

Jason M. Pobjoy. *The Child in International Refugee Law*. Cambridge: Cambridge University Press, 2017. 317 pp. Paperback: \$44.99 ISBN 978-1-316-62740

Jason Pobjoy comes to this text with a particularly thorough and expansive set of knowledge of the field of international law, treaties, and human rights. By profession he is an attorney, and is currently a barrister with Blackstone Chambers in London, and has a reputation as an excellent oral and written advocate. He has also taught and published extensively in the field of public international law, international refugee law, and human rights. It is with this background that he approaches this particular discussion of the rights of the child refugee. His legal training informs both the theories and structure of the book, while simultaneously tempering those ideas which might tend towards the idealistic. His background and perspective force the reader to contend with the realistic limitations of existing instruments, but his knowledge of the framework within which these instruments operate steers him away from calling for out and out repeal or amendments. Instead, he calls for implementing international treaties as they are to their fullest extent, creating overlapping protections for refugees and, in particular, refugee children. He uses his detailed knowledge of and experience with international treaties to point out the already existing provisions that could be utilized to fully complement the protection regime.

According to Pobjoy, the book has been written to address the gaps in international refugee law that are evidenced by the unique plight of refugee children. Specifically, he asserts that the across the breadth of scholarly research and discussion of refugee law: “What remains missing is a comprehensive, comparative review of the procedural and substantive obstacles that a child – whether unaccompanied, separated or accompanied – may encounter in establishing refugee status, and a consideration of the manner in which these challenges might be resolved” (3). While the *Convention and Protocol Relating to the Status of Refugees* (the “*Convention*”) is technically age blind, Pobjoy points out that the vast majority of jurisprudence on the subject of international law has been developed around adults. Children and their claims are usually considered in the context of their families, and more specifically underneath their parents’ claims. Refugee children’s claims nearly always rise and fall with the claims of their guardians. On the rare occasion that children’s claims are assessed on their own, decision makers usually fail to consider the unique nature of a child’s claim, running the risk of violating international law by withholding sanctuary.

This is where Pobjoy looks to bridge the gap, centering his focus on the two primary issues that he sees our adult-focused lens has caused: “invisibility,” which is the failure of decision makers to consider the specific claim of a refugee child, regardless of whether or not they are accompanied by a parent, and “incorrect assessment,” which is a failure of decision makers to interpret the *Convention* in a way that takes into account that the claimant is a child. Because the majority of children’s claims are viewed as derivative, their fates are usually inextricably tied to that of their parents. Ironically, those minors that are unaccompanied may have a better chance of having their claims being assessed properly, because decision makers are forced to consider the risks of persecution faced by a child, instead of generalizing their risks as the same as those faced by other members of their family.

Incorrect assessment presents a whole other set of risks. In order to qualify as a refugee and the protection of nonrefoulement, an applicant must show a well-founded fear of being persecuted on account of race, religion, nationality, membership in a particular social group or political opinion. It is difficult enough to make such assessments of an adult. The standard for a finding of a well-founded fear is both objective and subjective, requiring that the individual show a subjective personal fear of their situation, but also that from an objective standpoint that their fear is warranted under the circumstances. This can be an incredibly complex determination, where

decision makers must assess claimants for signs of subjective fear. If that is the case for an adult, it can only be more difficult in the case of a child. Often children will be unable to articulate the cause of their fear, or even be unaware of the circumstances that have made them refugees. They simply may not know exactly what they are to fear, only that they are afraid. Sometimes these fears are appropriately communicated by parents or guardians, but sometimes these risks are unique to children and cannot actually be shared by the entire family unit.

To be clear, the risk to be prevented from occurring is of course the return of a child to a country where he or she faces a substantial risk of being persecuted. Under the terms of the *Convention*, a state which does so has violated international law. While the consequences of such violations are unclear, Pobjoy points out that we can realistically only hold states accountable to those laws to which they submit themselves. As such international treaties are few and far between, the majority of scholarly review has focused intensely on the *Convention*, because it is the only such treaty on refugees that has achieved near universal ratification. Pobjoy points out that some commentators have altogether dismissed the *Convention* for the purposes of the child refugee. Such scholars believe that the historical context within which the *Convention* was enacted has so permeated the document that it cannot be reconfigured for the purpose of assessing the claims of children. Calls for an amendment to the *Convention*, or a new one entirely devoted to the subject of child refugees tend to come from those circles. Pobjoy however takes a different approach. He points to the *Convention's* evolution over time, and how it has been adapted and expanded to reach categories of persons that may not have been under consideration during the initial drafting, but nonetheless been shown to have been deserving of protection. For example, protections that have been extended to those at risk of gender-based violence, or persecution on the basis of sexual orientation.

If the *Convention*, as written, can accommodate these categories, why could it not do the same for children? Pobjoy believes that it can: "The hypothesis advanced in this book is that progressive developments in the interpretation of the *Refugee Convention*, coupled with a greater understanding of the relationship between international refugee law and international law on the rights of the child, enable the *Convention* to respond in a sophisticated and principled way to refugee claims brought by children" (5). The key to Pobjoy's thesis is that "relationship between international refugee law and international law on the rights of the child", and the bulk of the book is spent exploring the true extent of that relationship. Specifically, Pobjoy focuses on the relationship between the *Convention* and the *Convention on the Rights of the Child (CRC)*. His approach calls for truly enforcing the rights enshrined in the *CRC* through the protection framework of the *Convention*. Essentially, his argument is that instead of amending the *Convention* or starting over entirely, we could simply fully implement the treaties and documents we already have. Part of the attraction to his thesis is its simplicity, but as is common with seemingly simple solutions, it makes one wonder why the solution is so novel? Is it perhaps because the invisibility of children's claims in the jurisprudence has served to stifle innovation? Whatever the answer, Pobjoy brings the possibility to the forefront at last.

It should be noted that Pobjoy's reliance on the *CRC* is not novel. As stated by Professor Eugene Verhellen, "the framework used most frequently to structure children's rights discussions remains" the *CRC*. (Vandenhoe et. al., 43) One cannot attempt to engage seriously with the topic of the rights of children without considering it and its influence. Pobjoy envisions the *CRC* being used in any of three ways to ensure that the rights and claims of refugee children are properly protected and addressed. First, the *CRC* could be used as what he calls a "procedural guarantee" (6). Under the *CRC*, children are recognized as having certain rights, such as the right to speak on their own behalf and be heard in proceedings relating to them. Second, the *CRC* could be used as an interpretive guide to the application of the *Convention* in the context of a child refugee. While the

*Convention* was written several decades ago, there is a general understanding that it should be interpreted in light of subsequently adopted human rights treaties, including the *CRC*. Finally, Pobjoy sees the *CRC* as a potentially independent source of status for children, that can exist outside of the traditional refugee regime. He points out that the *CRC* makes no delineation between children as citizens of the state and children as refugees within a state. The *CRC* is to guarantee the rights of all children within the borders of a signatory state—regardless of how that child came to be present within said state. As such, the protections of the *Convention* should arguably be unnecessary for the protection of a child refugee. It should be enough that the child is in fact, a child, and within the borders of a *CRC* party state.

The book is structured to explore the ramifications of these three “modes of interaction”. The first chapter is essentially a primer on the history of international refugee law. His thorough, albeit brief, review of the history shows how development of refugee law and the rights of children, despite having similar origins as responses to existing political and social conditions, they have operated largely independently of each other. Interestingly enough, civil wars and conflicts that spawn refugee crises often involve extreme violations of the rights of children, but those two issues are usually addressed in siloes, rather than seen as interconnected. It is this chapter which makes the essential case for taking a more integrated approach to the *CRC* and the *Convention*. Chapter 2 expounds on the first mode of interaction, the procedural guarantee. In it Pobjoy unpacks some of the rights recognized by the *CRC*, as well as the duties imposed on states. Pobjoy believes that the *CRC* demands that all children’s claims for refugee status be considered on their own merit, regardless of whether or not they are accompanied. As he points out, the *CRC* imposes a duty of non-separation on states, requiring them to keep children with their parents if it is in the best interest of the child.

Chapters 3, 4, and 5 are all focused on the second mode of interaction, the *CRC* as an interpretive tool. While the *CRC* is technically an extrinsic text, it has potential to inform the object and purpose of the *Convention*. He doesn’t merely rely on the existence of the *CRC* to assert its interpretive authority, he also regularly points out publications and guides published by the UNHCR that explicitly support the use of the *CRC* in this fashion. In addition to consideration of his second mode of interaction, these chapters also shed light on those specific provisions of the *Convention*’s definition of refugee that can present problems for children. Finally, chapter 6 speaks to our third mode of interaction, the *CRC* as an independent source of status and subsequent protection. Pobjoy bases his analysis first on the nonrefoulement provisions within the *CRC*, and finally focusing on the ‘best interests of the child’ principle that is also codified in the treaty. The *CRC*, as a more expansive and inclusive document, may in fact protect children when even the *Convention* cannot.

As a preliminary concern, Pobjoy has to engage with the proverbial elephant in the room. If his thesis is based on the rights of children recognized in the *CRC*, then he has a problem: The US hasn’t ratified it. There aren’t very many ways to get around this particular hurdle without crippling the entirety of the hypothesis. In order for a document to be considered enforceable against those who might have violated it, they must at the very least to be subject to it. In the realm of international law, sovereign states are only subject to that which they willingly subject themselves. Pobjoy admits to this shortcoming relatively early on. He points to the *Vienna Convention on the Law of Treaties* (the *Vienna Rules*), the preeminent guide to interpretation of international legal instruments, and its famous Article 31 as having codified the “general rule” of treaty interpretation (33). In Article 31, the *Vienna Rules* call for a decision maker to consider “any relevant rules of international law applicable in the relations between the parties” (37), which is the operative provision that Pobjoy relies on for introducing the *CRC* as a “relevant rule of international law.”

In the case of the United States, it is that second half that presents an issue. Pobjoy argues for a generous interpretation of the phrase, following an implied ratification theory of sorts that is apparently legitimized by the understanding that the *CRC* at the very least expresses the “common intentions” of all parties. There may be a true case for this approach, because while the United States has not ratified the treaty, it is a signatory to the *CRC*. This does indicate that it shares the common goals enshrined in the treaty. However, given that the United States remains the lone holdout on ratification, it bears considering that the passage of time could show the exact opposite of what Pobjoy’s preferred understanding would imply. Failure to ratify after all this time could be considered an expression of a specific intent not to be bound by the obligations in the *CRC*. While either position might be the case, it is this issue of enforcement, perennial to all discussions of international law, that makes his work here aspirational, despite its other claims to legitimacy and pragmatism. This isn’t to say that the work shouldn’t be done, or the theory not be expressed, but it is a sobering realization about an otherwise incredibly practical work.

Pobjoy takes a topic that has somehow languished in obscurity and brings it into the light. Where the book shines are his methods of analysis. He painstakingly examines each aspect of his hypothesis, first establishing its authority in the various treaties and guidebooks, then addressing those instances where the almost accidental engagement with the rights of child refugees has generated a haphazard and inconsistent protection regime. While the need for this discussion is obvious to even the casual observer, his use of examples impresses upon the reader the urgency of the issue. He regularly reminds the reader of the unique harms that can be faced by a child, but not by an adult, and the long term effects that those harms can have. However, a deeper analysis of the psychological consequences of persecution on a child would have been particularly appropriate. The consequences of such harms as female genital mutilation, sex trafficking, being pressed into military service, and others would be catastrophic for any individual, but for children, the trauma inflicted can have far reaching effects that serve to perpetuate the initial persecution long after the source of such persecution has been terminated. Such a deep dive would not only serve to generate a sense of immediacy, but also paint a clear picture of just how seriously the poor adjudication of these children’s claims could violate their rights.

Perhaps the most valuable contributions of this work are the practical suggestions that Pobjoy offers to decision makers. Again, his theory is not that such a drastic reworking of existing treaties or procedures are necessary, but merely that we expand our understanding of the framework that exists to include consideration of the rights that the *CRC* was written to protect. For example, he points to the Canadian system, that requires each individual to file an individual claim for refugee status, regardless of whether or not those individuals are accompanied by family members. In the vast majority of cases, while these claims are assessed individually, they are procedurally addressed jointly with other family members, reducing the burden on the courts. The book is clearly not intended to be an exhaustive discussion of the rights of children, and Pobjoy readily admits that there are other challenges faced by children that will have to be addressed. However, this book starts a conversation that has been needed for a long time, and will undoubtedly be considered by scholars and decision makers alike. As we speak, hundreds of unaccompanied children are sitting in detention centers in the United States, waiting for their opportunity to be heard. How can we be sure that their rights are not violated during the adjudication process? We must hope, that the decision makers they are brought before have had the opportunity to read this work, and we must ensure that the conversation started here continues.

Sarah Staples, book review, Jason M. Pobjoy. *The Child in International Refugee Law*, *AmeriQuests* 14.2 (2018)

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