s mental state (or *mens rea*<sup>294</sup>) in the case of a child means determining whether the child had the necessary “intent and knowledge”<sup>295</sup> when acting to be held personally accountable for the offense. This evaluation should take into account factors such as the emotional, mental and cognitive development of the child. Circumstances that may negate the presence of *mens rea* encompass, for instance, severe mental impairments, involuntary intoxication, or lack of maturity.<sup>296</sup>

If the child is confirmed to have the requisite mental capacity to assume criminal responsibility, further examination is still necessary to assess whether other factors negate the child’s individual responsibility. This includes evaluating whether the child acted due to coercion, duress, or in defense of themselves or others, which is especially pertinent when considering claims from former child soldiers.<sup>297</sup> Additional aspects to regard encompass the age at which the child joined the armed group, the motives behind his or her involvement and departure from the group, the duration of his or her membership, and any repercussions faced for refusing to join. Moreover, factors such as coerced substance use, level of education, comprehension of the

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<sup>293</sup> UNHCR, *UNHCR Statement on Article 1F of the 1951 Convention* (2009), pp. 7, 9–11.

<sup>294</sup> “Mens rea” is a legal concept that pertains to the mental state of the defendant in a criminal offense (Herring 2022, p. 127).

<sup>295</sup> The Rome Statute of the International Criminal Court sets out in its article 30 that these two elements are required to establish the “mental element” of culpability: para. 1 reads “[u]nless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”. Article 30(2) defines “intent” and 30(3) “knowledge”.

<sup>296</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), paras. 64, 64(i).

<sup>297</sup> *Ibid.*, para. 64(ii). *The Paris Principles* (2007) from UNICEF state that “[c]hildren who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles” (para. 3.6). In case law, the Special Court for Sierra Leone did not indict children as they were regarded victims of international crimes themselves (Public Affairs Office of the Special Court for Sierra Leone, *Press Release: Special Court Prosecutor Says He Will Not Prosecute Children* (2002)).

events, and experiences of trauma, abuse, or mistreatment may contribute to the rejection of the child's responsibility.<sup>298</sup>

If the child's individual responsibility for the criminal offence is eventually established, the severity of the crime is usually balanced against the level of persecution anticipated upon repatriation of the child. If there is a high probability of the child encountering severe persecution, the offense must be considerably grave to justify the child's exclusion from refugee status. Considering the proportionality of the consequences of exclusion includes analyzing any mitigating or aggravating circumstances pertinent in the child's case. Even when the circumstances do not justify a defense for the child's claim, aspects such as the child's age, level of maturity, and vulnerability remain crucial to consider. Regarding child soldiers, aspects to be considered also comprise of experiences of mistreatment by armed forces personnel and conditions during involvement in the armed group.<sup>299</sup> Additionally, it is essential to evaluate the potential outcomes and treatment awaiting the child upon his or her return, including the risk of severe human rights violations resulting from their departure from armed forces or group.<sup>300</sup>

All in all, conducting a comprehensive and personalized assessment of all factors in a child's case before invoking Article 1(F) of the Refugee Convention is crucial. The best interests of the child require safeguarding the children's rights, special position and protection and ensuring the consideration of their mental state and ability to comprehend and give consent to the measures they are asked or ordered to take.<sup>301</sup> Due to the significant ramifications of exclusion, it is also imperative to incorporate stringent procedural safeguards into the process of determining exclusion.<sup>302</sup>

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<sup>298</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 64(ii). For further information on rejecting individual responsibility, see UNHCR, *Guidelines on International Protection No. 5* (2003), paras. 21–24. See also, for instance, the following cases referenced by the UNHCR in footnote 127 of the *Guidelines* where the courts acknowledged that children who had committed crimes typically warranting the application of exclusion clauses could be absolved of responsibility due to their vulnerable circumstances: Commission des Recours des Réfugiés of France, *CRR, 28 janvier 2005, 448119, M.C.*; Commission des Recours des Réfugiés of France, *CRR, 28 avril 2005, 459358, M.V.*; *Exclusion*.

<sup>299</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 64(iii). For a detailed analysis on exclusion from refugee status in the case of child soldiers, see UNHCR, *Advisory Opinion From the Office of the United Nations High Commissioner for Refugees (UNHCR) Regarding the International Standards for Exclusion From Refugee Status as Applied to Child Soldiers* (2005).

<sup>300</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 64(iii).

<sup>301</sup> See *ibid.*, para. 63.

<sup>302</sup> UNHCR, *Guidelines on International Protection No. 5* (2003), para. 31. For further analysis on procedural issues, see also paras. 32–36 and UNHCR, *Background Note on the Application of the Exclusion Clauses* (2003), paras. 98–113.

### 5.3 Procedural and Evidentiary Safeguards

In its guidelines on child asylum claims, the UNHCR has also delineated the general measures for the treatment of children in the asylum procedure. These measures are stated to establish minimum standards for the conduct of states in accordance with refugee and international human rights law. Young age, dependency and immaturity are reasons why children should benefit from particular procedural and evidentiary safeguards to guarantee an equitable decision-making on their refugee status.<sup>303</sup> The UNHCR notes that the applicable age for children to enjoy specific procedural safeguards outlined in the guidelines is the moment they apply for asylum, rather than when a decision on their international protection is made. This differs from the substantive evaluation of the child's refugee claim, where the forward-looking nature of the assessment may also consider their age at the time of the asylum decision.<sup>304</sup>

The UNHCR's Executive Committee has mentioned in its Conclusion on Children at Risk that states are recommended to "[d]evelop child and gender-sensitive national asylum procedures, where feasible, - - with adapted procedures including - - prioritized processing of unaccompanied and separated child asylum-seekers".<sup>305</sup> The measure is part of a non-exhaustive list of general preventive, responsive and remedial actions aimed at averting the exposure of children to situations of heightened risk. The Committee on the Rights of the Child has confirmed the approach by declaring that the refugee status applications submitted by unaccompanied and separated children should be prioritized, and all endeavors should be undertaken to reach a prompt and fair decision.<sup>306</sup> The UNHCR guidelines on child asylum claims published a few years later go a step further by requiring that all claims filed by child applicants, regardless of the child being accompanied or not, should typically be processed with priority as children frequently need special protection and assistance. The prioritized processing refers to shortened waiting periods at each phase of the child's asylum process, including in the issuance of a decision on their claim.<sup>307</sup>

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<sup>303</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 65.

<sup>304</sup> *Ibid.*, footnote 129.

<sup>305</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. g(viii). See also UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), para. 8.1 in which the Agency established that (unaccompanied) children's refugee status applications should be given priority in RSD procedures.

<sup>306</sup> CRC, *General comment No. 6 (2005)*, para. 70.

<sup>307</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 66.

However, before beginning the asylum procedure of a child, the UNHCR suggests taking the child applicant into account in a way that implements the child-friendly approach to the RSD procedure required by the best interests of the child: the Agency has observed that children need adequate time to prepare and contemplate recounting their experiences. Children require time to establish trust with their guardian and other professionals and to feel safe. Typically, if a child's claim is directly linked to the claims of his or her accompanying family members or if the child is seeking derivative status, prioritizing the child's claim will not be essential unless other factors indicate that priority processing is warranted.<sup>308</sup>

There is no universal guideline dictating under whose name a child's asylum application should be submitted, especially in cases involving notably young children or when the asylum claim is made on the basis of a parent's fear for their child's safety. This determination is subject to the specific regulations of each country. However, it is essential to have adequate flexibility to adjust the principal applicant's name during the process if it becomes apparent that the child, rather than the parent, is the more suitable principal applicant. This is particularly significant in claims such as female genital mutilation and forced marriage where parents seek international protection together with their child because of the fear for the child's life, even if the child might not fully understand the reasons behind fleeing. In such situations, allowing the change as regards the name of the principal asylum applicant assists in preventing administrative complications from unduly prolonging the proceedings.<sup>309</sup>

In case the child has arrived in the state unaccompanied or separated from his or her parents or legal guardians, the commencement of the asylum procedure and refugee status determination should also initiate prompt efforts to find the parents and other family members of the child applicant.<sup>310</sup> The Executive Committee of the High Commissioner's Programme has recommended in its Conclusion on Children at Risk that states undertake to "[f]acilitate children's enjoyment of family unity through putting in place procedures to prevent separation, and in

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<sup>308</sup> Ibid. See also the material referenced by the UNHCR in relation to this in footnote 132 of the *Guidelines: UNHCR, Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (2003), chapters 3.2.5, 4.2.1–4.2.3. These Procedural Standards are meant to be implemented by the UNHCR staff in operations where it is responsible for conducting the RSD pursuant to its mandate. Therefore, as stated on p. 1-4, "[t]hey are not intended to identify standards for national procedures, which in certain States may exceed the standards proposed. However, many of the principles upon which the recommendations are based are equally relevant in all RSD operations". It should also be remarked that the 2003 RSD Procedural Standards have been updated: for the revised version, see UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (2020).

<sup>309</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 67 and footnote 133.

<sup>310</sup> See *ibid.*, para. 68.

respect of unaccompanied and separated children, facilitate tracing and family reunification with their family members in accordance with the respective child's best interests".<sup>311</sup> Although family reunification is usually considered to be in the best interests of the child,<sup>312</sup> exceptions may arise if (i) there is evidence indicating that tracing or reunification efforts could jeopardize the safety of the child's parents or other family members, (ii) the child has experienced abuse or neglect, and/or (iii) the parents or family members are implicated in or have been involved in the child's persecution.<sup>313</sup>

The implementation of a child-friendly RSD process requires that children who are the principal asylum applicants are entitled to have a legal representative, which typically means a lawyer or other person qualified to assist the child in the legal matters related to the RSD procedure and in the interactions with the state's authorities. The representative must be adequately trained and provide continuous support and guidance to the child in his or her asylum procedure. In addition, in the case of an unaccompanied or separated child, an unbiased, qualified guardian should be directly appointed to the child at no cost. Guardian is an impartial professional with specialized expertise who oversees that the child's best interests are a primary consideration in the decision-making and that the child's well-being is taken care of during the asylum procedure. Important remark is that the process of selecting a guardian for an unaccompanied or separated refugee child must be non-discriminatory: the procedure should adhere to or surpass the prevailing national administrative or judicial procedures followed in the case of appointing a guardian to a child who is a citizen of the country.<sup>314</sup>

Given that the final decisions should be grounded in a thorough assessment of the individual circumstances of each child taking into account their personal, familial, and cultural context, it is essential that those involved in RSD procedures possess knowledge and understanding of the child's history, culture, and background.<sup>315</sup> Facilitating the participation of the child and respecting the child's right to express his or her views (Article 12 of the UNCRC) hold significant importance in the asylum procedure. A child's firsthand narrative often serves as a crucial element in identifying their specific protection needs as the child is frequently the sole provider of

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<sup>311</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (h)(iii).

<sup>312</sup> UNHCR, *2021 UNHCR Best Interests Procedure Guidelines*, p. 135.

<sup>313</sup> UNHCR, *Guidelines on International Protection No. 8 (2009)*, para. 68.

<sup>314</sup> *Ibid.*, para. 69 and footnote 135. See also UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (g)(viii), which recommends states to provide "qualified free legal or other representation for unaccompanied or separated children".

<sup>315</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum (1997)*, para. 8.10.

such information regarding his or her experience. To ensure that the child can freely express his or her views and needs and due weight is given to the said, it is imperative to establish safe and child-friendly procedures and environments that foster trust throughout all phases of the asylum process. Moreover, children should receive all requisite information, presented in a language and manner suitable for their understanding, regarding the options available to them and the associated implications.<sup>316</sup>

The UNHCR's Executive Committee has noted in its Conclusion on Children at Risk that the identification of children at heightened risk is a challenging as children "are frequently less visible than adults and may not have the opportunity or feel able to report protection incidents, particularly if these occur in the private domain and/or are associated with social stigmas or taboos".<sup>317</sup> The UNHCR has further analyzed that children may struggle to provide accounts of their experiences in a manner comparable to adults due to various factors: obstacles may include trauma, parental influence, limited education, apprehension towards authorities, reliance on scripted narratives provided by smugglers, or fear of retaliation. Additionally, their age and level of maturity may hinder their ability to discern relevant information or comprehend their experiences in a manner easily comprehensible to adults. Consequently, some children may omit or distort crucial details, be unable to distinguish imagined events from reality, or struggle with abstract concepts such as time or distance. Such discrepancies in a child's narrative may stem from developmental limitations instead of lying.<sup>318</sup>

To encourage children to express their views and share their experiences, children must be informed about their right to privacy and confidentiality (Article 16 of the UNCRC)<sup>319</sup> and thereby empowered to communicate freely, devoid of any coercion, restriction, or fear of retaliation.<sup>320</sup> Suitable modes of communication must be tailored to various stages of the asylum

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<sup>316</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 70. See also CRC, *General comment No. 6* (2005), para. 25; CRC, *General comment No. 12* (2009): *The right of the child to be heard*, paras. 123–124.

<sup>317</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (d).

<sup>318</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 72.

<sup>319</sup> According to Article 16(1) of the UNCRC, "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation". Article 16(2) continues by stating that "[t]he child has the right to the protection of the law against such interference or attacks".

<sup>320</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 70. In addition to Article 12 of the UNCRC stating the child's right to be heard, Article 13 of the UNCRC ensures that "[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice". Paragraph 2 of the same Article prevents arbitrary restrictions of this right: "[t]he exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) [f]or respect of the rights or reputations of others; or (b) [f]or the protection of national security or of public order (ordre public), or of public health or morals".

procedure, such as the asylum interview, and must factor in the child's age, gender, cultural heritage and maturity, as well as the specifics of his or her flight and arrival.<sup>321</sup> Beneficial non-verbal communication avenues for children may encompass activities like play, drawing, writing, role-playing, storytelling, and singing. In the case of disabled children, their specific needs must be considered by providing "whatever mode of communication they need to facilitate expressing their views".<sup>322</sup>

Furthermore, in order to guarantee the consideration of children's views as well as adequate identification and addressing of their needs and protection risks, the UNHCR ExCom acknowledges that children need to have "access to adults with expertise in age-appropriate and gender-sensitive interviewing and communication skills".<sup>323</sup> It is imperative that the asylum claims' assessors possess the requisite expertise and training to accurately evaluate the reliability and significance of a child's testimony. This may entail engaging specialists to interview children in informal settings or environments conducive to open communication where children feel secure, such as reception centers.<sup>324</sup>

While typically the burden of proof is shared between the examiner and the applicant in case the asylum claim is made by an adult, if the applicant is a child, or, on even more compelling grounds, an unaccompanied child, it may be inevitable that the examiner bears a greater burden of proof.<sup>325</sup> If the factual details of the case remain elusive and/or the child demonstrates an incapacity to thoroughly expound upon their claim, the examiner must render a decision based on all available information, which might necessitate a generous application of the benefit of the doubt.<sup>326</sup> Likewise, if there are doubts about the credibility of certain aspects of the child's claim, the child's assertions should be presumed to be credible, pending evidence to the contrary.<sup>327</sup>

Asylum authorities must exert heightened diligence in collecting pertinent country of origin information and other corroborating evidence. Similarly to how country of origin information

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<sup>321</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 71.

<sup>322</sup> Ibid. See also CRC, *General comment No. 9 (2006): The rights of children with disabilities*, para. 32.

<sup>323</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (d).

<sup>324</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 72.

<sup>325</sup> Ibid., para. 73. See also UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (g)(viii), which recommends states to develop adapted evidentiary requirements.

<sup>326</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 73. See also UNHCR, *Handbook* (2019), paras. 196, 219.

<sup>327</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 73; ICRC et al., *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* (2004), p. 61.

can exhibit gender bias by predominantly reflecting male experiences, the experiences of children might also be overlooked. Furthermore, children may possess limited awareness of the prevailing conditions in their country of origin or lack the ability to articulate the reasons behind their persecution.<sup>328</sup>

Children should have the right to access state's asylum procedures, regardless of their age.<sup>329</sup> However, if uncertainty arises about a child's age, and only then, age assessment is conducted as part of a thorough evaluation considering both the physical appearance and the psychological maturity of the child. The Executive Committee has underlined that such assessment must be conducted in a manner that is scientific, safe, fair, sensitive to the child's needs and gender, and respectful for human dignity. In addition, the ExCom has found that states should use a margin of appreciation and ensure that in cases of doubt, the age assessment leans towards considering the individual as a child.<sup>330</sup> Due to variations between states in how the age is measured and the significance it holds, caution is necessary to avoid drawing negative conclusions about credibility in cases where cultural or national norms might either underestimate or overestimate a child's age. Children should also receive clear explanations about the purpose and the course of the age assessment in a language they understand, with guidance from their appointed guardian.<sup>331</sup>

While international human rights law guarantees children's right to privacy, interference with this right might be justified and in the best interests of the child in certain circumstances. More specifically, DNA testing can sometimes serve as an additional evidentiary safeguard in the RSD procedure and may be especially valuable, for instance, in cases where there are suspicions that asylum-seeking children have been trafficked by individuals who falsely claim to be their parents or other relatives.<sup>332</sup> However, DNA tests should only be utilized when alternative methods of verification have proven inadequate. Under typical circumstances, DNA testing is only performed when permitted under law and consented by the persons to be tested, giving all persons concerned a comprehensive explanation of the purpose behind such testing. In certain situations, children may lack the capacity to provide consent due to reasons such as their age,

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<sup>328</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 74.

<sup>329</sup> UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), para. 6.

<sup>330</sup> UNHCR ExCom, *Conclusion on Children at Risk No. 107 (LVIII) – 2007*, para. (g)(ix); UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum* (1997), para. 5.11.

<sup>331</sup> UNHCR, *Guidelines on International Protection No. 8* (2009), para. 75.

<sup>332</sup> See *ibid.*, para. 76. See also UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context* (2008), paras. 6, 12, 16.

immaturity, or limited comprehension of the process. In such instances, their designated guardian (if a family member is absent) will make the decision on consenting while considering the child's perspective and best interests.<sup>333</sup>

Finally, decision regarding the refugee status of the child must be conveyed to the child in a language and format comprehensible to him or her. The decision should be communicated directly to the child, with his or her guardian, legal representative, or other support person present, within a supportive and non-intimidating setting. In the event of a negative decision, special attention is required in conveying it to the child, along with clear explanations of possible future actions to mitigate the psychological distress or harm caused by the negative decision.<sup>334</sup> Minimum procedural safeguards encompass offering the child a possibility to make an appeal of his or her decision, providing him or her guidance regarding the submission of an appeal, and adapting the deadlines for appeal to be more appropriate for the child.<sup>335</sup> All possible children's appeals should be handled with fairness and as promptly as feasible: it is in the child's best interests that every endeavor is undertaken to render a decision promptly in order to prevent children from being in a state of uncertainty for an extended period concerning their status and future.<sup>336</sup>

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<sup>333</sup> See UNHCR, *Guidelines on International Protection No. 8* (2009), para. 76. See also UNHCR, *UNHCR Note on DNA Testing to Establish Family Relationships in the Refugee Context* (2008), paras. 10, 13, 16, 18–21.

<sup>334</sup> See UNHCR, *Guidelines on International Protection No. 8* (2009), para. 77; UNHCR, *Technical Guidance: Child Friendly Procedures* (2021), p. 36.

<sup>335</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), paras. 8.2, 8.5; UNHCR, *Technical Guidance: Child Friendly Procedures* (2021), p. 36.

<sup>336</sup> UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum* (1997), paras. 8.1, 8.5.

## 6 Conclusions

Since children are often overlooked in national refugee status determination processes, the purpose of this thesis was to find out how the best interests of the child, as codified in Article 3(1) of the United Nations Convention on the Rights of the Child, should be taken into account in the refugee status determinations conducted by states in accordance with the Convention Relating to the Status of Refugees. The study employed the method of doctrinal legal research to dissect and interpret the relevant articles of both Conventions in accordance with the general rules of treaty interpretation and special interpretative techniques characteristic to human rights. The thesis mostly used official authoritative guidance published by the supervisors of the UNCRC and the Refugee Convention but was also supplemented by practical examples of case law to ground the theoretical insights in practical reality. After extensive analysis, it is clear that the best interests of the child must be considered throughout the RSD process in two distinct ways: by ensuring that the substantive assessment of the child's refugee claim is child-sensitive and by making the RSD process child-friendly through procedural and evidentiary safeguards.

Regarding the first way, the thesis established that the child's best interests must be a primary consideration in the substantive determination of a child's eligibility for refugee status. The relationship between the UNCRC and the Refugee Convention is complementary: although the best interests of the child do not remove the need for the child to fulfill the criteria for refugee status as set out in Article 1 A (2) of the Refugee Convention, the best interests of the child require the authority conducting the RSD to consider the definition of a refugee from the child's point of view. A child-sensitive interpretation of refugee status entails evaluating the well-foundedness of fear, persecution, and grounds for it mentioned in the refugee definition, as well as the suitability of an internal flight or relocation alternative and possible exclusion from refugee status pursuant to Article 1 F of the Refugee Convention, in a way that considers the child's age, immaturity, vulnerability, and specific needs.

By applying the child-sensitive interpretation to the "well-founded fear" criterion, the study found that a child may manifest its fear differently from an adult, possibly being unable to express it or exaggerating it. Therefore, the best interests of the child necessitate that the assessment of the well-foundedness of the child's fear should consider both subjective and objective elements. In addition to the child's personal situation, the conditions of the child's parents and other members of the family, including their circumstances in the child's country of origin,

are relevant when assessing whether the child asylum applicant has a “well-founded fear of being persecuted”.

Similarly to a child’s expression of fear, the thesis discovered that mistreatment or threats that might not constitute persecution for an adult could reach that threshold in the case of a child. In relation to this, it was noted that the persecution of children can be either child-related or child-specific. Child-related manifestations of persecution include psychological traumas inflicted on the child by a hostile environment, such as witnessing violence against family members, forced separation from parents, or other experiences that instill a well-founded fear of persecution in the child despite the child not being the immediate target of the persecutory harm. Child-specific forms of persecution, then again, cover persecution that targets only children, disproportionately impacts them, or violates specific rights afforded to children. Child trafficking, female genital mutilation and forced under-age recruitment of children as soldiers are only a few examples of such persecution.

The five Convention grounds for persecution – race, religion, nationality, membership of a particular social group, and political opinion – must also be interpreted with an awareness of how these factors uniquely affect children. The thesis observed that a child-sensitive interpretation of the causal connection to one of the Convention grounds requires that a refugee status assessor considers a ground even if the child has not explicitly invoked it. It was found that each of the grounds can be invoked in the refugee claim of a child. However, children’s claims have predominantly been assessed within the framework of the ground “membership of a particular social group”, as children themselves can be recognized as a particular social group under the Convention.

The best interest of the child must be considered also if an internal flight or relocation alternative is proposed as part of the RSD process. The thesis found that the best interests of the child have a special role in guiding the analysis on the relevance and reasonableness of internal flight or relocation for a child applicant, as a location deemed reasonable for an adult may not meet the criteria of reasonableness and appropriateness when the asylum applicant is a child. Assessing an internal flight or relocation alternative from the point of view of the child’s best interests places emphasis on the safety and individual circumstances of the child in the proposed relocation area. Evaluating the availability of care, education, and protection, as well as the potential psychological impact of such relocation and the child’s ability to adapt, are all essential aspects to be taken into account when assessing the appropriateness of the alternative. For

unaccompanied children, the reasonableness of relocation is even more critical, as lack of familial support can lead to significant hardship, potentially infringing on children's rights.

Regarding the exclusion from refugee status, the thesis noted that the exclusion clauses in Article 1 F of the Refugee Convention must be always applied with heightened caution when it comes to children. The mental state of the child, ability to comprehend and give consent to the measures they are asked or ordered to take, as well as whether the child acted due to coercion, duress, or in defense of themselves or others, are crucial in determining the child's accountability and disqualification of his or her refugee status. In accordance with the best interests of the child, aspects such as the child's age, maturity, and vulnerability remain crucial to consider even when the circumstances do not justify a defense for the child's claim.

The second way in which the best interests of the child should be taken into account is through the establishment of procedural and evidentiary safeguards. The thesis identified various child-sensitive mechanisms and safeguards that must be put in place to ensure that children's voices are heard and their specific needs are addressed. The practical solutions in the child's best interests include prioritized processing of children's claims, adequate flexibility in case the principal asylum applicant's name would need adjusting to that of a child, and the commencement of family tracing and reunification in the case of an unaccompanied or separated child. A legal representative and, if needed, a qualified guardian should be provided to the child to assist the child and oversee the best interests of the child during the RSD process. Children should also be provided with adequate time to prepare for a possible interview and a safe and supportive environment to share their experiences in accordance with their right to be heard. Furthermore, ensuring child-friendly interview techniques and that those involved in RSD procedures possess the required expertise and understanding for evaluating the child's claim are essential safeguards.

The study outlined that evidentiary standards applied when assessing a child's claim should be flexible and considerate of the difficulties children may face in providing detailed and coherent accounts of their experiences. The child's best interests require that decision-makers are trained to understand these challenges and to interpret evidence through a child-sensitive lens. If uncertainty arises about a child's age and age assessment is conducted, the authorities should use a margin of appreciation and ensure that in cases of doubt, the age assessment leans towards considering the individual as a child. DNA testing can also serve as an additional evidentiary safeguard in the child's RSD procedure.

Lastly, but not least, a decision on the child's refugee status should be conveyed to the child in a language and format comprehensible to him or her. The best interests of the child require that in the event of a negative decision, special attention should be paid in conveying it to the child along with explanations of future actions to mitigate the psychological distress caused by such decision. Regarding appeal procedures, every effort should be made to handle all appeals of children in a fair and prompt manner.

This study has provided a detailed framework for understanding and applying the best interests of the child in refugee status determinations within the confines of existing international law. By systematically analyzing international guidelines, general comments, and relevant legal principles, the thesis has illuminated how states can fulfill their obligations under both Conventions without compromising the protective goals of either. The thesis has demonstrated that the child's best interests shape the refugee status determination in ways that ensure the rights, special position, and protection of the child, as well as take sufficiently account of the child's age, needs and vulnerabilities. At the same time, the findings of the study underscore the multifaceted nature and critical importance of integrating the best interests of the child into states' RSD processes. Mere reference to the best interests of the child in decision-making regarding the child's refugee status is insufficient; the best interests of the child must be properly applied.

In conclusion, the best interests of the child should be central to states' refugee status determinations. The concept of the child's best interests not only aligns with the core values of the UNCRC but also enhances the protective framework of the Refugee Convention. Ensuring that children seeking refugee status receive the protection they deserve requires both a legal commitment to the best interests principle and practical measures to implement this commitment effectively. By making the best interests of the child a primary consideration in refugee status determination, states can uphold the fundamental rights of children and contribute to a more just and humane refugee protection system.