

# No Refuge from Childhood: How Child Protection Harms Refugees

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## Abstract

*This article sheds new and critical light on the notion, enshrined in international law, that child refugees are a uniquely vulnerable and dependent age group requiring special protection. Although protection is not inherently detrimental, this conception of child protection often ends up harming refugees of all ages. It casts adult refugees as less vulnerable, less dependent and less deserving of protection than their younger counterparts. It downplays the contextual, relational and socially constructed nature of vulnerability, dependence and childhood. It potentially contributes to the disregard for the capacity and wishes of child refugees. It usually affords these children only temporary protection, thereby increasing their uncertainty, driving them to disengage from welfare services and incentivizing the state to delay decisions about their entitlements. Meanwhile, international law not only places great value on children's relationships with their parents but also authorizes the punishment of supposedly unfit parents, and this ambivalence helps states weaponize legal principles of child protection against refugee families. What is needed, however, is not for child refugees to be denied protection. Rather, a fundamental reimagining of protection is in order: a shift from hierarchies of vulnerability, dependence and deservingness towards free global movement based on solidarity and equity.*

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# 1 Introduction

International law generally defines ‘children’ as those under the age of 18.<sup>1</sup> Approximately half of ‘refugees’ worldwide are estimated to be ‘children’ in this legal sense.<sup>2</sup> In this article, we cast new and critical light on the international legal principle of child protection, according to which ‘children’ are a distinct age group, uniquely vulnerable and dependent<sup>3</sup> and, therefore, deserving of special protection. Drawing on cross-disciplinary scholarship and wide-ranging legal materials, we argue that child protection, in this dominant legal form, frequently works to the detriment of ‘refugees’ of all ages – ‘children’ and ‘adults’ alike.

The existing scholarship tends to frame problems affecting young refugees as violations of international legal norms of child rights.<sup>4</sup> One scholar, for example, recently noted that international law ‘calls for [a focus on children’s] ... welfare’ and bemoaned the lack of ‘realignment of [national] policy’ on ‘child refugees’ with this principle of ‘international law’.<sup>5</sup> Our argument, in contrast, is that the problems stem not simply from disregard for international legal norms but, rather, from the potentially harmful effects of these norms themselves.<sup>6</sup>

<sup>1</sup> Convention on the Rights of the Child (CRC) 1989, 1577 UNTS 3, Art. 1 (‘[f]or the purposes of the present Convention, 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>2</sup> United Nations High Commissioner for Refugees (UNHCR), *Figures at a Glance*, 18 June 2020, available at [www.unhcr.org/figures-at-a-glance.html](http://www.unhcr.org/figures-at-a-glance.html); Kenny and Loughry, ‘Addressing the Limitations of Age Determination for Unaccompanied Minors: A Way Forward’, 92 *Children and Youth Services Review* (2018) 15, at 15. On the various reasons why such estimates are, inevitably, inaccurate, see, e.g., UNHCR, United Nations International Children’s Emergency Fund (UNICEF) and International Organization for Migration (IOM), *Refugee and Migrant Children in Europe Accompanied, Unaccompanied and Separated* (2019), at 6, available at [www.unicef.org/eca/media/12671/file](http://www.unicef.org/eca/media/12671/file); Sigona, Chase and Humphris, *Understanding Causes and Consequences of Going ‘Missing’* (2017), at 2, available at <https://becomingadultproject.files.wordpress.com/2017/12/ba-brief-6-low-res.pdf>; Silverman, ‘“Imposter-Children” in the UK Refugee Status Determination Process’, 32 *Refuge* (2016) 30, at 31; Kronick and Rousseau, ‘Rights, Compassion and Invisible Children: A Critical Discourse Analysis of the Parliamentary Debates on the Mandatory Detention of Migrant Children in Canada’, 28 *Journal of Refugee Studies* (2015) 544, at 545. Nonetheless, a significant proportion of ‘refugees’ are believed to be below the legal age of majority.

<sup>3</sup> Both vulnerability and dependence are central to our analysis. Although these concepts are closely inter-related, they are not identical. See, e.g., Dodds, ‘Dependence, Care, and Vulnerability’, in C. Mackenzie, W. Rogers and S. Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (2014) 181, at 182–183 (‘[d]ependence is one form of vulnerability. Dependence is vulnerability that requires the support of a specific person (or people). ... To be dependent is to be in circumstances in which one must rely on the care of other individuals to access, provide or secure (one or more of) one’s needs, and promote and support the development of one’s autonomy or agency’).

<sup>4</sup> For child rights-based analyses of refugee law, see J.M. Pobjoy, *The Child in International Refugee Law* (2017); S. Arnold, *Children’s Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (2018). For a human rights-based analysis of child migration, see, e.g., J. Bhabha, *Child Migration and Human Rights in a Global Age* (2014). For the claim that states fail to translate their stated compassion for ‘child refugees’ into action, see, e.g., A. Sirriyeh, *The Politics of Compassion: Immigration and Asylum Policy* (2018), at 58; Pruitt, ‘Children & Migration: Political Constructions and Contestations’, 12 *Global Policy* (2021) 592, at 594.

<sup>5</sup> Campbell, ‘Why “the Best Interests” of Unaccompanied Asylum-Seeking Children Are Left at the Border: Structural Violence and British Asylum Policies’, 37 *Journal of Borderlands Studies* (2022) 847, at 851.

<sup>6</sup> Moreover, the concept of ‘violation’ itself is a long-standing bone of contention within legal theory. Whereas legal formalists often describe the law as being either respected or violated, legal realists, critical

Laying the groundwork for our critique, section 2 outlines two key aspects of the child protection principle. The first of these is the age hierarchy of deservingness. The assumption that 'children' are uniquely vulnerable and dependent is widely regarded as the rationale behind the international legal principle of child protection. As we describe, this assumption leads international law to cast 'child refugees' as more deserving of protection and assistance than their 'adult' counterparts. The second aspect is the law's ambivalence about children's relationships with their parents. On the one hand, international law highly values the child-parent bond, while, on the other, it gives the state the power to decide if and when to punish parents and remove their 'children'.

With these foundations in place, section 3 proceeds to critique both the logic and practice of child protection. First, we argue that the legal principle of child protection downplays the relational, contextual and socially constructed dimensions of vulnerability, dependence and childhood. Indeed, the law does not merely respond to pre-given childhood vulnerability and dependence but, rather, changes and even amplifies these qualities, and it does so based on questionable and culturally specific norms. Second, by labelling 'child refugees' as vulnerable and dependent, international law potentially disregards their agency and competence, sidelines their wishes and encourages them to display helplessness and victimhood. In this way, it disempowers and silences them. Third, hierarchies of deservingness, whether based on age or other protected characteristics, help states withhold assistance and support from most people in need. Lastly, international law's ambivalence about child-parent relations enables states to portray their anti-refugee practices as protecting 'child refugees', despite the harm such practices inflict on both these 'children' and their parents.

The following two sections illustrate some of these problems through a broad range of legal examples at the international, regional and national levels. Section 4 focuses on pitfalls concerning 'adult refugees'. We demonstrate how, in the name of legal norms of child protection, 'adult refugees' have been subjected to harsher treatment, and how some of them have also been vilified and even prosecuted for the hardships experienced by their children. Section 5 turns to the disservice done by the law to its ostensible beneficiaries: 'child refugees' themselves. We show how the temporary nature of child protection – the fact that it usually expires at the legal age of majority – can vulnerabilize 'child refugees': it can aggravate their anxiety, push them to pre-emptively disengage from welfare authorities and encourage the state to delay decisions about their entitlements until they reach the legal age of adulthood. We also discuss the problematic claim, made by several states, that repatriation serves the best interests of unaccompanied 'child refugees' by reuniting them with their parents (regardless of the potential dangers awaiting them in their countries of origin).

legal scholars and others view it as inherently indeterminate. On some of the competing positions taken within this debate, see, e.g., Kress, 'Legal Indeterminacy', 77 *California Law Review* (1989) 283; Schauer, 'Formalism', 97 *Yale Law Journal* (1987) 509; Kennedy, 'Legal Formality', 2 *Journal of Legal Studies* (1973) 351. On the implications of this debate for child law, see Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy', 39 *Law and Contemporary Problems* (1975) 226; Viterbo, 'Critical Childhood Studies Meets Critical Legal Scholarship', in S. Balagopalan, J. Wall and K. Wells (eds), *The Bloomsbury Handbook of Theories in Childhood Studies* (2023) 349, at 350.

As reiterated throughout the article, the notion of protection itself is not inherently harmful. Rather, the problem lies in how protection often tends to be envisaged, framed, allocated and, inevitably, weaponized. Legal norms of child protection, in particular, can sometimes be beneficial to ‘refugees’ of all ages. Yet, since legal scholars and others tend to take such benefits for granted, our aim is to bring to light the detrimental effects of child protection, which rarely receive the attention they deserve. In doing so, we make no claim as to whether the pitfalls of child protection generally outweigh its advantages<sup>7</sup> or how (if at all) special protection should be designed. Rather than professing to propose a ‘solution’ to the problems we expose, our aim is to contribute to a richer, more nuanced and critical approach to child protection in the refugee context and more broadly. Moreover, the alternative to child protection, in its dominant legal form, must not be to deny ‘child’ refugees protection. Far from it. What is needed, we suggest, is a shift away from exclusionary hierarchies of vulnerability, dependence and deservingness towards free movement buttressed by global solidarity and equitable power relations.

Our critique weaves together several bodies of knowledge. Among them are studies on the harmful effects of the dominant discourse of child protection across various contexts, ranging from family law,<sup>8</sup> criminal justice<sup>9</sup> and armed conflict<sup>10</sup> to colonial rule,<sup>11</sup> work,<sup>12</sup> trafficking<sup>13</sup> and migration.<sup>14</sup> Additionally, we draw on critical

<sup>7</sup> In fact, it may be impossible to weigh advantages against disadvantages due to the unquantifiable and subjective nature of their effects. In other legal contexts, see Travers, ‘Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England’, 1 *International Journal of the Legal Profession* (1994) 173; Bano, “‘Standpoint”, “Difference” and Feminist Research”, in R. Banakar and M. Travers (eds), *Theory and Method in Socio-Legal Research* (2005) 91.

<sup>8</sup> See, e.g., Mnookin, *supra* note 6; Federle, ‘Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings’, 15 *Cardozo Law Review* (1993) 1523.

<sup>9</sup> See, e.g., Ainsworth, ‘Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition’, 36 *Boston College Law Review* (1995) 927; Viterbo, ‘The Pitfalls of Separating Youth in Prison: A Critique of Age-Segregated Incarceration’, in A. Cox and L.S. Abrams (eds), *The Palgrave International Handbook of Youth Imprisonment* (2021) 539.

<sup>10</sup> See, e.g., Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’, 109 *American Anthropologist* (2007) 296; M.A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012); H. Viterbo, *Problematizing Law, Rights, and Childhood in Israel/Palestine* (2021).

<sup>11</sup> See, e.g., Viterbo, ‘Ties of Separation: Analogy and Generational Segregation in North America, Australia, and Israel/Palestine’, 42 *Brooklyn Journal of International Law* (2017) 686.

<sup>12</sup> See, e.g., Liebel, ‘Do Children Have a Right to Work? Working Children’s Movements in the Struggle for Social Justice’, in K. Hanson and O. Nieuwenhuys (eds), *Reconceptualizing Children’s Rights in International Development* (2012) 225; M. Bourdillon et al., *Rights and Wrongs of Children’s Work* (2010); Woodhead, ‘Combatting Child Labour: Listen to What the Children Say’, 6 *Childhood* (1999) 27.

<sup>13</sup> See, e.g., N. Howard, *Child Trafficking, Youth Labour Mobility and the Politics of Protection* (2016); E.A. Faulkner, *The Trafficking of Children: International Law, Modern Slavery, and the Anti-Trafficking Machine* (2023); J.L. Westwood, ‘The Social Construction of Risk in Child Trafficking Discourses: A Study of Melodramatic Tactics in Child Trafficking Narratives’ (2010) (PhD thesis on file at the University of Central Lancashire, UK), available at <https://clok.uclan.ac.uk/3717/3/Westwood%20Joanne%20Final%20e-Thesis%20%28Master%20Copy%29.pdf>.

<sup>14</sup> See, e.g., Lind, ‘Governing Vulnerabilised Migrant Childhoods through Children’s Rights’, 26 *Childhood* (2019) 337, at 345; Lemberg-Pedersen, ‘The Humanitarianization of Child Deportation Politics’, 36 *Journal of Borderlands Studies* (2021) 239; Silverstein, “‘Best Interests of the Child”, Australian Refugee Policy, and the (Im)possibilities of International Solidarity’, 22 *Human Rights Review* (2021) 389.

childhood studies,<sup>15</sup> which call into question conventional wisdom about the supposedly distinct traits and needs of ‘children’, ‘adults’ and other age categorizations.<sup>16</sup> Also informing our analysis is scholarship on the socially constructed aspects of both vulnerability and dependence,<sup>17</sup> including those of ‘refugees’.<sup>18</sup> Some studies specifically challenge the equation of either vulnerability or dependence with chronological age, both in relation to ‘refugees’<sup>19</sup> and in general.<sup>20</sup> Others highlight how conceptions of vulnerability and dependence can be used as tools of control and governance.<sup>21</sup> We also draw on critiques of hierarchies of deservingness – regarding ‘children’,<sup>22</sup> ‘refugees’<sup>23</sup> and others<sup>24</sup> – as well as critical writing on special protection in international refugee law.<sup>25</sup> Lastly, our arguments are inspired by scholarship that challenges contemporary legal and political norms regarding migration and national borders.<sup>26</sup>

<sup>15</sup> On some of the insights that critical childhood studies and critical legal scholarship can offer one another, see Viterbo, *supra* note 6.

<sup>16</sup> See, e.g., H.P. Chudacoff, *How Old Are You? Age Consciousness in American Culture* (1989); M. King and C. Piper, *How the Law Thinks About Children* (2nd edn, 1995); H. Cunningham, *Children and Childhood in Western Society Since 1500* (2nd edn, 2005); Kelly, ‘The Brain in the Jar: A Critique of Discourses of Adolescent Brain Development’, 15 *Journal of Youth Studies* (2012) 944; E. Burman, *Deconstructing Developmental Psychology* (3rd edn, 2016).

<sup>17</sup> See, e.g., Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, 20 *Yale Journal of Law and Feminism* (2008) 1; MacKenzie, Rogers and Dodds, *supra* note 3.

<sup>18</sup> See, e.g., Smith and Waite, ‘New and Enduring Narratives of Vulnerability: Rethinking Stories about the Figure of the Refugee’, 45 *Journal of Ethnic and Migration Studies* (JEMS) (2019) 2289; Otto, ‘Coming of Age in the Border Regime: The End of Vulnerability?’, 17 *Migration Letters* (2020) 425; Mesarič and Vacchelli, ‘Invoking Vulnerability: Practitioner Attitudes to Supporting Refugee and Migrant Women in London-Based Third Sector Organisations’, 47 *JEMS* (2021) 3097.

<sup>19</sup> See, e.g., Clark, ‘Understanding Vulnerability: From Categories to Experiences of Young Congolese People in Uganda’, 21 *Children & Society* (2007) 284; O’Higgins, ‘Vulnerability and Agency: Beyond an Irreconcilable Dichotomy for Social Service Providers Working with Young Refugees in the UK’, 136 *New Directions for Child and Adolescent Development* (2012) 79.

<sup>20</sup> See, e.g., Christensen, ‘Childhood and the Cultural Constitution of Vulnerable Bodies’, in A. Prout (ed.), *The Body, Childhood and Society* (2000) 38; J. Herring, *Vulnerability, Childhood and the Law* (2018).

<sup>21</sup> See, e.g., Dunn, Clare and Holland, ‘To Empower or to Protect? Constructing the “Vulnerable Adult” in English Law and Public Policy’, 28 *Legal Studies* (2008) 234; Heidbrink, ‘Anatomy of a Crisis: Governing Youth Mobility through Vulnerability’, 47 *JEMS* (2021) 988; Turner, ‘The Politics of Labeling Refugee Men as “Vulnerable”’, 28 *Social Politics* (2021) 1.

<sup>22</sup> See, e.g., R.C. Carpenter, ‘Innocent Women and Children’: Gender, Norms and the Protection of Civilians (2006); Gordon, ‘The Perils of Innocence, or What’s Wrong with Putting Children First’, 1 *Journal of the History of Childhood and Youth* (2008) 331; Viterbo, ‘Just for Kids: How the Youth Decarceration Discourse Endorses Adult Incarceration’, *Criminology & Criminal Justice* (forthcoming).

<sup>23</sup> See, e.g., B. Anderson, *Us and Them? The Dangerous Politics of Immigration Control* (2013); R. Hamlin, *Crossing: How We Label and React to People on the Move* (2021); O’Connell Davidson, ‘Moving Children? Child Trafficking, Child Migration, and Child Rights’, 31 *Critical Social Policy* (2011) 454.

<sup>24</sup> See, e.g., Watkins-Hayes and Kovalsky, ‘The Discourse of Deservingness: Morality and the Dilemmas of Poverty Relief in Debate and Practice’, in D. Brady and L.M. Burton (eds), *The Oxford Handbook of the Social Science of Poverty* (2016) 1.

<sup>25</sup> See, e.g., Krivenko, ‘Reassessing the Relationship between Equality and Vulnerability in Relation to Refugees and Asylum Seekers in the ECtHR: The MSS Case 10 Years On’, 34 *International Journal of Refugee Law* (IJRL) (2023) 192.

<sup>26</sup> See, e.g., S. Juss, *International Migration and Global Justice* (2016); C. Bertram, *Do States Have the Right to Exclude Immigrants?* (2018); Achiume, ‘Migration as Decolonization’, 71 *Stanford Law Review* (2019) 1509.

Throughout the article, we build upon, and contribute to, these various bodies of literature.

Before we embark on our analysis, a note on terminology is in order. We treat neither ‘children’ nor ‘refugees’ as terms that designate pre-given, natural and self-evident groups. Rather, our point of departure is that these categories, along with related ones such as ‘adults’ and ‘citizens’, are all social, political and legal constructs whose delin-eations warrant questioning.<sup>27</sup> To problematize these concepts, we place them within quotation marks.<sup>28</sup> For a similar reason, we occasionally opt for more open-ended phrases, such as ‘young refugees’ and ‘their older counterparts’ (while using more precise terms when discussing issues affecting narrower or more specific age groups). Although we avoid any clear-cut definitions – particularly, the dominant legal ones – we regard the term ‘refugees’ as broadly applicable to people who either seek or are given refuge abroad from hardships in their countries of origin. Thus conceptualized, ‘refugees’ include, but are by no means limited to, ‘asylum seekers’.<sup>29</sup>

## 2 Child Protection in International Law

The international legal principle of child protection is characterized by two key fea-tures.<sup>30</sup> First, it reinforces an age hierarchy of deservingness, according to which ‘child’ refugees are more vulnerable, more dependent and, therefore, more deserving of protection and aid than their ‘adult’ counterparts. Second, it is ambivalent about

<sup>27</sup> For a similar observation, see Silverstein, *supra* note 14, at 394.

<sup>28</sup> The terms ‘child’ and ‘refugee’ are equally problematic. However, in this article, our focus is on problem-atizing the former (‘child’), not the latter (‘refugee’). To maintain this focus, we place the phrases ‘child’, ‘adult’, ‘child refugee’ and ‘adult refugee’ in quotation marks throughout the article, whereas ‘refugee’ as a standalone term appears in quotation marks only at the beginning of the article (with a small number of exceptions where quotation marks help convey a specific argument about the ‘refugee’ label). For non-legalistic conceptualizations of ‘refugee’, see, e.g., Hein, ‘Refugees, Immigrants, and the State’, 19 *Annual Review of Sociology* (1993) 43; Koser, ‘Refugees, Transnationalism and the State’, 33 *JEMS* (2007) 233; Y.L. Espiritu *et al.*, *Departures: An Introduction to Critical Refugee Studies* (2022).

<sup>29</sup> See also Costello and Ioffe, ‘Non-Penalization and Non-Criminalization’, in C. Costello, M. Foster and J. McAdam (eds), *The Oxford Handbook of International Refugee Law* (2021) 917, at 920 (‘the term “refugees” in article 31(1) [of the Refugee Convention] should be interpreted broadly, and clearly includes asylum seekers, understood broadly to include all those in search of international protection. There are also good legal reasons to regard refugees under expanded regional definitions as entitled to the protection in article 31’). Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

<sup>30</sup> This principle is enshrined in several child-focused treaties, other treaties with child protection provisions and various legal instruments. For an overview of these legal instruments, including those discussed in this section, see, e.g., R. Akhtar, C. Nyamutata and E. Faulkner, *International Child Law* (4th edn, 2020); A. Holzscheiter, *Children’s Rights in International Politics: The Transformative Power of Discourse* (2010). In addition, according to the dominant child rights discourse, protection is one of the three types of rights conferred by international child law, the other two being provision and participation. See, e.g., Quennerstedt, ‘Children, But Not Really Humans? Critical Reflections on the Hampering Effect of the “3 P’s”’, 18 *International Journal of Children’s Rights (IJCR)* (2010) 619; Reynaert, Bouverne-de-Bie and Vandevelde, ‘A Review of Children’s Rights Literature since the Adoption of the United Nations Convention on the Rights of the Child’, 16 *Childhood* (2009) 518.

child-parent relations: while consecrating the child-parent bond, it also permits the state to punish parents and remove their 'children' from their care.

### A The Age Hierarchy of Deservingness

The notion that 'children' are a uniquely vulnerable and dependent group, and, thus, deserving of greater protection than is afforded to their 'adult' counterparts, is widely regarded as the rationale behind the international legal principle of child protection. In the refugee context, this principle brings about an age hierarchy of deservingness, which reserves various forms of protection, care and safeguarding exclusively for 'child refugees' on account of their supposedly unique vulnerability and dependence.<sup>31</sup> A series of international child rights instruments have enshrined this age hierarchy. As early as 1924, the first Declaration on the Rights of the Child stipulated that '[t]he child must be the first to receive relief in times of distress'.<sup>32</sup> Similarly, the 1959 Declaration on the Rights of the Child states that 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection. ... The child shall in all circumstances be among the first to receive protection and relief'.<sup>33</sup> This latter provision was partially quoted, three decades later, in the Convention on the Rights of the Child (CRC), the world's most widely ratified treaty, which also entrenches the notion that 'childhood is entitled to special care and assistance'.<sup>34</sup> That these and other elements of the CRC are applicable to 'child refugees' is underscored by two of the treaty's provisions: first, its non-discrimination provision (Article 2), which requires that the rights of 'each child' be respected 'irrespective of the child's ... national, ethnic or social origin, ... birth or other status'; and, second, an express reference to 'refugee children' in Article 22.<sup>35</sup>

In addition, two provisions – Article 22 of the CRC and Article 23 of the African Charter on the Rights and Welfare of the Child (ACRWC) – entitle 'child refugees' to 'appropriate protection and humanitarian assistance'.<sup>36</sup> According to the Committee on the Rights of the Child (the UN body monitoring the implementation of the CRC)<sup>37</sup> as well as some legal scholars,<sup>38</sup> this phrase – 'appropriate protection

<sup>31</sup> On some of the ways in which different groups within hierarchies of deservingness define and relate to each other, see, e.g., Anderson, *supra* note 23.

<sup>32</sup> Declaration on the Rights of the Child, 26 September 1924, League of Nations OJ Special Supplement 21, at 43.

<sup>33</sup> Declaration on the Rights of the Child, GA Res. 1386 (XIV), 20 November 1959, preamble. This principle was later quoted in the preamble of the CRC, *supra* note 1.

<sup>34</sup> CRC, *supra* note 1, preamble.

<sup>35</sup> *Ibid.*, Arts 2, 22.

<sup>36</sup> *Ibid.*, Art. 22; African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), Art. 23. Both provisions also put in place special measures for tracing parents and other relatives of 'child refugees'.

<sup>37</sup> UN Committee on the Rights of the Child (UNCRC), General Comment no. 6: Treatment of Unaccompanied and Separated Children outside Their Country of Origin, UN Doc. CRC/GC/2005/6, 1 September 2005, para. 64; UNCRC, *A.B. v. Finland*, UN Doc. CRC/C/86/D/51/2018, 12 March 2021, paras 12.2, 12.4; UNCRC, *M.T. v. Spain*, UN Doc. CRC/C/82/D/17/2017, 5 November 2019, para. 13.8; UNCRC, *R.K. v. Spain*, UN Doc. CRC/C/82/D/27/2017, 5 November 2019, para. 9.12.

<sup>38</sup> Pobjoy, 'Article 22: Refugee Children', in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (2019) 818, at 838; G.S. Goodwin-Gill, J. McAdam and E. Dunlop, *The Refugee in International Law* (4th edn, 2021), at 526–527.

and humanitarian assistance’ – requires providing ‘child refugees’ with additional protection and humanitarian assistance (on top of those given to all ‘refugees’) on account of their supposedly distinct vulnerabilities and developmental needs. Other jurists have interpreted this phrase as requiring the prioritization of ‘child refugees’ over other ‘refugees’.<sup>39</sup> Meanwhile, the African Committee of Experts on the Rights and Welfare of the Child, which monitors the implementation of the ACRWC, has interpreted ‘appropriate protection and humanitarian assistance’ mainly as requiring that ‘children’ be assisted in obtaining refugee status.<sup>40</sup>

Having repeatedly described ‘children’ as vulnerable,<sup>41</sup> including in the refugee context,<sup>42</sup> the UN Committee on the Rights of the Child has also formulated the age hierarchy as follows (in a joint statement with the UN Committee on Migrant Workers):

Children must be [at the] top of [the] global migration agenda. ... All children caught up in the global migration crisis should be treated as children first and foremost. ... Migrant children, defined as those below the age of 18, continue to suffer the most from the violation of their rights.<sup>43</sup>

By implication, ‘adults’ – those no longer designated as ‘children first and foremost’ – are relegated to a lower position on the human rights agenda. Alleged to suffer less from violations of their rights, they are deemed less deserving of potentially crucial aid.

Such sentiments now dominate the discourse of international human rights law, which has come to single out ‘child refugees’ as a distinct group with greater vulnerability and more acute needs than their elders. The United Nations (UN) General Assembly, for instance, has expressed this view in several of its human rights resolutions,<sup>44</sup> including Resolution 69/154, according to which ‘children, because of their age, social status and physical and mental development, are often more vulnerable than adults in situations of forced displacement’.<sup>45</sup>

<sup>39</sup> Peter and Mwalimu, ‘The African Charter on the Rights and Welfare of the Child’, in A.A. Yusuf and F. Ouguergouz (eds), *The African Union: Legal and Institutional Framework: A Manual on the Pan-African Organization* (2012) 477, at 485.

<sup>40</sup> African Committee of Experts on the Rights and Welfare of the Child, *Mapping Children on the Move within Africa* (2018), at 36, available at [https://bettercarenetwork.org/sites/default/files/2021-11/ACERWC\\_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-\\_A4\\_Website-version.pdf](https://bettercarenetwork.org/sites/default/files/2021-11/ACERWC_Study-Mapping-Children-on-the-Move-within-Africa-Nov2018-_A4_Website-version.pdf).

<sup>41</sup> See, e.g., UNCRC, General Comment no. 20 (2016) on the Implementation of the Rights of the Child during Adolescence, UN Doc. CRC/GC/20, 6 December 2016, paras 2, 80; UNCRC, General Comment no. 2 (2002): The Role of Independent Human Rights Institutions in the Promotion and Protection of the Rights of the Child, UN Doc. CRC/GC/2002/2, 15 November 2002, para. 5; UNCRC, General Comment no. 4 (2003): Adolescent Health and Development in the Context of the Convention on the Rights of the Child, UN Doc. CRC/GC/2003/4, 1 July 2003, introduction.

<sup>42</sup> UNCRC General Comment no. 6, *supra* note 37, para. 68. The committee has also used similar language in the context of ‘international migration’. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and UNCRC, Joint General Comment no. 3/22 on the General Principles Regarding the Human Rights of Children in the Context of International Migration, UN Doc. CMW/C/GC/3-CRC/C/GC/22, 16 November 2018, para. 3.

<sup>43</sup> UN Human Rights Office, *Children Must Be Top of Global Migration Agenda*, UN Experts Say, 17 November 2017, available at [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22408&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22408&LangID=E).

<sup>44</sup> New York Declaration for Refugees and Migrants, GA Res. A/RES/71/1, 3 October 2016, paras 23, 29, 32, 59; Global Compact on Refugees, GA Res. A/73/12 (Part II), 2 August 2018, paras 5(a), 59–60, 76–77.

<sup>45</sup> Assistance to Refugees, Returnees and Displaced Persons in Africa, GA Res. A/RES/69/154, 18 December 2014, preamble, para. 9.

Since the 1980s, the UN High Commissioner for Refugees (UNHCR), arguably the most prominent international agency regarding refugee matters, has followed a similar path. 'Child refugees', it maintains, have 'special needs and vulnerability within the broader refugee population', and their needs deserve 'special attention'.<sup>46</sup> In contrast, 'adult refugees' have repeatedly been depicted by the UNHCR as less deserving, less vulnerable and a lower priority, and their needs as less pressing. In its guidelines regarding 'child asylum claims', the UNHCR expresses this age hierarchy in no uncertain terms: 'Children's socio-economic needs are often more compelling than those of adults'.<sup>47</sup> Other UNHCR guidelines elaborate on specific contexts in which 'child refugees' ought to be prioritized over their older counterparts.<sup>48</sup> Similarly, the UNHCR's director of international protection once asserted that 'child refugees ... [are] the most vulnerable category' of refugees and, as such, are among 'the most ... deserving ... of all uprooted populations'.<sup>49</sup> Over the years, several other UNHCR documents have likewise described it as a 'widely-recognized [*sic*] principle that children must be among the first to receive protection and assistance in any refugee situation'.<sup>50</sup> According to the UNHCR, 'child refugees' suffer from 'special problems'<sup>51</sup> and deserve 'special treatment' and 'special consideration'<sup>52</sup> in view of 'their dependence, their vulnerability and their developmental needs'.<sup>53</sup>

This age hierarchy manifests itself not only in the law's differing treatment of 'child' and 'adult' refugees but also in the different legal terms attached to each of these groups. A notable example is the term 'unaccompanied minors', which the UN Committee on the Rights of the Child defines as those who are 'particularly

<sup>46</sup> UNHCR Executive Committee (ExCom), Refugee Children no. 47 (XXXVIII), UN Doc. A/42/12/Add.1, 12 October 1987, para. a; UNHCR ExCom, Refugee Children and Adolescents no. 84 (XLVIII), UN Doc. A/52/12/Add.1, 17 October 1997, preamble; UNHCR ExCom, Refugee Children no. 59 (XL), UN Doc. A/44/12/Add.1, 13 October 1989, para. g. 'Child refugees' are also repeatedly described as uniquely vulnerable in UNHCR, *Refugee Children: Guidelines on Protection and Care* (1994), at 38, 72–73, 101, 152, available at [www.unhcr.org/uk/media/refugee-children-guidelines-protection-and-care](http://www.unhcr.org/uk/media/refugee-children-guidelines-protection-and-care). Their depiction as having 'special needs' also appears in UNHCR, *Note on Refugee Children*, UN Doc. EC/SCP/46, 9 July 1987, para. 1, available at [www.unhcr.org/uk/publications/note-refugee-children](http://www.unhcr.org/uk/publications/note-refugee-children).

<sup>47</sup> UNHCR, *Guidelines on International Protection: 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*, UN Doc. HCR/GIP/09/08, 22 December 2009, para. 14, available at [www.unhcr.org/media/guidelines-international-protection-no-8-child-asylum-claims-under-articles-1-2-and-1-f-1951](http://www.unhcr.org/media/guidelines-international-protection-no-8-child-asylum-claims-under-articles-1-2-and-1-f-1951).

<sup>48</sup> UNHCR, *Refugee Children*, *supra* note 46, at 22, 66, 72–73, 81–82, 141, 145.

<sup>49</sup> McNamara, *A Human Rights Approach to the Protection of Refugee Children*, 14 November 1998, available at [www.unhcr.org/uk/admin/dipstatements/42a00a6c2/statement-mr-dennis-mcnamara-director-division-international-protection.html](http://www.unhcr.org/uk/admin/dipstatements/42a00a6c2/statement-mr-dennis-mcnamara-director-division-international-protection.html); Clark, *supra* note 19, at 284.

<sup>50</sup> *Refugee Children* no. 47, *supra* note 46, para. c; UNHCR, *Note on Refugee Children*, *supra* note 46, para. 57; *Refugee Children and Adolescents* no. 84, *supra* note 46, preamble; UNHCR ExCom, *Conclusion on Children at Risk* no. 107 (LVIII), 5 October 2007, para. b. Another age distinction drawn by the UNHCR concerns eligibility to asylum on grounds of persecution: 'Identical mistreatment may be deemed persecution when faced by a "child" but not by an "adult".' UNHCR, *Guidelines*, *supra* note 47; see also Oertli, 'Forensic Age Estimation in Swiss Asylum Procedures: Race in the Production of Age', 35 *Refugee* (2019) 8, at 9.

<sup>51</sup> UNHCR, *Note on Refugee Children*, *supra* note 46, paras 10, 57.

<sup>52</sup> *Ibid.*, paras 2, 4.

<sup>53</sup> UNHCR, *Refugee Children*, *supra* note 46, at 166.

vulnerable'.<sup>54</sup> No equivalent term exists in the dominant legal discourse regarding unaccompanied 'adult' refugees. Nor is the vulnerability of these 'adults' duly recognized, regardless of how dependent and defenceless they may be. Similarly, the term 'orphans of war' was used by the UNHCR's predecessor – the International Refugee Organization – to denote 'children', and only 'children', whose parents had died in war.<sup>55</sup> In these and other ways, legal terminology reflects and reinforces the relative disregard for 'adult' refugees among legal and human rights actors.

Overall, then, the dominant legal paradigm of child protection has increasingly cast 'child refugees' and 'adult refugees' as two distinct groups, while also establishing a hierarchy of deservingness between them. On the one hand, 'child refugees' are deemed uniquely vulnerable, dependent and, hence, deserving of special treatment and extra protection. On the other hand, 'adult refugees' are considered less worthy of protection. Later in this article, we lay bare the detrimental effects of this age hierarchy while also calling into question its assumptions about age, vulnerability, dependence and deservingness.

## **B Legal Ambivalence towards Child-Parent Relations**

Alongside its age hierarchy of deservingness, another significant feature of child protection, in its present legal form, is its ambivalence towards child-parent relations. On the one hand, international law attributes great importance to the child-parent bond. On the other hand, it imposes certain duties upon parents while also entitling the state to intervene in the name of 'the child's best interests'. Such intervention can take various forms, including punishing the parents and removing the 'child' from their care. Such legal ambivalence is evident in the CRC. On the one hand, this treaty states that '[t]he child ... shall have ... the right to know and be cared for by his or her parents'. The CRC further proclaims that 'the child ... should grow up in a family environment', and it speaks of 'the right of the child to preserve ... family relations'. Specifically referencing refugees, this treaty also encourages states to cooperate 'in any efforts ... 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'.<sup>56</sup> On the other hand, the CRC authorizes the state to 'take all appropriate ... measures', including child removal, 'to protect the child from all forms of ... neglect ... [and] maltreatment ... while in the care of parent(s)'.<sup>57</sup>

Moreover, the CRC simultaneously speaks for and against severing child-parent contact. On the one hand, it provides that 'a child shall not be separated from his or her parents against their will'. On the other hand, this provision comes with a wide caveat 'except when ... such separation is necessary for the best interests of the child ... [such as in cases] involving ... neglect of the child by the parents'. Where separation

<sup>54</sup> UNCRC General Comment no. 6, *supra* note 37, paras 1, 50.

<sup>55</sup> Constitution of the International Refugee Organization (1946), Annex I, Part 1, section 4, available at [https://treaties.un.org/doc/Treaties/1948/08/19480820%2007-01%20AM/Ch\\_V\\_1p.pdf](https://treaties.un.org/doc/Treaties/1948/08/19480820%2007-01%20AM/Ch_V_1p.pdf).

<sup>56</sup> CRC, *supra* note 1, preamble, Arts 7–8, 22.

<sup>57</sup> *Ibid.*, Art. 19.

has already occurred, the CRC similarly protects ‘the right of the child ... to maintain personal relations and direct contact with both parents on a regular basis’, but this protection, too, comes with the proviso: ‘except if it is contrary to the child’s best interests.’<sup>58</sup>

As illustrated by some of these quotes, the CRC makes matters even less certain by using decidedly ambiguous phrases, such as ‘the child’s best interest’, ‘the child’s well-being’, ‘[parental] neglect’ and ‘[parental] rights and duties’. Such phrases, which are central to child law, are either vaguely formulated or only minimally elaborated in the CRC. The ‘child’s best interests’ and ‘well-being’ principles, in particular, are vaguely described in Article 3: ‘In all actions concerning children, ... the best interests of the child shall be a primary consideration. ... [T]he child [should be given] such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents’. There are bound to be competing views about what ‘the best interests’ and the ‘well-being’ of each ‘child’ require in any given context, what course of action best guarantees ‘protection and care’, what level of state intervention is appropriate given the parents’ ‘rights and duties’ and what sort of parental conduct amounts to ‘neglect’ or ‘maltreatment’. No less ambiguously, the CRC requires states to ‘respect the responsibilities, rights and duties of parents’.<sup>59</sup> No clarity is provided regarding what these ‘responsibilities, rights and duties’ entail, nor regarding how to strike a balance between them where they pull in different directions. As we reveal in this article, this combination of vague wording and potentially conflicting provisions helps states couch their anti-refugee policies and practices in the language of child protection.<sup>60</sup>

### 3 A Critique of the Legal Principle of Child Protection

#### *A Vulnerability and Dependence Are Socially Constructed*

As we have shown, the international legal principle of child protection imposes an evident age hierarchy on refugees. From the moment they are believed to have reached adulthood, they are deemed less vulnerable and less dependent. As a result, their suffering is frequently portrayed as less deplorable, and their needs as less pressing, than they were prior to this point. This use of childhood as a proxy for vulnerability and dependence, however, is questionable in four interrelated respects. First, it downplays the

<sup>58</sup> *Ibid.*, Art. 9. There is also some vagueness in Article 10, which provides for child-parent contact where these parties live in different states, ‘save in exceptional circumstances’. See also Ioffe, ‘The Right to Family Reunification of Children Seeking International Protection under the Convention on the Rights of the Child: Misplaced Reliance on *Travaux*?’ 34 *IJRL* (2022) 215.

<sup>59</sup> Such phrases appear twice. CRC, *supra* note 1, Arts 5, 14.

<sup>60</sup> The language of ‘child rights’, ‘the child’s best interests’ and/or ‘the child’s welfare’ has proven detrimental to ‘children’ and their parents in various other ways and contexts, beyond those discussed in this article. See, e.g., M. Guggenheim, *What’s Wrong with Children’s Rights* (2007); D. Roberts, *Shattered Bonds: The Color of Child Welfare* (2002); Pimentel, ‘Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child’, 38 *Cardozo Law Review* (2016) 1; see also the sources cited in notes 8–14 and notes 67–68 and 88–91.

extent to which both vulnerability and dependence are deeply contextual (stemming from an individual's current circumstances), relational (resulting from a person's relations with their social surroundings), structural (the product of broader economic, political and historical forces) and socially constructed.<sup>61</sup> Indeed, vulnerability and dependence alike are neither simply immutable (the result of particularly innate characteristics) nor reducible to a person's chronological age.<sup>62</sup> Instead, these traits are inherent to human existence, persisting and constantly changing in a non-linear manner throughout each person's life.<sup>63</sup> For instance, speaking the local language, being familiar with local customs and knowing how to find crucial information online can all increase a person's independence and lower their risk of being deceived or exploited. Some 'adult' refugees, however, might lack such knowledge or might not gain it as quickly and easily as some of their younger counterparts. Indeed, many refugee parents rely on their children below the age of majority to translate, explain or find information for them in their new country.<sup>64</sup> In this regard, it is the 'adult' refugee, not necessarily the 'child', who may be more dependent and vulnerable. Similarly, the trauma endured by many refugees, whether due to the conditions in their countries of origin or the harrowing journey to their countries of destination, is hardly confined to a particular age group.<sup>65</sup> In fact, the post-traumatic stress disorder of an 'adult' refugee can be no less severe than that of a 'child' refugee, depending on their individual circumstances.

Second, the dominant legal discourse of child protection not only ignores, downplays or oversimplifies such pre-existing vulnerability and dependence. In some respects, it also potentially makes 'children' and 'adults' alike even more vulnerable and dependent than they might otherwise have been, albeit in different ways for each of these groups.<sup>66</sup> On the one hand, as discussed earlier and further illustrated later, it casts 'adult' refugees as a lower priority and as less deserving of protection, care and assistance. Consequently, 'adult' refugees can lawfully be subjected to worse conditions and harsher treatment and can thus be made more vulnerable. On the other hand, contemporary law also enhances and prolongs the dependence and vulnerability of the young as well as their ignorance and incapacity. For instance, adult control over 'children' is enshrined in law, and so is the ineligibility of under-18-year-olds in most of the world to carry out paid work, vote and meaningfully participate in the public sphere.

<sup>61</sup> Gilson, 'The Perils and Privileges of Vulnerability: Intersectionality, Relationality, and the Injustices of the U.S. Prison Nation', 6 *philoSOPHIA* (2016) 43, at 43–44; J. Butler, *The Force of Nonviolence: An Ethico-Political Bind* (2020), at 185–204.

<sup>62</sup> Clark, *supra* note 19, at 285–291 and the sources cited therein.

<sup>63</sup> Fineman, *supra* note 17; Herring, *supra* note 20; MacKenzie, Rogers and Dodds, *supra* note 17.

<sup>64</sup> See, e.g., M.F. Orellana, *Translating Childhoods: Immigrant Youth, Language, and Culture* (2009); Degener, "'Sometimes My Mother Does Not Understand, Then I Need to Translate": Child and Youth Language Brokering in Berlin-Neukölln (Germany)', 10 *mediAzioni* (2010) 346.

<sup>65</sup> See, e.g., Nicholl and Thompson, 'The Psychological Treatment of Post Traumatic Stress Disorder (PTSD) in Adult Refugees: A Review of the Current State of Psychological Therapies', 13 *Journal of Mental Health* (2004) 351.

<sup>66</sup> Viterbo, *supra* note 6, at 355–356.

In this and other respects, international legal norms entrench power relations that potentially work against society's younger members. This is among the reasons why scholars and activists alike, including under-18-year-olds, have repeatedly called for greater autonomy to be given to those below the legal age of majority. Such autonomy, it has been argued, could be advanced by lowering or even removing the existing age restrictions on the right to dignified, well-regulated and empowering work<sup>67</sup> and the right to vote,<sup>68</sup> for example. Regardless of whether one subscribes to these proposals, what is evident is that vulnerability and dependence, where they seem to exist, often largely result from social mechanisms,<sup>69</sup> central among which is contemporary law.<sup>70</sup> Were these mechanisms to be dismantled, the sort of vulnerability and dependence that are frequently assumed to be natural or universal would likely diminish significantly. Later in this article, we provide specific examples of how both 'child' and 'adult' refugees, rather than being innately vulnerable due to their pre-existing traits or circumstances, are vulnerabilized – that is, made (more) vulnerable – by legal and human rights actors.

Third and relatedly, differences between 'children' and 'adults' are, to a greater extent than is often recognized, socially and legally manufactured. In some respects, this may well be particularly true regarding 'children' in their teenage years (who, in many countries, reportedly make up the majority of 'child' refugees).<sup>71</sup> Yet childhood and adulthood generally, as currently envisaged within the dominant discourse of law and human rights, are historically, culturally and socio-economically specific constructs. For example, in the past, 'children' and 'adults' – as the law now demarcates them – were neither perceived nor treated as distinct age groups with marked differences between them. Instead, pre-teens often mixed with those we would now define as 'adults' in public, absorbed similar information and engaged in similar activities.<sup>72</sup> Until the 19th century, a person's date of birth was rarely known, celebrated or accurately recorded, a situation still true for hundreds of millions around the world.<sup>73</sup> Age-related legislation was also relatively rare and mostly unenforced. Personal status changed

<sup>67</sup> See, e.g., Liebel, *supra* note 12; Bourdillon *et al.*, *supra* note 12; Woodhead, *supra* note 12.

<sup>68</sup> See, e.g., J. Wall, *Give Children the Vote: On Democratizing Democracy* (2021); Schrag, 'Children and Democracy: Theory and Policy', 3 *Politics, Philosophy & Economics* (2004) 365; Munn, 'Capacity Testing the Youth: A Proposal for Broader Enfranchisement', 15 *Journal of Youth Studies* (2012) 1048.

<sup>69</sup> See, e.g., Christensen, *supra* note 20.

<sup>70</sup> King and Piper, *supra* note 16.

<sup>71</sup> See, e.g., 'Latest Statistics and Graphics on Refugee and Migrant Children', *UNICEF*, available at [www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children](http://www.unicef.org/eca/emergencies/latest-statistics-and-graphics-refugee-and-migrant-children); 'Asylum Seeker Demography: Young and Male', *Pew Research Center*, 2 August 2016, available at [www.pewresearch.org/global/2016/08/02/4-asylum-seeker-demography-young-and-male](http://www.pewresearch.org/global/2016/08/02/4-asylum-seeker-demography-young-and-male); 'Demographics of Young Migrants in the UK', *The Migration Observatory*, 30 November 2015, <https://migrationobservatory.ox.ac.uk/resources/briefings/testing-demographics-of-young-migrants-in-the-uk>.

<sup>72</sup> Cunningham, *supra* note 16; Gittins, 'The Historical Construction of Childhood', in M.J. Kehily (ed.), *An Introduction to Childhood Studies* (2nd edn, 2009) 35.

<sup>73</sup> 'Every Child's Birth Right: Inequities and Trends in Birth Registration', *UNICEF*, December 2013, available at [www.unicef.org/media/73661/file/Every-Childs-Birth-Right-2013.pdf](http://www.unicef.org/media/73661/file/Every-Childs-Birth-Right-2013.pdf); Phillips, Adair and Lopez, 'How Useful Are Registered Birth Statistics for Health and Social Policy? A Global Systematic Assessment of the Availability and Quality of Birth Registration Data', 17 *Population Health Metrics* (2018) 1.

gradually or through rites of passage, not through legal age thresholds. There were no universal compulsory education laws, and the schools that did exist consisted of mixed-age classrooms.<sup>74</sup> When imprisoned people started being separated, it was not by their age but, rather, by their perceived character, the severity of their offence and whether they had a prior criminal record.<sup>75</sup> More recently, prior to the adoption of the CRC in 1989, no international treaty offered an age-based definition of the term ‘child’.<sup>76</sup> Through these and other legal shifts, distinct age groups emerged as having dissimilar behaviour, capacity and knowledge. International law has played a decisive role in solidifying and globalizing these historically, culturally and socio-economically specific age norms.<sup>77</sup>

Lastly, proponents of age-based legal distinctions sometimes cite what they regard as scientific evidence of biological age differences. Yet the research they cite – typically, in fields such as brain development studies and developmental psychology — has attracted extensive criticism. Developmental psychology, it has been argued, is a reductive social project aimed at creating rational subjects amenable to existing socio-economic power relations.<sup>78</sup> Similarly, studies of adolescent neurodevelopment have been criticized for their contested and ever-changing assumptions about brain activity, their disregard of countless variables that potentially influence the brain, their generalizations based on participants from particular social backgrounds who are tested in the limited setting of a laboratory and their oversimplification of brain maps for media and statistical purposes.<sup>79</sup> Moreover, human development is heavily affected by social stimuli,<sup>80</sup> which have only recently – and not universally – become highly age regimented. With key knowledge, experiences, skills and rights being withheld from many young people well into their teens, if not beyond, it is no wonder – nor is it inevitable – that they appear to be relatively dependent, incapable and vulnerable.

<sup>74</sup> Chudacoff, *supra* note 16; N. Lesko, *Act Your Age! A Cultural Construction of Adolescence* (2001).

<sup>75</sup> May, ‘Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century’, 17 *Victorian Studies* (1973) 7.

<sup>76</sup> Archard and Tobin, ‘Art. 1 The Definition of a Child’, in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary* (2019) 22.

<sup>77</sup> Boyden, ‘Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood’, in A. James and A. Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (2nd edn, 2003) 190.

<sup>78</sup> See, e.g., Burman, *supra* note 16; J. Morss, *Growing Critical: Alternatives to Developmental Psychology* (1996); R. Stainton Rogers and W. Stainton Rogers, *Stories of Childhood: Shifting Agendas of Child Concern* (1992).

<sup>79</sup> See, e.g., Bessant, ‘Hard Wired for Risk: Neurological Science, “The Adolescent Brain” and Developmental Theory’, 11 *Journal of Youth Studies* (2008) 347; Kelly, *supra* note 16; Cox, ‘Brain Science and Juvenile Justice: Questions for Policy and Practice’, in W.T. Church *et al.* (eds), *Juvenile Justice Sourcebook* (2nd edn, 2014) 123.

<sup>80</sup> See, e.g., Bennett and Baird, ‘Anatomical Changes in the Emerging Adult Brain: A Voxel-Based Morphometry Study’, 27 *Human Brain Mapping* (2006) 766; Fine, Joeland Rippon, ‘Eight Things You Need to Know About Sex, Gender, Brains, and Behavior’, 15 *SE&F Online* (2019), available at <http://sfonline.barnard.edu/neurogenderings/eight-things-you-need-to-know-about-sex-gender-brains-and-behavior-a-guide-for-academics-journalists-parents-gender-diversity-advocates-social-justice-warriors-tweeters-facebookers-and-ever>.

## B The Disempowering Potential of the 'Vulnerable' and 'Dependent' Labels

So far, we have argued against conflating age with either vulnerability or dependence. But even if age could be taken out of the equation, the labels 'vulnerable' and 'dependent' themselves would remain potentially problematic. Like any other concept, these labels are, in principle, multidimensional and open to multiple interpretations.<sup>81</sup> In some contexts, they have been conceptualized or operationalized as encompassing qualities worthy of being cherished and celebrated.<sup>82</sup> Yet, in their dominant legal and human rights iterations, the 'vulnerability' and 'dependence' labels often work to the detriment of those to whom they are applied.<sup>83</sup> In particular, the attribution of vulnerability and dependence to society's younger members – the purported beneficiaries of international child law – frequently ends up negating their agency. In principle, the imputed vulnerability and dependence of the young are seen by the dominant legal discourse as warranting special protection.<sup>84</sup> But special protection ought not to be confused with beneficial treatment. Although the legal mechanisms of child protection can benefit some people ('children' and 'adults') in certain circumstances,<sup>85</sup> the equation of youth with vulnerability and dependence can equally lend legitimacy to the practice of systemically disregarding young people's wishes as well as denying them supposedly adult rights.<sup>86</sup>

<sup>81</sup> On the conceptual vagueness of vulnerability, see Brown, "'Vulnerability': Handle with Care", 5 *Ethics and Social Welfare* (2011) 313, at 314; Gilodi, Albert and Nienaber, 'Vulnerability in the Context of Migration: A Critical Overview and a New Conceptual Model', 7 *Human Arenas* (2022) 620. On the indeterminacy of both legal and all language, see, e.g., Viterbo, *supra* note 10, at 21.

<sup>82</sup> See, e.g., V. Held, *The Ethics of Care: Personal, Political, and Global* (2006); Fineman, *supra* note 17; J. Butler, Z. Gambetti and L. Sabsay (eds), *Vulnerability in Resistance* (2016); Gilson, *supra* note 61, at 53–55.

<sup>83</sup> Brown, *supra* note 81; see also the various such criticisms given in Gilodi, Albert and Nienaber, *supra* note 81.

<sup>84</sup> In practice, 'child refugees' are not always given greater support. Instead, they oscillate between being treated as deserving victims and undeserving threats. See Crawley, "'Asexual, Apolitical Beings': The Interpretation of Children's Identities and Experiences in the UK Asylum System", 37 *JEMS* (2011) 1171; Sirriyeh, 'Sanctuary or Sanctions: Children, Social Worth and Social Control in the UK Asylum Process', in M. Harrison and T. Sanders (eds), *Social Policies and Social Control: New Perspectives on the 'Not-So-Big Society'* (2016) 71; Otto, 'Children, Adults or Both? Negotiating Adult Minors and Interests in a State Care Facility in Malta', 46 *JEMS* (2020) 372; Wernesjö, 'Across the Threshold: Negotiations of Deservingness among Unaccompanied Young Refugees in Sweden', 46 *JEMS* (2020) 389. Sometimes, 'child refugees' even receive less financial support from states and are therefore at a disadvantage. See Pruitt, Berents and Munro, 'Gender and Age in the Construction of Male Youth in the European Migration "Crisis"', 43 *Signs* (2018) 687, at 688.

<sup>85</sup> For example, child protection norms may lead some border patrol units to limit their use of force against refugee groups if they believe 'children' are present. See, e.g., Select Committee of the Parliament of Australia on a Certain Maritime Incident, 'The "Children Overboard" Incident', 23 October 2022, available at [www.aph.gov.au/parliamentary\\_business/committees/senate/former\\_committees/scrifton/report/c02](http://www.aph.gov.au/parliamentary_business/committees/senate/former_committees/scrifton/report/c02). Similarly, refugee parents are sometimes spared deportation if they have young children born in their current country of residence. See Pobjoy, *supra* note 4, at 213–218.

<sup>86</sup> Meyer, 'The Moral Rhetoric of Childhood', 14 *Childhood* (2007) 85; Viterbo, *supra* note 10, at 201–202; Hart, 'The Child as Vulnerable Victim: Humanitarianism Constructs Its Object', 20 *International Journal of Environmental Research and Public Health* (2023) 5102.

According to some human rights advocates, the panacea to these problems lies in legal instruments, such as the CRC, which enshrine ‘the child’s right to be heard’.<sup>87</sup> However, the legal wording of this right grants decision-makers extensive discretion to determine which young voices are heard, in what circumstances and what impact these voices make, if any. Thus, Article 12 of the CRC provides the right to be heard only to ‘[children] capable of forming [their] ... own views’ and only on ‘matters affecting [them]’. This allows for the exclusion of ‘children’ if their views are deemed not to be ‘their own’ (despite ‘adults’ also being influenced by others)<sup>88</sup> or if the issue is considered not to affect them significantly. Even those who are heard can be dismissed since Article 12 only requires that their wishes be ‘given due weight in accordance with the age and maturity of the child’. This vague wording permits decision-makers to disregard ‘children’ whose views they find challenging by labelling them too young or immature. Moreover, as mentioned earlier, Article 3 of the CRC mandates that all decisions prioritize ‘the best interests of the child’, enabling ‘adults’ to selectively listen only to opinions they believe reflect those interests. Indeed, research across numerous countries and contexts shows that judges and other practitioners are much less likely to respect ‘children’s’ views if they misalign with their own, if the ‘child’ is deemed to be too young or both.<sup>89</sup> Thus, legal instruments such as the CRC may end up facilitating tokenism couched as child participation.<sup>90</sup>

Where the young people in question are refugees, such disregard and disempowerment are all the more likely to occur.<sup>91</sup> Young refugees are not merely vulnerable and dependent but also, to varying degrees, competent and resilient. Their ability to traverse national borders, sometimes at considerable cost to themselves or their loved ones, speaks volumes for their strength and resilience. Some of them also worked for a living from a very young age in their countries of origin,<sup>92</sup> acquiring certain life skills and a degree of independence and resilience that many people in other parts of the

<sup>87</sup> See, e.g., Rap, ‘The Right to Effective Participation of Refugee and Migrant Children: A Critical Children’s Rights Perspective’, UNU-CRIS Working Paper Series W-2019/3 (2019).

<sup>88</sup> For critiques of some of these tendencies, see, e.g., P. Alderson, *Young Children’s Rights: Exploring Beliefs, Principles and Practice* (2008); Mazzei, ‘An Impossibly Full Voice’, in A.Y. Jackson and L.A. Mazzei (eds), *Voice in Qualitative Inquiry: Challenging Conventional, Interpretive, and Critical Conceptions in Qualitative Research* (2009) 45.

<sup>89</sup> See, e.g., A. Daly, *Children, Autonomy and the Courts: Beyond the Right to be Heard* (2018); Arce, ‘Towards an Emancipatory Discourse of Children’s Rights’, 20 *IJCR* (2012) 365; Hanson, ‘Children’s Participation and Agency When They Don’t “Do the Right Thing”’, 23 *Childhood* (2016) 471; Viterbo, *supra* note 10, at 206–215.

<sup>90</sup> See, e.g., Tisdall, ‘Children and Young People’s Participation: A Critical Consideration of Article 12’, in W. Vandenhoele *et al.* (eds), *Routledge International Handbook of Children’s Rights Studies* (2015) 185; Stainton Rogers, ‘Promoting Better Childhoods: Constructions of Child Concern’, in M.J. Kehily (ed.), *An Introduction to Childhood Studies* (2nd edn, 2009) 153.

<sup>91</sup> Otto and Kaufmann, ‘When Generalized Assumptions of Young Refugees Don’t Hold: Rethinking Ascriptions and Subjectifications through an Intersectional Lens’, 29 *Journal of Ethnic & Cultural Diversity in Social Work* (2020) 136, at 144.

<sup>92</sup> See, e.g., Crawley, ‘When Is a Child Not a Child? Asylum, Age Disputes and the Process of Age Assessment’ (2007), at 49, available at <https://ilpa.org.uk/wp-content/uploads/resources/13267/Executive-Summary-Age-Dispute.pdf>.

world may only obtain much later in life.<sup>93</sup> In addition, teenage refugees, despite being legally defined as children, can be physically stronger or more socially adept than some 'adults', including certain 'adult' refugees. And, yet, several studies have found that, in order to be considered genuine 'children', young refugees are often driven to exhibit helplessness, dependence and other traits commonly associated with childhood.<sup>94</sup> Such behaviour is expected even of teenage refugees who view themselves as resilient, mature, competent and responsible as well as those who view their vulnerability as contextual rather than immutable.<sup>95</sup> This is especially true for young refugees who work to support themselves: presumed dependent and incompetent, they frequently find their economic competence disregarded, undervalued and inadequately compensated.<sup>96</sup> In these and other respects, legally established notions of vulnerability and dependence infantilize young refugees, denying their agency and downplaying their capacity.<sup>97</sup>

Further, to satisfy the demands of the asylum system, young refugees rely on legal intermediaries, such as lawyers and guardians. These intermediaries, in turn, shape the refugees' accounts, sometimes without even consulting them, and generally with the aim of emphasizing the passivity and victimhood expected of 'children'.<sup>98</sup> For instance, in the USA, an attorney reportedly prepared a 16-year-old from Honduras for his asylum hearing by advising him, 'if you need to cry, well you should cry. Think that they can deport you and separate you from your father'.<sup>99</sup> These issues are not entirely unique to 'child' refugees. To varying degrees, refugees of all ages are frequently required to display helplessness and vulnerability in order to receive aid and support.<sup>100</sup> Once refugees are deemed sufficiently vulnerable, they tend to be subjected to top-down programmes that are both foreign and inattentive to their own views about their

<sup>93</sup> On the skills and competence 'children' gain from work, see, e.g., Woodhead, *supra* note 12, at 40; Bourdillon, 'Children and Work: A Review of Current Literature and Debates', 37 *Development and Change* (2006) 1201, at 1202.

<sup>94</sup> Clark, *supra* note 19, at 292–293; O'Higgins, *supra* note 19; Sirriyeh, *supra* note 84; Otto, *supra* note 84, at 384; Otto and Kaufmann, *supra* note 91, at 141; Bialas, 'Ambiguous Ages, Ambivalent Youths: How Asylum Seekers in Germany Navigate Age Categorization', 2 *Migration Politics* (2023) 1, at 2, 15–16. Similarly, non-refugee young people in contact with welfare services have suggested that their chances of receiving support are higher if they 'perform' vulnerability in line with social expectations. See Brown, 'Questioning the Vulnerability Zeitgeist: Care and Control Practices with "Vulnerable" Young People', 13 *Social Policy and Society* (2014) 371, at 379–380. Refugee men, to the extent that they internalize the stereotype of 'the strong man', are less likely to perform such vulnerability. See Magugliani, '(In) Vulnerable Masculinities and Human Trafficking: Men, Victimhood, and Access to Protection in the United Kingdom', 14 *Journal of Human Rights Practice* (2022) 726.

<sup>95</sup> Wernesjö, *supra* note 84; Clark, *supra* note 19, at 288–289.

<sup>96</sup> Clark, *supra* note 19, at 290.

<sup>97</sup> See also Galli, 'A Rite of Reverse Passage: The Construction of Youth Migration in the US Asylum Process', 41 *Ethnic and Racial Studies* (2018) 1651, at 1657; Otto, *supra* note 84, at 378; Otto and Kaufmann, *supra* note 91, at 144–145.

<sup>98</sup> Galli, *supra* note 97, at 1659, 1666–1667. For a similar argument regarding intermediaries who work with refugee women, see Mesarič and Vacchelli, *supra* note 18, at 3103–3104.

<sup>99</sup> Quoted in Galli, *supra* note 97, at 1666.

<sup>100</sup> Turner, *supra* note 21, and the sources cited therein; O'Higgins, *supra* note 19; Stein, 'The Refugee Experience: Defining the Parameters of a Field of Study', 15 *International Migration Review* (1981) 320.

needs, identities and circumstances.<sup>101</sup> Beyond the refugee context, so-called ‘vulnerable adults’ often have their views and experiences similarly overlooked as their lives are reduced to a series of externally assessed risk factors.<sup>102</sup>

### C Hierarchies of Deservingness Legitimize Exclusion and Neglect

Hierarchies of deservingness – whether based on chronological age or other legally protected characteristics – are, by their identity-based nature, exclusionary. Instead of striving for universal or even needs-based protection, they regard individuals who do not fit into a protected category as legitimate targets of apathy or mistreatment. Neither the humanity of these individuals nor their suffering alone is seen as sufficiently compelling to earn the level of protection they need.<sup>103</sup> In this manner, the law’s exclusionary logic permits states to limit the protection they provide. Aided by legal hierarchies of deservingness, states are able to focus on assisting only a fraction of those in need while cutting assistance from the supposedly not-so-vulnerable and not-so-dependent others. In addition, some governments deploy this legal logic for deterrent purposes by attempting to disincentivize potential aid recipients who do not fit into a legally protected group from applying in the first place.<sup>104</sup> The special protection regime, with its hierarchies of deservingness, thus ends up as an apology for, and an accomplice in, various forms of state abandonment, neglect and violence.<sup>105</sup>

Moreover, this seemingly protective logic frequently results in a ‘vulnerability contest’, in which refugees who ‘prove’ that they are sufficiently vulnerable stand a better chance of receiving protection.<sup>106</sup> Thus, vulnerability and dependence operate as

<sup>101</sup> Turner, *supra* note 21.

<sup>102</sup> Dunn, Clare and Holland, *supra* note 21.

<sup>103</sup> In the refugee context, see Harvey and Juss, ‘Critical Perspectives on Refugee Law’, 20 *International Journal on Minority and Group Rights* (2013) 143, at 143; Smith and Waite, *supra* note 18; Otto, *supra* note 18, at 426; Sözer, ‘Humanitarianism with a Neo-Liberal Face: Vulnerability Intervention as Vulnerability Redistribution’, 46 *JEMS* (2020) 2163, at 2164, 2166–2167; Magugliani, *supra* note 94; Hathaway, ‘Better Policies to Address Migrants’ Vulnerabilities’ (keynote lecture at the VULNER Project, 2023), available at [www.youtube.com/watch?v=U49aQXGSUvI](https://www.youtube.com/watch?v=U49aQXGSUvI) (however, while James Hathaway criticizes the reliance on ‘vulnerability’ in international refugee law, he seems to take no issue with special protection based on age, gender or other identity categories nor with using the label ‘vulnerable’ outside the refugee context).

<sup>104</sup> Sözer, *supra* note 103, at 2164–2165; Heidbrink, *supra* note 21, at 1000–1001; Engström, Heikkilä and Mustaniemi-Laakso, ‘Vulnerabilisation: Between Mainstreaming and Human Rights Overreach’, 40 *Netherlands Quarterly of Human Rights* (2022) 118, at 132–134 and the sources cited by these authors.

<sup>105</sup> On critical conceptions of violence, and their potential contribution to highlighting the law’s complicity in state violence, see Viterbo, ‘Torture’s In/visibility’, in L. Olson and S. Molloy (eds), *Interdisciplinary Perspectives on Torture* (2019) 23.

<sup>106</sup> A growing number of scholars and others have been using the metaphor of a ‘vulnerability contest’ in the refugee context. See, e.g., Howden and Kodlak, ‘The Vulnerability Contest’, *News Deeply* (17 October 2018), available at <https://deeply.thenewhumanitarian.org/refugees/articles/2018/10/17/the-vulnerability-contest>; Hassouri, ‘Vulnerable by Category: A Critical Assessment of Constructions of Vulnerability in International Refugee Law’, in N. Fromm, A. Jünemann and H. Safouane (eds), *Power in Vulnerability: A Multi-Dimensional Review of Migrants’ Vulnerabilities* (2021) 31; Engström, Heikkilä and Mustaniemi-Laakso, *supra* note 104; Turner, *supra* note 21. Our use of the contest metaphor does not imply that all refugees strategically calculate how to compete with one another. Rather, it likens protection to a prize awarded to a limited number of participants according to certain rules, specifically hierarchies of deservingness.

instruments by which gatekeepers restrict access to aid and support.<sup>107</sup> In this vulnerability contest, hierarchies of deservingness based on legally protected characteristics (such as age) intersect with other problematic hierarchies of deservingness, such as those that are often drawn between ‘refugees’ and ‘migrants’<sup>108</sup> as well as those between racialized, religious or national groups.<sup>109</sup> Consequently, people who happen to be born in certain countries, or who happen to belong to certain social groups, are unfairly advantaged, while others are condemned to a life of impoverishment or under authoritarian rule.<sup>110</sup>

Thus, through its hierarchies of deservingness, international law enables states to resist transnational human mobility and reaffirm their borders and sovereignty.<sup>111</sup> In order to tackle the problems identified in this article, therefore, what is needed is not to deny protection to ‘child’ refugees (or, for that matter, other protected groups). Instead, refugees across the age spectrum, both ‘children’ and ‘adults’, deserve greater protection than they are currently afforded. Simply put, what is needed is levelling up. To this end, an overall shift is required – away from this hierarchical and exclusionary national regime and towards global solidarity and freedom of movement.<sup>112</sup> Rather than ask who deserves to migrate and be protected, the question ought to be how best to support free global movement. Global solidarity, in its deepest sense, is rooted not in compassion for those who are similar to ‘us’ but in a respect for difference.<sup>113</sup> Accordingly, such solidarity ought not be hindered by national borders, or by the social differences that these borders forge.

<sup>107</sup> Engström, Heikkilä and Mustaniemi-Laakso, *supra* note 104, at 132–134, and the sources cited therein.

<sup>108</sup> For a critical discussion of this hierarchy, see, e.g., Crawley and Skleparis, ‘Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe’s “Migration Crisis”’, 44 *JEMS* (2018) 48; Goodman, Sirriyeh and McMahon, ‘The Evolving (Re)categorisations of Refugees throughout the “Refugee/Migrant Crisis”’, 27 *Journal of Community & Applied Social Psychology* (2017) 105; De Coninck, ‘Migrant Categorizations and European Public Opinion: Diverging Attitudes towards Immigrants and Refugees’, 46 *JEMS* (2020) 1667; Gutiérrez Rodríguez, ‘The Coloniality of Migration and the “Refugee Crisis”: On the Asylum-Migration Nexus, the Transatlantic White European Settler Colonialism-Migration and Racial Capitalism’, 34 *Refuge* (2018) 16; Hamlin, *supra* note 23.

<sup>109</sup> For critical analysis, see, e.g., Maneri, ‘Breaking the Race Taboo in a Besieged Europe: How Photographs of the “Refugee Crisis” Reproduce Racialized Hierarchy’, 44 *Ethnic and Racial Studies* (2021) 4; Kyriakidou, ‘Hierarchies of Deservingness and the Limits of Hospitality in the “Refugee Crisis”’, 43 *Media, Culture & Society* (2021) 133.

<sup>110</sup> Bertram, *supra* note 26.

<sup>111</sup> Sajjad, ‘What’s in a Name? “Refugees”, “Migrants” and the Politics of Labelling’, 60 *Race & Class* (2018) 40; Motomura, ‘The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age’, 105 *Cornell Law Review* (2019) 457; see also Mégret, ‘Transnational Mobility, the International Law of Aliens, and the Origins of Global Migration Law’, 111 *American Journal of International Law Unbound* (2017) 13.

<sup>112</sup> For further discussion, see, e.g., Gill, ‘Border Abolition and How to Achieve It’, in D. Cooper, N. Dhawan and J. Newman (eds), *Re-imagining the State: Theoretical Challenges and Transformative Possibilities* (2019) 231; Jeffries and Ridgley, ‘Building the Sanctuary City from the Ground Up: Abolitionist Solidarity and Transformative Reform’, in H. Schwiertz and H. Schwenken (eds), *Inclusive Solidarity and Citizenship along Migratory Routes in Europe and the Americas* (2021) 144; G.M. Bradley and L. De Noronha, *Against Borders: The Case for Abolition* (2022).

<sup>113</sup> Viterbo, *supra* note 11, at 743–744; see also, more broadly, J. Dean, *Solidarity of Strangers: Feminism after Identity Politics* (1996).

Currently, the notion of free global movement may seem aspirational. Historically, however, this notion is less radical than might be supposed. After all, the closed society of the nation state is a historically recent deviation from the previous norm of 'global movement'.<sup>114</sup> In addition, a historical perspective throws into sharp relief countries' moral obligation to respect global mobility.<sup>115</sup> Specifically, it is often colonial powers, past and present, that plunder, exploit and provoke war across the world and, later, when people seek refuge from these dire circumstances, deny them entry and protection.<sup>116</sup> These politically dominant countries often shift the blame from these historical, political and economic structures to the individual refugees themselves from whom their borders supposedly need to be 'protected'.<sup>117</sup>

### **D Legal Ambivalence About Child-Parent Relations Facilitates Harm to Refugees**

As described above, international law is ambivalent about the relations between 'child' refugees and their parents. On the one hand, it enshrines the right of 'children' to live with their parents. On the other hand, 'children' can legally be removed from their parents, and the latter – if they are deemed unfit – can be punished. Both aspects of this arrangement are framed as forms of child protection serving 'the child's best interests' and their 'well-being'.<sup>118</sup> As a result, the international legal principle of child protection easily lends itself to competing claims about the relations between 'child' refugees and their parents. To an extent, law always invites competing interpretations,<sup>119</sup> but when it comes to child-adult relations, this dynamic is especially pronounced. This is due to the law's combination of vague language (such as 'the child's best interests')<sup>120</sup> and competing provisions (such as those concerning parental autonomy versus those related to state intervention), a dynamic present in all legal fields and particularly evident in the present context.

<sup>114</sup> Juss, *supra* note 26; Mégret, *supra* note 111. On the invention of nationality more broadly, see, e.g., B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983).

<sup>115</sup> Cf. Achiume, *supra* note 26 (arguing that former colonial powers should be considered to have an obligation to open their borders to migrants from formerly colonized territories).

<sup>116</sup> N. El-Enany, *(B)ordering Britain: Law, Race and Empire* (2020), at 73–132; Spijkerboer, *International Migration Law and Coloniality* (28 January 2022), available at <https://verfassungsblog.de/international-migration-law-and-coloniality>.

<sup>117</sup> On this discourse, see, e.g., Holmes and Castañeda, 'Representing the "European Refugee Crisis" in Germany and Beyond: Deservingness and Difference, Life and Death', 43 *American Ethnologist* (2016) 12.

<sup>118</sup> In some cases, particularly those involving parental abuse or neglect, severing child-parent contact can benefit the 'child' and would be justifiable as per Article 9 of the CRC, *supra* note 1. However, it should be noted that parents from disadvantaged and marginalized groups – including refugees, racialized minorities, impoverished people and single parents – have long been disproportionately targeted by such interventions. See, e.g., Yablon-Zug, 'Separation, Deportation, Termination', 32 *Boston College Journal of Law & Social Justice* (2012) 63; Viterbo, *supra* note 11; S.M. Davey, *A Failure of Proportion: Non-Consensual Adoption in England and Wales* (2020); A.J. Dettlaff, *Confronting the Racist Legacy of the American Child Welfare System: The Case for Abolition* (2023).

<sup>119</sup> Viterbo, *supra* note 6, at 350–351.

<sup>120</sup> Mnookin, *supra* note 6; Federle, *supra* note 8.

It is therefore unsurprising, and perhaps even inevitable, that some claims made in reliance on the legal principle of child protection serve to exclude and harm refugees. Aided by the law's ambiguity, political and legal actors can easily portray the suffering they inflict on refugees as a form of child protection. States are thus able to weaponize the principle of child protection by claiming that their actions against refugees actually serve the best interests of 'child' refugees,<sup>121</sup> or that they ensure child-parent contact. Later in the article, we reveal two versions of this deployment of child protection as an anti-refugee tool. First, we examine how states blame and even prosecute refugee parents for their children's suffering. Second, we discuss the ways in which states present child repatriation as a form of family unification. Both approaches exploit the dependence (real or perceived) of 'child' refugees on their parents. When 'child' refugees are accompanied by their parents (on whom they presumably depend), the host country might vilify the parents for any misfortune that befalls their children, thereby making both the parents and the child more vulnerable. Conversely, when 'child' refugees are unaccompanied, their supposed dependence on their parents can be used as a pretext to deport them to their country of origin, regardless of the dangers they may face there. In both scenarios, state practices weaponize dependence against refugees, increasing their vulnerability. This demonstrates, once again, that vulnerability is not simply an inherent trait but is partly the result of state action.

## 4 How Does Child Protection Harm 'Adult' Refugees?

Having expounded the various pitfalls of child protection, we now turn to illustrating some of them using specific legal examples at the international, regional and national levels. We start with the law's detrimental impact on 'adult' refugees.

### A *Child Protection Denies 'Adult' Refugees Important Protections*

Two thirds of humanity – people aged 18 years and over<sup>122</sup> – generally fall outside the CRC's definition of 'child'.<sup>123</sup> As we have shown, the international legal principle of child protection deems them less deserving of protection, aid and empathy. This age hierarchy has been enshrined in specific and concrete legal provisions. Detention is one illustrative context. In the dominant discourse of international law, the detention of 'adults', including 'adult' refugees, has repeatedly been described as more permissible and justifiable than that of 'children'. Thus, under the CRC, child detention must be a matter of last resort.<sup>124</sup> Regarding 'child' refugees, human rights actors generally support an even stricter rule – namely, a categorical ban on child detention with no

<sup>121</sup> On 'the child's best interests' as a discursive tool for governing 'child refugees', see Silverstein, *supra* note 14, at 391.

<sup>122</sup> See, e.g., '1 in 6 Children Lives in Extreme Poverty, World Bank-UNICEF Analysis Shows', *World Bank* (20 October 2020), available at [www.worldbank.org/en/news/press-release/2020/10/20/1-in-6-children-lives-in-extreme-poverty-world-bank-unicef-analysis-shows](http://www.worldbank.org/en/news/press-release/2020/10/20/1-in-6-children-lives-in-extreme-poverty-world-bank-unicef-analysis-shows).

<sup>123</sup> CRC, *supra* note 1, Art. 1.

<sup>124</sup> *Ibid.*, Art. 37(b) (the applicability of which to 'child refugees' is emphasized in Articles 2 and 22(1)).

exceptions whatsoever.<sup>125</sup> In contrast, ‘adults’, including ‘adult’ refugees, are granted no comparable legal rights. Under international law, their detention is generally allowed as long as it is not arbitrary, unlawful or without due process.<sup>126</sup> Accordingly, while some human rights organizations criticize ‘immigration detention’, they portray it as more permissible where the individual detained is an ‘adult’. As a case in point, in 2021, the UN Special Rapporteur on the Human Rights of Migrants drew a distinction between the ‘immigration detention of children’ and that of ‘adults’. The former, he stressed, ‘is always a child rights violation and should therefore be banned’, whereas the latter is not categorically prohibited and should merely be ‘a measure of last resort’.<sup>127</sup> The UN Human Rights Committee has likewise stated that child detention ‘is not justified’, whereas, in the case of ‘adults’, immigration detention is defensible provided it can be ‘justified as reasonable, necessary and proportionate’.<sup>128</sup> Similar views are found in legal scholarship: ‘The detention of minor asylum seekers’, one jurist has asserted, ‘is more problematic than that of adults’.<sup>129</sup>

At the regional legal level, a series of rulings by the European Court of Human Rights (ECtHR) have endorsed a similar hierarchy of deservingness, particularly in the context of refugee detention. Although the European Convention on Human Rights unconditionally forbids ‘inhuman or degrading treatment’,<sup>130</sup> the ECtHR has repeatedly and narrowly interpreted this prohibition as applicable only to ill-treatment exceeding ‘a minimum level of severity’. The Court has added that ‘[t]he assessment of this minimum is relative: it depends on ... the circumstances of the case, such as ... the age ... of the victim’.<sup>131</sup> Accordingly, the Court has affirmed that ‘[the detention] of minors raises particular issues in that regard, since children ... are considered extremely vulnerable and have specific needs related in particular to their age and lack of independence. ... [Migrant] minors ... constitute a vulnerable category requiring

<sup>125</sup> See, e.g., CMW and UNCRC, Joint General Comment no. 4/23 on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return, UN Doc. CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, paras 5, 12; Smyth, ‘Towards a Complete Prohibition on the Immigration Detention of Children’, 19 *Human Rights Law Review* (2019) 1 (as noted by Ciara Smyth, the Committee on the Rights of the Child has occasionally sent ‘mixed messages’ by, among other things, citing the last resort principle while at the same time calling for a categorical ban on child immigration detention, at 6–9).

<sup>126</sup> International Covenant on Civil and Political Rights 1966, 999 UNTS 171, Art. 9(1); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, GA Res. A/RES/45/158, 18 December 1990, Art. 16(4). For a critique of the discrimination between ‘children’ and ‘adults’ in this context, see Viterbo, *supra* note 22.

<sup>127</sup> Morales (Special Rapporteur on the Human Rights of Migrants), One and a Half Years After: The Impact of COVID-19 on the Human Rights of Migrants, 30 July 2021, para. 59, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/212/04/PDF/N2121204.pdf?OpenElement>.

<sup>128</sup> UN Human Rights Committee, *E.K.A.G. et al. v. Australia*, Communication no. 2094/2011, UN Doc. CCPR/C/108/D/2094/2011 (2013), paras 3.14, 9.3.

<sup>129</sup> C. Smyth, *European Asylum Law and the Rights of the Child* (2014), at 211.

<sup>130</sup> Article 3 ECHR.

<sup>131</sup> ECtHR, *Tarakhel v. Switzerland*, Appl. no. 29217/12, Judgment of 4 November 2014, paras 94, 118; ECtHR, *Mikadze v. Russia*, Appl. no. 52697/99, Judgment of 7 June 2007, para. 108; see also the observations regarding this judicial reasoning in Engström, Heikkilä and Mustaniemi-Laakso, *supra* note 104, at 122, 131.

the special attention of the authorities'.<sup>132</sup> In other words, if two individuals of different ages are ill-treated in precisely the same way, the difference in their ages could lead the court to deem the ill-treatment of one of them unlawful but that of the other lawful. Indeed, on several occasions, the ECtHR has ruled that the detention of 'adult refugees' may be lawful even where the detention of 'child refugees' in the exact same facilities and under the same conditions is unlawful.<sup>133</sup> As the Court explained on one such occasion, it reached this conclusion 'in view of the children's young age'.<sup>134</sup> Thus, while singling out 'child refugees' as deserving of protection from ill-treatment in detention, the ECtHR has enabled the same ill-treatment of 'adult refugees'.<sup>135</sup>

So far, we have provided examples from international and regional law concerning detention. However, similar legal positions can be found at the national level and in contexts other than detention. Sweden and the United Kingdom provide illustrative examples. First, Sweden's refugee law states: 'Children may be granted residence permits ... even if the circumstances ... do not have the same seriousness and weight that is required for a permit to be granted to adults.'<sup>136</sup> In other words, Swedish law explicitly regards 'adult refugees' as less deserving of residence permits than their younger counterparts. Second, in the United Kingdom, the judiciary has treated the adult status of some Albanian and Vietnamese trafficking victims as grounds for refusing refugee protection. One judgment, in 2017, held that it was 'not accepted that the appellant is intrinsically vulnerable to being re-trafficked, [as he is] a mature young man'. Similarly, in two other cases, from 2017 and 2018, refugees who had been trafficked during their childhood were denied refugee protection on the grounds that each of them was 'no longer a child', with the British Court also describing one of them as an 'adult male'.<sup>137</sup>

<sup>132</sup> ECtHR, *R.R. and Others v. Hungary*, Appl. no. 36037/17, Judgment of 2 March 2021, para. 49.

<sup>133</sup> ECtHR, *Popov v. France*, Appl. no. 39472/07, Judgment of 19 January 2012, paras 103–105; ECtHR, *R.C. and V.C. v. France*, Appl. no. 76491/14, Judgment of 12 July 2016, para. 34; ECtHR, *A.B. and Others v. France*, Appl. no. 11593/12, Judgment of 12 July 2016, para. 109; ECtHR, *R.K. and Others v. France*, Appl. no. 68264/14, Judgment of 12 July 2016, para. 66; ECtHR, *R.M. and Others v. France*, Appl. no. 33201/11, Judgment of 12 July 2016, para. 70; ECtHR, *A.M. and Others v. France*, Appl. no. 24587/12, Judgment of 12 July 2016, para. 46.

<sup>134</sup> *Popov v. France*, *supra* note 133, paras 103–105.

<sup>135</sup> In principle, the European Court of Human Rights has stated that all refugees are vulnerable. In practice, it has tended to recognize only the vulnerability of refugee claimants whom it regards as particularly vulnerable, such as those under the age of majority or those suffering from ill health. See Krivenko, *supra* note 25, at 203, 205–208.

<sup>136</sup> Aliens Act 2005, ch. 5, para. 6. For a critical analysis, see Josefsson, 'Children's Right to Asylum in the Swedish Migration Court of Appeal', 25 *IJCR* (2017) 85, at 93.

<sup>137</sup> See, respectively, A.N. (*Albania*), [2017] UKUT (IAC) PA/04137/2016, para. 10; A.B. (*Albania*), [2018] UKUT (IAC) AA/10878/2015, para. 14; T.A.N. (*Vietnam*), [2017] UKUT (IAC) PA/06313/2016, para. 10, all quoted in Magugliani, 'Trafficked Adult Males as (Un)Gendered Protection Seekers: Between Presumption of Invulnerability and Exclusion from Membership of a Particular Social Group', 34 *IJRL* (2022) 353. On child trafficking more broadly, see, e.g., J. O'Connell Davidson, *Children in the Global Sex Trade* (2005); J.J. Pearce, P. Hynes and S. Bovarnick, *Trafficked Young People: Breaking the Wall of Silence* (2013); P. Fussey and P. Rawlinson, *Child Trafficking in the EU: Policing and Protecting Europe's Most Vulnerable* (2017).

These examples all indicate a broader trend. Once refugees are classified as adults, they can often be denied welfare benefits, educational opportunities and health care that are afforded to their younger counterparts.<sup>138</sup> If these ‘adults’ are denied asylum, it is also easier to detain or remove them than it would have been had they been defined as ‘children’, due to child-specific legal protections.<sup>139</sup> A considerable number of ‘adult’ refugees are denied protection in this way, including those who were until recently considered ‘children’ but have ‘aged out’ (as a commonly used phrase puts it)<sup>140</sup> – a transition that occurs instantaneously in legal terms.<sup>141</sup> For these individuals on the cusp of legal adulthood, the loss of their former legal status can have devastating consequences. In recent years, several Afghan and Eritrean refugees in the United Kingdom have even resorted to killing themselves soon after turning 18. Having previously been granted temporary ‘leave to remain’ (a residency status) on account of being ‘unaccompanied minors’, they feared they would now be deported to the countries they had escaped where they had suffered persecution, imprisonment or the ravages of war in their earlier years.<sup>142</sup>

## B Child Protection Facilitates the Vilification and Prosecution of Refugee Parents

In addition to exposing ‘adult’ refugees to harsher treatment, the law sometimes operates against them in another way. Refugees who are parents with children below

<sup>138</sup> On the preferential treatment of ‘child refugees’ in these areas, see, e.g., European Migration Network, *Policies on Reception, Return and Integration Arrangements for, and Numbers of, Unaccompanied Minors: An EU Comparative Study* (2010), available at [https://emn.ie/files/p\\_20100716105712unaccompanied%20minors%20synthesis%20report.pdf](https://emn.ie/files/p_20100716105712unaccompanied%20minors%20synthesis%20report.pdf); Hjern, Brendler-Lindqvist and Norredam, ‘Age Assessment of Young Asylum Seekers’, 101 *Acta Paediatrica* (2012) 4, at 4; Kronick and Rousseau, *supra* note 2, at 545; Noll, ‘Junk Science: Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum’, 28 *IJRL* (2016) 234, at 234–235; Dembour, ‘Surely Not! Procedurally Lawful Age Assessments in the UK’, in M. Sedmak, B. Sauer and B. Gornik (eds), *Unaccompanied Children in European Migration and Asylum Practices: In Whose Best Interests?* (2017) 155; Oertli, *supra* note 50, at 9; Bialas, *supra* note 94, at 8; Sorsveen and Ursin, ‘Constructions of “the Ageless” Asylum Seekers: An Analysis of How Age Is Understood among Professionals Working within the Norwegian Immigration Authorities’, 35 *Children & Society* (2021) 198.

<sup>139</sup> See, e.g., Council Regulation 604/13, OJ 2013 L 180/31.

<sup>140</sup> See, e.g., Silverman, *supra* note 2, at 32.

<sup>141</sup> Prabhat, Singleton and Eyles, ‘Age Is Just a Number? Supporting Migrant Young People with Precarious Legal Status in the UK’, 27 *IJCR* (2019) 228, at 233–234.

<sup>142</sup> Gentleman, ‘Suicides Raise Alarm About UK’s Treatment of Child Refugees’, *The Guardian* (17 June 2018), available at [www.theguardian.com/uk-news/2018/jun/17/suicides-raise-alarm-about-uk-treatment-of-child-refugees-eritrean](http://www.theguardian.com/uk-news/2018/jun/17/suicides-raise-alarm-about-uk-treatment-of-child-refugees-eritrean); Gentleman, ‘Eritrean Teenager Who Killed Himself in UK Lacked Right Support, Inquest Finds’, *The Guardian* (7 January 2022), available at [www.theguardian.com/uk-news/2022/jan/07/eritrean-teenager-who-killed-himself-in-uk-lacked-right-support-inquest-finds](http://www.theguardian.com/uk-news/2022/jan/07/eritrean-teenager-who-killed-himself-in-uk-lacked-right-support-inquest-finds); Taylor, ‘Teenage Refugee Was Fourth of Friendship Group to Kill Himself’, *The Guardian* (17 September 2019), available at [www.theguardian.com/uk-news/2019/sep/17/teenage-refugee-was-fourth-of-friendship-group-to-kill-himself](http://www.theguardian.com/uk-news/2019/sep/17/teenage-refugee-was-fourth-of-friendship-group-to-kill-himself); Taylor, ‘Eritrean Refugee, 19, Killed Himself as He “Feared He Would Be Sent Back”’, *The Guardian* (8 November 2019), available at [www.theguardian.com/uk-news/2019/nov/08/eritrean-refugee-19-who-killed-himself-feared-he-would-be-sent-back](http://www.theguardian.com/uk-news/2019/nov/08/eritrean-refugee-19-who-killed-himself-feared-he-would-be-sent-back). For another act of desperation, committed by a Sudanese refugee in the USA who had recently been deemed an adult, see Carlson, Cacciatore and Klimek, ‘A Risk and Resilience Perspective on Unaccompanied Refugee Minors’, 57 *Social Work* (2012) 259, at 266–267.

the age of majority risk being blamed for the hardships suffered by their children and, therefore, being characterized as unfit parents, all in the name of child protection. In some cases, this can even lead to refugee parents being taken to court. The following three examples, relating to refugee parents in three European countries – Greece, Switzerland and Sweden – throw this issue into sharp relief.

The first example concerns an Afghan asylum seeker in Greece. In 2022, he was reportedly facing trial with a potential sentence of up to 10 years in prison for allegedly endangering the life of his five-year-old son who had drowned after boarding a dinghy in Turkey. 'I just came here for my son's future', the bereaved father told the media. As he described the incident, he had been compelled to escape Turkey with his son; having had their asylum application rejected twice by the Turkish authorities, the pair had been facing deportation to Afghanistan. The Greek government, invoking law and human rights, has described such refugees as acting 'outside the limits of the law' and insisted that Greece's asylum policy respects human rights.<sup>143</sup> We have not been able to ascertain how this case ended. However, even if this individual has been cleared of these charges, the ordeal of facing imprisonment for attempting to ensure a safer future for his son will undoubtedly remain with him.

A second example, from Switzerland, illustrates how the dominant legal discourse of child protection can end up stigmatizing refugee parents, albeit without penal repercussions in this particular case. In 1996, the ECtHR refused a 12-year-old Turkish boy permission to join his refugee parents in Switzerland. According to the Court, the parents could instead return to their country of origin and reunite with their son there. Not only was the Court unpersuaded by the obstacles militating against the family's reunion in Turkey – namely, the father faced political persecution there and had therefore received a residence permit in Switzerland on humanitarian grounds, while the mother suffered from a life-threatening medical condition – but it also held against the parents their decision to seek refuge in Europe: 'By leaving Turkey, ... [the father] caused the separation from his son.'<sup>144</sup> Thus, once again, refugee parents were blamed for the child's suffering.

The third and final example comes from Sweden where a governmental report assigned similar blame to refugee parents. 'Children who are staying in the country without permission have most often not chosen their situation themselves', the report states. 'Instead, it is the actions of the parents that have led to the often-difficult situation of the children'. A former Swedish migration minister similarly accused undocumented parents of taking their children 'hostage', while a governmental proposition suggested that 'it would be tempting [for parents] to use children in situations

<sup>143</sup> Fallon, 'Asylum Seeker Father Faces 10 Years in Greek Jail for Son's Death', *Al Jazeera* (16 May 2022), available at [www.aljazeera.com/features/2022/5/16/asylum-seeker-father-faces-10-years-in-greek-jail-for-sons-death](https://www.aljazeera.com/features/2022/5/16/asylum-seeker-father-faces-10-years-in-greek-jail-for-sons-death).

<sup>144</sup> ECtHR, *Gül v. Switzerland*, Appl. no. 23218/94, Judgment of 19 February 1996, para. 41. For an analysis of this case within the broader context of ECtHR jurisprudence, see C. Costello, *The Human Rights of Migrants in European Law* (2016), at 122–126.

where the wish to migrate is strong, but the reasons for being granted asylum are not strong enough'.<sup>145</sup>

## 5 How Does Child Protection Harm 'Child' Refugees?

The legally enshrined principle of child protection can work to the detriment not only of 'adults' but also of its purported beneficiaries: those it classifies as children.

### A Temporary Protection Vulnerabilizes 'Child' Refugees

The category 'child' is, by definition, a transient legal status, as is the special protection it entails. The temporary nature of this protection potentially vulnerabilizes young refugees, making them even more vulnerable than they might otherwise have been.<sup>146</sup> It can do so in four key respects: (1) by exacerbating their anxiety; (2) by incentivizing them to disengage from welfare authorities; (3) by incentivizing the state to delay decisions about their entitlements; and (4) by rendering their status uncertain. First, in some respects, the transience of child protection can aggravate the distress experienced by 'child' refugees. The law signals to them that they are steadily approaching the point at which they will 'age out', lose various forms of protection and potentially face deportation.<sup>147</sup> Put differently, the law grants young refugees special protection, only to constantly remind them that this protection will soon be withdrawn. In principle, temporariness does not have to create uncertainty. In other contexts, people with temporary protection can be fairly certain about the treatment that awaits them once their temporary protection expires.<sup>148</sup> Yet 'child refugees' often have no way of knowing if or when they will be given asylum (or other forms of protection) once they reach the age of legal majority.<sup>149</sup>

At first glance, the uncertain fate awaiting these refugees once they 'age out' may seem easier to cope with than the certainty (if such certainty existed) that a specifically negative future awaited them. In many respects, that may well be true.

<sup>145</sup> Lind, *supra* note 14, at 345.

<sup>146</sup> On some of the ways in which state actors and structural processes vulnerabilize young refugees, see Otto, *supra* note 18, at 426; Lind, *supra* note 14, at 344. On how state policies and practices vulnerabilize migrants generally, see, e.g., Atak *et al.*, "'Migrants in Vulnerable Situations" and the Global Compact for Safe Orderly and Regular Migration', 273 *Queen Mary School of Law Legal Studies Research Papers* (2018) 1; Smith and Waite, *supra* note 15, at 2292–2294.

<sup>147</sup> Silverman, *supra* note 2, at 32; Sorsveen and Ursin, *supra* note 138, at 199; Rota *et al.*, 'Unaccompanied Young Refugees in the European Union: A Perennial Limbo Situation Studied in a Longitudinal Perspective', 25 *European Journal of Social Work* (2022) 1030; Pobjoy, *supra* note 4, at 226.

<sup>148</sup> An example, involving age-based protection, is the minimum age of criminal responsibility (MACR), which shields society's youngest lawbreakers from criminal liability. These young people can be certain that, once they reach the MACR, they will be legally liable for any crimes they commit.

<sup>149</sup> On the uncertain status and entitlements of 'child' refugees, see Prabhat, Singleton and Eyles, *supra* note 141, at 236. In some countries, their entitlement to educational services and other forms of support becomes uncertain even earlier: in the months leading up to their 18th birthday. See Chase, 'Security and Subjective Wellbeing: The Experiences of Unaccompanied Young People Seeking Asylum in the UK', 35 *Sociology of Health & Illness* (2013) 858, at 868.

Nonetheless, their uncertain future status can take a heavy toll on their mental and physical well-being, leaving them in a protracted state of waiting, unable to travel freely or plan their lives.<sup>150</sup> In addition, their oscillation between hope (concerning each decision affecting their status) and despair (whenever that decision is delayed or fails to yield the desired outcome) can feel like a debilitating vicious cycle.<sup>151</sup>

Possibly for these reasons, some 'child refugees' have reportedly said that they would rather be denied asylum promptly than continue to live in uncertainty due to their temporary legal protection.<sup>152</sup> Often, young refugees report an increase in mental health issues as they near the legal age of majority.<sup>153</sup> We describe above how anxiety over the possibility of deportation has led some 'adult' refugees who have recently turned 18 to take their own lives. Indeed, suicidal ideation in response to the prospect of deportation can start at an earlier age. As one 17-year-old Afghan refugee put it, '[y]ou are sometimes thinking just suicide yourself right now before you just go there [that is, back to your country of origin] and get dead. I swear, ... sometimes I am thinking ... what is the point in living this life[?]'.<sup>154</sup> The uncertainty of a young refugee's future status can potentially contribute to such emotional distress.

Second, the temporary nature of child protection potentially incentivizes young refugees to disengage from welfare services before reaching adulthood. Indeed, reports suggest that some refugees resort to this course of action in a deliberate attempt to avoid deportation after they turn 18. They hope that if their whereabouts are no longer known – if they go under the law's radar, so to speak – the state will be unable to lay its hands on them. Those who take such action are at increased risk of experiencing destitution, poor health, homelessness and exploitation as well as of living in constant fear of being found by the police and immigration services. Nonetheless, some of

<sup>150</sup> Connolly, 'Seeing the Relationship between the UNCRC and the Asylum System through the Eyes of Unaccompanied Asylum Seeking Children and Young People', 23 *IJCR* (2015) 52, at 60, 67–69; Rota *et al.*, *supra* note 147. This situation has also been criticized by some courts. See, e.g., *R. (A.B.C.) (a Minor) (Afghanistan) v. SSHD*, EWHC 2937 (Admin), Judgment of 6 December 2011, para. 58 (cited in Pobjoy, *supra* note 4, at 226). On the impact of this uncertainty on refugees in their early adulthood, see Chase, *supra* note 149, at 865–866.

<sup>151</sup> On a similar dynamic in another context – that of so-called administrative detention (incarceration without charge or trial) – see Viterbo, 'Security Prisoners', in O. Ben-Naftali, M. Sfard and H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (2018) 383, at 385–386.

<sup>152</sup> Children's Commissioner for England, *Children's Voices: A Review of Evidence on the Subjective Wellbeing of Children Subject to Immigration Control in England* (2017), at 27, available at <https://assets.childrenscommissioner.gov.uk/wpuploads/2017/11/Voices-Immigration-Control-1.pdf>.

<sup>153</sup> Hodes *et al.*, 'Risk and Resilience for Psychological Distress amongst Unaccompanied Asylum Seeking Adolescents', 49 *Journal of Child Psychology and Psychiatry* (2008) 723, cited in Kenny and Loughry, *supra* note 2, at 19; Connolly, *supra* note 150, at 67–68; Sigona, Chase and Humphris, *supra* note 2, at 1. Other statutory age thresholds can have a similar effect, such as situations in which 'child' protection and services are legally extended to refugees into their mid-twenties. See, e.g., Britain's Children (Leaving Care) Act 2000, paras 23C, 23D, 24, 24B.

<sup>154</sup> Quoted in Connolly, *supra* note 150, at 68.

them consciously prefer these hardships over the possibility of being transported back to their country of origin.<sup>155</sup>

Third, the impermanent nature of child protection potentially incentivizes the state to delay decisions about the eligibility of ‘child’ refugees for certain rights. If such decisions are sufficiently deferred, the refugee in question reaches the legal age of adulthood and may more easily be deported. Such a scenario may not be merely hypothetical. As a case in point, professionals working with young refugees in Italy believe that additional layers of bureaucracy have been created specifically for the purpose of seeing these young people ‘age out’.<sup>156</sup>

As argued in the previous section, childhood vulnerability is not simply a pre-existing, natural fact. Rather, it is largely the product of social forces, including legal norms. This argument is further borne out by the temporariness of child protection and the consequent vulnerabilization of ‘child’ refugees. Rather than being an innately vulnerable group as a result of their age, these young refugees can have their vulnerability affected and exacerbated by child protection laws and policies. This vulnerabilization evinces a circular logic: the law renders these ‘children’ vulnerable and, in so doing, confirms its preconception that ‘children’ are vulnerable.<sup>157</sup>

## B Child Deportation in the Name of Child Protection

The elasticity of legal principles such as ‘the child’s best interests’, combined with the law’s ambivalence towards child-parent relations, potentially plays into the hands of political actors seeking to deport young unaccompanied refugees. By citing legal principles concerning the family and the child’s interests, a state can more comfortably claim that repatriation would unite unaccompanied ‘child refugees’ with their parents, regardless of the wishes of these young people and the potential dangers awaiting them in their countries of origin.<sup>158</sup> Thus, the legal discourse of child protection can end up serving political attempts to deny ‘children’ asylum.

Since the turn of this century, several European countries have weaponized international legal norms regarding child protection in this manner. For instance, the

<sup>155</sup> Meloni and Chase, ‘Transitions into Institutional Adulthood’, *Becoming Adult* (2017), at 3, available at <https://discovery.ucl.ac.uk/id/eprint/10114613/1/ba-brief-4-low-res.pdf>; Sigona, Chase and Humphris, *supra* note 2, at 1, 3; Crawley, *supra* note 92, at 18. This is not the only instance in which temporary protection pushes refugees into conduct that risks increasing their vulnerability. Yahyaoui Krivenko, *supra* note 25, at 211, n. 96, describes ‘cases where [refugee] women intentionally get pregnant to access certain services and preferential treatment in the country of asylum’.

<sup>156</sup> Heidbrink, *supra* note 21, at 999, 1001.

<sup>157</sup> Jacob Lind, *supra* note 14, at 347, calls this ‘a mutual logic of vulnerabilization’, whereby ‘the state is the creator of ... increased ... vulnerability, and then it utilises children’s rights logics to respond to this vulnerability it has itself created’. On the similarly circular logic of state violence, see Viterbo, ‘Future-Oriented Measures’, in O. Ben-Naftali, M. Sfard and H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (2018) 118, at 134–135.

<sup>158</sup> For child rights-based criticisms of the ‘family unit as trump card’ in the context of repatriation, see Pobjoy, *supra* note 4, at 206, 231–232; J. McAdam, *Complementary Protection in International Refugee Law* (2007), at 181–182; Bhabha, ‘“Not a Sack of Potatoes”: Moving and Removing Children across Borders’, 15 *Boston University Public Interest Law Journal* (2006) 197, at 204–205.

Norwegian government has described the arrival of young unaccompanied refugees as a violation of 'the child's best interests' and even as a form of child 'abuse'. In response to this supposed violation of child rights, governmental guidelines state that 'when family reunion is possible in the child's home country', or wherever the child's family is currently residing abroad, 'family reunion will not be granted in Norway'.<sup>159</sup> Certain norms enshrined in international law have thus offered the government a rhetorical means to rationalize, to itself and to others, an exclusionary migration policy.<sup>160</sup> Similarly, on several occasions since at least 2007, the Swedish judiciary has denied residence permits to young refugees on the grounds that it was in 'the child's best interests' to return to their country of origin.<sup>161</sup> In 2009, the Swedish government instructed its migration agency to 'work towards setting up an organized reception in the countries of origin of unaccompanied minors, who must return due to a legally binding decision'. In the same year, the British government also began working to establish facilities in Afghanistan to which young refugees could be deported.<sup>162</sup>

In a more expansive expression of this sentiment, several European countries jointly ran from 2011 to 2014 a pilot programme designed to construct deportation corridors for young unaccompanied Afghan refugees. Coordinated by Sweden, with participation from the United Kingdom, the Netherlands and Norway, and with Denmark and Belgium as 'observer' states, this programme ushered in a shift in official rhetoric on refugees. Previously, since the early 2000s, European policy documents had used generalized humanitarian terms – such as 'family tracing' and 'family reunification' – to describe the components of the deportation corridor. But as this pilot programme progressed, greater emphasis was placed on international legal concepts of child rights, such as 'the child's best interests'. Ultimately, the programme did not result in the deportation of the refugees targeted, nor were most of their families traced. Nonetheless, this rhetorical shift demonstrates the utility of international child law in justifying the denial of asylum to young refugees, ostensibly in their best interests.<sup>163</sup>

## 6 Conclusion

Protection, in and of itself, is not inherently harmful. Child protection, in particular, can sometimes benefit both 'child' and 'adult' refugees. Yet, in its current legal form, child protection also often ends up working to the detriment of refugees of all ages in multiple ways. It reinforces an age hierarchy, according to which 'adult' refugees are innately less vulnerable, less dependent and, hence, less deserving of protection, aid and compassion than their younger counterparts. Various manifestations of this age hierarchy, in discourses and practices of law and human rights, have been brought

<sup>159</sup> Engebretsen, 'The Child's – or the State's – Best Interests? An Examination of the Ways Immigration Officials Work with Unaccompanied Asylum Seeking Minors in Norway', 8 *Child & Family Social Work* (2003) 191, at 193.

<sup>160</sup> *Ibid.*, at 199–200.

<sup>161</sup> Josefsson, *supra* note 136, at 97.

<sup>162</sup> Lemberg-Pedersen, *supra* note 14, at 246.

<sup>163</sup> *Ibid.*, at 248, 254.

to light in this article. As we have shown, the law's exclusionary and ageist hierarchy presents the suffering of 'adult' refugees as somehow less reprehensible and their needs as less important.

Contrary to the image fostered by international law, we have argued that childhood, vulnerability and dependence are not natural or universal. Nor are they reducible to chronological age. Instead, they are all largely the product of social, economic and legal forces. Vulnerability and dependence alike change in a non-linear way throughout human life. Equally, the age differences that contemporary international law takes for granted are, to a large extent, a culturally, socio-economically and historically specific artefact. In conflating both vulnerability and dependence with childhood, international law not only downplays adult vulnerability and dependence but also potentially silences and disempowers its ostensible beneficiaries: young refugees. Once they are marked as vulnerable and dependent 'children', their wishes can easily be dismissed or misrepresented, their capacity can be overlooked, their autonomy can be minimized and they can be driven to exhibit supposedly childlike passivity and victimhood.

Insofar as 'child' refugees are vulnerable, their vulnerability is partly the result of their temporary protection under international law. The law constantly reminds them that they are drawing steadily closer to the age at which they will lose their special protections and may face deportation. This impending change in their legal status, and their uncertain fate thereafter, can take a heavy toll on their mental health. Some 'child' refugees, in a desperate attempt to prevent the state from laying its hands on them once they reach the legal age of adulthood, decide to pre-emptively disengage from welfare services, even if this leads them to a life of destitution, exploitation and poor health. Meanwhile, the temporariness of child protection potentially provides an incentive for the state to delay decisions about 'child' refugees because, once they reach the legal age of majority, they can more easily be denied protection and deported.

Further complicating matters is the ambivalence of international law about the relations between 'child' refugees and their parents. On the one hand, international law enshrines the right of both refugee 'children' and their parents to be with each other. On the other hand, it authorizes the punishment of supposedly unfit refugee parents and the removal of their children. To a large extent, this ambivalence stems from, and is compounded by, the open-endedness of such legal phrases as 'the child's best interests', 'parental rights and duties' and 'parental neglect'. Aided by the ambivalence and ambiguity of international law, various states have weaponized child protection and child rights against 'child' refugees or their parents. Thus, as we have revealed, refugee parents have been vilified and even taken to court for the hardships endured by their children. Further, claims have been made that it is in the best interests of unaccompanied 'child' refugees to be repatriated in order to be reunited with their parents, despite the wishes of these young people, the dangers awaiting them in their countries of origin and the difficulty of tracing their families there.

What we have all been witnessing, then, is not simply violations of international legal norms of child rights but, rather, the potentially harmful effects of these norms themselves. The alternative to the dominant legal discourse of child protection,

however, must not be to withhold protection from 'child' refugees. On the contrary: what is needed is a bolder reimagining of protection – a shift away from hierarchies of vulnerability, dependence and deservingness and towards free global movement based on solidarity and historical accountability. We hope that our analysis will help lay the foundations for the realization of this vision.

