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The Right to Education and The Resettlement and Integration of Refugee Children in New Zealand:

A Legal Perspective on the Rights of Refugee Children

A thesis

in fulfilment

of the requirements for the degree

of

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by

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i. Abstract

This thesis examines the realisation of the right to education for refugee children in New Zealand, establishing the analysis within both international and domestic legal frameworks. It argues that despite New Zealand's obligations under international law and domestic provisions safeguarding children's rights, refugee children's right to education is inadequately implemented and insufficiently monitored. While some measures exist, significant gaps remain, particularly the absence of a clear legal framework and a comprehensive, child-centred policy informed by refugee children's rights.

Adopting a socio-legal approach, the thesis explores the extent to which New Zealand's laws and policies protect the right to education of refugee children. The analysis primarily uses legal methods, examining legislation, policies, and practices. Sociological and educational perspectives will inform this to enhance interpretation and contextual understanding of education for refugee children. The analysis is supplemented by empirical research to further illustrate how legal provisions interact with practical realities, demonstrating how law, policy implementation, and social contexts influence the educational experiences of refugee children.

The thesis concludes that the inadequate realisation of the right to education is mainly due to the lack of a rights-based and child-centred framework within New Zealand's legal and policy landscape. It proposes the adoption of a child rights-based approach that recognises the distinct interests and lived experiences of refugee children. Such an approach provides a holistic foundation for implementation and monitoring, ensuring that refugee children in New Zealand can adequately enjoy their right to education and consequently facilitate effective resettlement and integration.

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For every shy child with a quiet dream — may you always know it is worth chasing.

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1. INTRODUCTION

1.1 Introduction

Over 35,000 refugees have been resettled in New Zealand since the Second World War.¹ However, the number of children included is not readily available. It has been noted that risks and vulnerabilities children face on the move tend to remain hidden and unaddressed due to the absence of reliable data.² The limited data thus prompts scrutiny of issues impacting the realisation of refugee children's rights in New Zealand through the examination of the legal framework underpinning education. It is well-established that education is instrumental to the livelihood of refugees, especially children.³ Education is indisputably essential for those in need, especially for refugees. It is a crucial component of resettlement and education has been identified as being instrumental in enabling refugee children and adults to survive and succeed in their new host country.⁴ A strong focus on education is thus undeniably necessary. This thesis therefore analyses the legal protection in place for the enjoyment of the right to education. It explores the right to education for refugee children and children of refugees (hereinafter referred to as refugee children) in New Zealand.

Not only is education a human right in itself, but it is essential for the realisation of other human rights.⁵ Ann Quennerstedt and Mikael Quennerstedt note that education is an arena where children's civil, political, and social human rights are to be met and respected.⁶ Access to and participation in education plays a crucial role in indicating the extent of social inclusion and integration of refugees in resettlement countries.⁷ Although this is the case, there has been limited research on the right to education for refugee children from a legal perspective in New Zealand.⁸ New Zealand is a key area

¹ Immigration New Zealand "New Zealand Refugee Quota Programme" <www.immigration.govt.nz>.

² Organisation for Economic Co-operation and Development (OECD) "Massive Data Gaps Leave Refugee, Migrant and Displaced Children in Danger and Without Access to Basic Services" (15 February 2018) <www.oecd.org>.

³ United Nations High Commissioner for Refugees (UNHCR) "Improving Access to Education for Asylum-Seeker, Refugee Children and Adolescents in Central Europe (July 2011) at 5.

⁴ James Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) at 584.

⁵ Lotta Brantefors and Ann Quennerstedt "Teaching and Learning Children's Human Rights: A Research Synthesis" (2016) 3 *Cogent Education* 1 at 2.

⁶ Ann Quennerstedt and Mikael Quennerstedt "Researching Children's Rights in Education: Sociology of Childhood Encountering Educational Theory" (2014) 35(1) *British Journal of Sociology of Education* 115 at 129.

⁷ Svetlana M King and Laurance D Owens "The Schooling Experiences of African Youth from Refugee Backgrounds in South Australia: Key Findings and Implications for Educational Practice" in Helen Askell-Williams (ed) *Transforming the Future of Learning with Educational Research* (Information Science Reference, Hershey, 2015) at 101.

⁸ There has been research on education for refugee children. While some make reference to children's rights, most are from educational, migration and sociological perspectives. See Jody L McBrien and Maria Hayward "Refugee Background Students in New Zealand and the United States: Roots and Results of Educational Policies and Practices" (2022) 6(2) *Journal of Global Education and Research* 133; Maria Hayward "Teaching as a Primary Therapeutic

of interest as its education system is internationally recognised for its innovative policies and approaches to providing quality education.⁹ Its consistent alignment with policies that are internationally championed for effectively balancing education philosophies, such as participation, equity, and investment return, has been recognised.¹⁰ It also has a long history of resettling refugees and has consistently done this through a formal system since 1987.¹¹ A legal analysis of education is therefore required to examine the right to education and the extent to which it realises the rights of refugee children.

1.2 Thesis Statement

This thesis examines whether, and to what extent, the right to education of refugee children is adequately realised in New Zealand’s law and policy, despite the existence of an international framework guaranteeing the right to education of refugee children and provisions in domestic legislation. While there are measures in place to ensure that refugee children enjoy their rights, the research argues that the right to education of refugee children is not adequately implemented and monitored. The research contends that this can be attributed to the New Zealand education system lacking a clear legal framework and a formal policy informed by children’s rights, which are required for satisfactory resettlement and the adequate realisation of refugee children’s rights. By identifying these gaps, the thesis provides a foundation for strengthening legal and policy frameworks and developing child-centred approaches that ensure refugee children can fully enjoy their right to education in New Zealand.

The New Zealand Resettlement Strategy, revised in 2023,¹² plays a pivotal role in guiding and prioritising state actions necessary for the integration of refugees in general and with regard to

Intervention for Learners from Refugee Backgrounds” (2017) 28 *Intercultural Education* 165; Jay Marlowe *A Fair Go For Refugees: Resettlement in Aotearoa and Global Trends* (Royal Society Te Apārangi, 2021) at 3; Jay Marlowe and others “The New Zealand Refugee Resettlement Strategy: Implications for Identity, Acculturation and Civic Participation” (2014) 9(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 60; Linda Mitchell and Olivera Kamenarac “Refugee Children and Families’ Positioning within Resettlement and Early Childhood Education Policies in Aotearoa New Zealand” (2022) 17(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 224; and Alia Bloom and Martine Udahemuka “‘Going Through the Doors of Pain’: Asylum Seeker and Convention Refugee Experiences in Aotearoa New Zealand” (2014) 9(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 70.

⁹ Human Rights Commission “Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu” (2010) HRC<www.hrc.co.nz> at 169.

¹⁰ Michael Dobbins “Education Policy in New Zealand – Successfully Navigating the International Market for Education” in Kerstin Martens and others (eds) *Transformation of Education Policy* (Palgrave Macmillan, London, 2010) at 153.

¹¹ Ministry of Business, Innovation and Employment *Immigration Factsheets- Refugees and Asylum Seekers* (February 2021).

¹² Cabinet Economic Development Committee “Refreshing the Refugee Resettlement and Migrant Settlement Strategies” (15 September 2023) DEV-23-MIN-0147.

education.¹³ The education integration outcome was mainly focused on the English language and was updated to ensure that “former refugees and their families achieve their education, training and English language goals”.¹⁴ It has been acknowledged that new success indicators and data sources should be introduced to adequately measure progress against the current Strategy outcomes.¹⁵

Although education is considered one of the main goals under the Strategy, it has a very narrow measurement of outcomes for education.¹⁶ This results in difficulties in determining if the right to education is adequately realised for all refugee children. In addition to assisting refugee children with overcoming the trauma of conflict and forced migration and providing a sense of stability,¹⁷ the provision of quality education for refugee children is fundamental to their well-being and future self-sufficiency.¹⁸ Education has been attributed to equipping refugees with the knowledge and skills needed to secure employment, access healthcare and participate in social and cultural life.¹⁹ Therefore, ensuring adequate implementation of the right to education as a relevant strategy to improve resettlement and integration outcomes for refugee children is necessary²⁰ and is demonstrated in this research.

This research will demonstrate in a novel way, that the role of education in the resettlement and integration of refugee children is dependent on strengthening the Refugee Resettlement Strategy to be child-centred and rights-based, the ability of education providers and facilitators to have an understanding of the right to education and provide quality education to refugee children, and the availability of a formal framework of education for refugee children. A child rights-based approach informed by conceptions of childhood and educational theory provides a holistic framework that will ensure the right to education is implemented and well-monitored to realise the rights of refugee children sufficiently. The thesis thus considers the laws and policies providing for the right to education for refugee children and the extent to which refugee children’s rights are protected and upheld to ensure successful resettlement and integration in New Zealand.

¹³ Immigration New Zealand “New Zealand Refugee Resettlement Strategy” <www.immigration.govt.nz>.

¹⁴ Cabinet Economic Development Committee, above n 12, at [5.4]; and Immigration New Zealand *New Zealand Refugee Resettlement Strategy* <www.immigration.govt.nz>.

¹⁵ Cabinet Economic Development Committee, above n 12, at [7].

¹⁶ Immigration New Zealand *Refugee Resettlement Strategy: Success Indicators and Measures* (2023) <www.immigration.govt.nz>.

¹⁷ Rebecca Leela Thomas “The Right to Quality Education for Refugee Children Through Social Inclusion” (2016) 1 *Journal of Human Rights and Social Work* 193 at 199-200.

¹⁸ Mamta Murthi and Raouf Mazou “Providing Inclusive Education to All Refugees is Within Our Reach” (17 March 2021) UNHCR <www.unhcr.org>.

¹⁹ Alia Bloom, Tim Donovan and Martine Udahemuka *Marking Time Experiences of Successful Asylum Seekers in Aotearoa New Zealand* (ChangeMakers Refugee Forum, Discussion Document, December 2013) at 35.

²⁰ Luis Benveniste, Karishma Silva and Johannes Hoogeveen “Refugee Education: Financing What Matters” (13 December 2023) World Bank Blogs <www.blogs.worldbank.org>.

1.3 Research Questions and Aims

1.3.1 Main Research Question

To what extent does the New Zealand legal framework protect refugee children's right to education?

1.3.2 Sub-Questions

1.3.2.1 Do refugee children have a right to education within the international human rights law framework?

1.3.2.2 What role does the right to education play in the protection and realisation of children's rights, and the rights of refugee children in particular?

1.3.2.3 What obligations does New Zealand have under international human rights law in respect of the right to education for refugee children?

1.3.2.4 What obligations are there in New Zealand's domestic legal and policy framework regarding the right to education of refugee children?

1.3.2.5 To what extent do New Zealand's laws and policies respect, protect and fulfil refugee children's rights to education?

1.3.2.6 How can the existing legal and policy framework be improved to ensure better realisation of the rights of refugee children in education?

1.3.3 Aims of the Research

The research's central aim is to critically examine how the current New Zealand legal framework implements the international human rights law obligations in education and how the New Zealand legal framework underpins the provision of education to refugee children, given their specific needs and interests.

In light of this aim, the objectives of the research are:

- a. To **consider** and **assess** New Zealand’s performance in implementing the right to education for refugee children
- b. To **demonstrate** the need for legal and policy reform relating to the resettlement and integration of refugee children in education
- c. To **ensure** there is a holistic approach to the educational resettlement of refugee children
- d. To **establish** how best to measure or monitor the realisation of the right to education necessary for resettlement and integration of refugee children in New Zealand
- e. To **provide** a child-centred, rights-based legal framework for delivering educational services and supports to ensure New Zealand fully complies with its international human rights treaty obligations.

1.4 Background

The above questions and objectives are essential for various reasons. Children, regardless of their status, are vulnerable due to their age and dependency on adults. During forced displacement, children are forced to leave places they call home and have experienced or witnessed violence in most circumstances.²¹ They may also be exposed to harsh living conditions, suffer from malnutrition and face uncertainty about the future.²² Furthermore, traumatic exposure before and during migration has been linked to psychological issues and mental health problems. These challenges have been proven to continue years after resettlement in a new country.²³ These effects also manifest post-migration. Children may experience stress due to adaptation and acculturation issues, conflict within the family, difficulties with education in a new language, social exclusion, and discrimination in a new host country.²⁴ Refugee children are even more susceptible due to the migration process, and the effects of forced migration are particularly extreme in the child’s case. Due to these vulnerabilities, they are exposed to further violence, abuse, exploitation, and discrimination.²⁵ These children, like other children, have special²⁶ needs and should thus be protected, cared for, and supported to enable them to thrive.

²¹ Toby Measham and others “Refugee Children and Their Families: Supporting Psychological Well-Being and Positive Adaptation Following Migration” (2014) 44 *Current Problems in Paediatric and Adolescent Health Care* 208.

²² At 208.

²³ Cindy C Sangalang and Cindy Vang “Intergenerational Trauma in Refugee Families: A Systematic Review” (2017) 19 *Journal of Immigrant and Minority Health* 745.

²⁴ Measham and others, above n 21, at 208.

²⁵ UNICEF “Good Practices That Bring the Global Refugee Compact to Life - Action for Refugee Children” (December 2019) <www.unicef.org> at 1.

²⁶ “Special” is the term used by the UNHCR. See UNHCR *Note on Refugee Children* UN Doc EC/SCP/46.

Refugee parents are also adversely affected by forced migration. The stress and anxiety that affect them have potentially severe disruption to their children's normal emotional development.²⁷ Studies have shown that the effects of war on parents may affect children even if they did not experience conflict directly and thus consciously and unconsciously absorb their parents' experiences of abuse, discrimination, and trauma into their lives.²⁸ Intergenerational transmission of trauma has been acknowledged in literature. It has been demonstrated that children's development and well-being are affected by the trauma experienced by parents.²⁹ Furthermore, trauma experienced by parents can limit their parenting abilities and consequently interrupt the development of the child.³⁰ As such, children born in new host countries to refugee parents are also adversely affected by forced migration, which may impact their integration capability. This informs the scope of this research with regard to the phrase "refugee children."

A refugee is defined in domestic legislation as one recognised as such if they have been recognised as a refugee outside New Zealand and brought to New Zealand under a government-mandated programme.³¹ It recognises a person as a refugee in terms of the Refugee Convention.³² Quota refugees (who are the focus of this research, as most refugees resettling in New Zealand arrive through the quota system)³³ are granted Permanent Residence status under the Refugee Quota Programme upon arrival.³⁴ They can apply for citizenship in New Zealand after five years.³⁵ As New Zealand Permanent Residents, they are entitled to live in New Zealand permanently and enjoy the same rights that other New Zealand permanent residents have, including the right to education.³⁶ The status of children, in this regard, is dependent on the parent's status. From birth, the child has the most favourable immigration status of either parent.³⁷ Therefore, the legal status of refugees, including those arriving as children, is the same as that of children born of refugees in New Zealand. Since this is the case and owing to the intergenerational transmission of trauma highlighted above, the phrase "refugee children" is, therefore, used in a broader sense to include New Zealand-born children of refugees. These children tend to be viewed or included in the study of ethnic minorities as a group,

²⁷ UNHCR "Refugee Children: Guidelines on Protection and Care" (1994) <www.unhcr.org> at 10.

²⁸ Myriam Denov and others "Intergenerational Resilience in Families Affected by War, Displacement, and Migration: "It Runs in the Family"" (2019) 22(1) *Journal of Family Social Work* 17 at 21.

²⁹ Natalie Flanagan and others "Crossing Borders: A Systematic Review Identifying Potential Mechanisms of Intergenerational Trauma Transmission in Asylum Seeking and Refugee Families" (2020) 11(1) *European Journal of Psychotraumatology* 1 at 2.

³⁰ Denov and others, above n 28, at 22.

³¹ Immigration Act 2009, s 126. The government mandated programme in New Zealand is the Refugee Quota Programme.

³² Section 129.

³³ Immigration New Zealand "Refugee and Protection Statistics Pack" (31 May 2025) <www.immigration.govt.nz>.

³⁴ Immigration New Zealand "New Zealand Refugee Quota Programme" <www.immigration.govt.nz>.

³⁵ Citizenship Act 1977, s 8(2)(b).

³⁶ Immigration New Zealand *Refugees and Asylum Seekers* (2 August 2024) <www.immigration.govt.nz>.

³⁷ Immigration Act, s 373.

thus ignoring the uniqueness of their refugee background.³⁸ It has also been acknowledged that the needs of such children may be overlooked in New Zealand.³⁹ This research will thus contribute towards filling some of these gaps.

In light of the above vulnerabilities, refugee children require special additional protection in the new countries in which they resettle. The United Nations General Assembly has affirmed the protection of refugee children in that:⁴⁰

children, because of their age, social status and physical and mental development, are often more vulnerable than adults in situations of forced displacement, recognizes that forced displacement, return to post-conflict situations, integration into new societies, protracted situations of displacement and statelessness can increase child protection risks, taking into account the particular vulnerability of refugee children to forcible exposure to the risks of physical and psychological injury, exploitation and death in connection with armed conflict, and acknowledges that wider environmental factors and individual risk factors, particularly when combined, may generate different protection needs.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) has noted that international protection includes, *inter alia*, provision for refugees' physical safety and assistance with the resettlement of refugees.⁴¹ Resettlement is thus an essential aspect of refugee children's livelihood in a host country and has the potential to violate their rights if not well executed.

1.5 Research Context

The rights of refugee children are central to this research, and it is vital to consider the laws that provide for these rights and how they have been realised in New Zealand. They are briefly introduced in this chapter and examined further in subsequent chapters.

³⁸ Milena Chimienti and others "Second Generation from Refugee Backgrounds in Europe" (2019) 7 Comparative Migration Studies at 1.

³⁹ Jonathan Sampson and others "Resettlement Journeys: A Pathway to Success?: An Analysis of the Experiences of Young People from Refugee Backgrounds in Aotearoa New Zealand's Education System" (2016) 31(1) New Zealand Sociology 31 at 39.

⁴⁰ *Assistance to Refugees, Returnees and Displaced Persons in Africa: Resolution Adopted by the General Assembly* UN Doc A/RES/69/154 (18 December 2014) at [9].

⁴¹ UN Office of the High Commissioner for Human Rights (OHCHR) "Fact Sheet No 20, Human Rights and Refugees" (July 1993) <www.ohchr.org>.

1.5.1 Legislation and Policy Context

The international protection of refugees dates back to 1921 when the League of Nations created the position of the High Commissioner for Russian Refugees.⁴² This raised awareness of the responsibility of the international community to protect refugees.⁴³ Since then, the protection of refugee children has developed under international refugee law, international human rights law, and international children's rights law. The Refugee Convention has often been viewed as a separate piece of legislation, interpreted in terms of its own objectives to the exclusion of international human rights law.⁴⁴ While this is the case, international human rights law has significantly influenced how key provisions under international refugee law are interpreted, and international refugee law has also influenced the interpretation of international human rights law on issues relating to refugees.⁴⁵ There are also areas in refugee protection that result in the intersection of different areas of international law, such as refugee law, human rights law, international humanitarian law and international criminal law.⁴⁶ It has thus been argued that refugee law should not be interpreted or applied without the consideration of other human rights treaties and their current juridical context and development.⁴⁷

Given these intersections, it is important to understand how rights and obligations in different treaties interact. Article 30 of the Vienna Convention on the Law of Treaties regulates instances where norms from multiple treaties may be in conflict and determines states' rights and obligations.⁴⁸ When multiple treaties cover the same subject matter, their provisions should first be interpreted in harmony before resolving any conflicts.⁴⁹ Where these rights and obligations cannot be reconciled, later treaties may modify or prevail over earlier ones, but only between states that are parties to both treaties.⁵⁰ Mark Villiger emphasises that under art 30, a state cannot unilaterally discharge its obligations under an earlier treaty by adopting a later treaty, and the existence of the earlier treaty

⁴² Gilbert Jaeger "On the History of the International Protection of Refugees" (2001) 83(843) *International Review of the Red Cross* 727 at 728.

⁴³ Erika Feller "The Evolution of the International Refugee Protection Regime" (2001) 5 *Washington University Journal of Law and Policy* 129 at 130.

⁴⁴ Tom Clark and François Crépeau "Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law" (1999) 17(4) *Netherlands Quarterly of Human Rights* 389 at 408.

⁴⁵ Spyridoula Katsoni "Impacts of the Interpretative Interaction between International Human Rights Law and the Refugee Convention" (2021) 10(1) *Cambridge International Law Journal* 96 at 118.

⁴⁶ David McKeever "Evolving Interpretation of Multilateral Treaties: 'Acts Contrary to the Purposes and Principles of The United Nations' in The Refugee Convention" (2015) 64(2) *The International and Comparative Law Quarterly* 405 at 411.

⁴⁷ Clark and Crépeau, above n 44, at 408; David McKeever, above n 46, at 406.

⁴⁸ Vienna Convention on the Law of Treaties 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980) [VCLT].

⁴⁹ Mark Eugen Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden, 2009) at 402.

⁵⁰ VCLT, above n 48, at art 30(3).

does not invalidate the subsequent treaty.⁵¹In this regard, monitoring the implementation of other human rights affecting refugees requires referencing the Refugee Convention.⁵² Reporting mechanisms of international human rights law can be reinforced through taking into account the specific circumstances of refugees and the protection afforded under the Refugee Convention.⁵³ Understanding how multiple treaties interact ensures that both refugee law and human rights obligations are effectively upheld.

There have been debates on whether children's rights are a subset of human rights or a distinct category, suggesting the need for a special approach for children. Lucinda Ferguson is of the view that children's rights can be categorised in both ways. Firstly, that children's rights are rights specifically for children, while there are also rights for a rights-holder who happens to be a child.⁵⁴ As such, children's rights can fall under international human rights law. It has been argued that viewing children's rights as special and separate from other human rights, because children form a distinct group, can be problematic, as it would be difficult to explain (from a theoretical perspective) what they mean and thus not applied appropriately. While this is the case, if understood as human rights, they can be grouped with general human rights without reference to the special features of children.⁵⁵ Although this is the case, the fact that the right is for a child is important in understanding what the right means.⁵⁶ The existence of the United Nations Convention on the Rights of the Child (UNCROC)⁵⁷ has also been seen to demonstrate the categorisation of children's rights. Since it was influenced by existing human rights, children's rights as set out in the UNCROC can be understood as human rights tailored for children.⁵⁸ Nigel Cantwell cautions against children's rights not being treated as children's inalienable human rights but merely as children's rights as understood before the UNCROC.⁵⁹

⁵¹ Mark Eugen Villiger, above n 49, at 402.

⁵² Clark and Crépeau, above n 44, at 389.

⁵³ At 391.

⁵⁴ Lucinda Ferguson "Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights" (2013) 21(2) *The International Journal of Children's Rights* 177 at 178.

⁵⁵ At 181.

⁵⁶ At 182.

⁵⁷ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

⁵⁸ Nigel Cantwell "Are Children's Rights Still Human?" in Antonella Invernizzi and Jane Williams (eds) *The Human Rights of Children: From Vision to Implementation* (Routledge, Oxford, 2011) 37 at 41.

⁵⁹ At 42.

1.5.1.1 International Refugee Law

The 1951 Convention Relating to the Status of Refugees (Refugee Convention)⁶⁰ has a crucial role in protecting refugees. It recognises and defines a refugee as a person who:⁶¹

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

It further sets out refugee rights such as non-refoulement,⁶² naturalisation,⁶³ non-discrimination,⁶⁴ employment,⁶⁵ housing⁶⁶ and education.⁶⁷ The Convention requires states to provide the same treatment as accorded to nationals in respect of the rights set out therein.⁶⁸ Although children are not specifically mentioned therein, it applies to all persons. In respect of the right to education, art 22(1) provides that refugees are to be afforded the same treatment with regard to elementary education. Elementary education generally relates to primary school-going age.⁶⁹ Although the international instruments refer to elementary, the term primary will be used throughout the thesis. It is worth noting that there is no reference to early childhood education⁷⁰ and this has the potential to hinder the enjoyment of the right to education for younger refugee children. Despite this, early childhood education is important as it plays a crucial role in the child's development and their ability to participate in society.⁷¹ It also ensures that children are ready for primary education.⁷² For education other than elementary, states are under an obligation to afford refugees treatment as favourable as

⁶⁰ Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

⁶¹ At art 1A(2).

⁶² At art 33.

⁶³ At art 34.

⁶⁴ At art 3.

⁶⁵ At art 17.

⁶⁶ At art 21.

⁶⁷ At art 22.

⁶⁸ At art 21.

⁶⁹ Primary education starts around age 5 -12 years of age. See Susannah Wright "Primary School Education" in Tanya Fitzgerald (ed) *Handbook of Historical Studies in Education* (Springer, Singapore, 2020) at 225; Ministry of Education "Primary and Secondary Education" <www.education.govt.nz> (10 April 2024); and Andreas Zimmermann and others *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford University Press, Oxford, 2011).

⁷⁰ This is the case in other international treaties as well. See Sandra Fredman and others "Recognizing Early Childhood Education as a Human Right in International Law" (2022) 22 Human Rights Law Review 1.

⁷¹ At 3.

⁷² *Transforming Our World: The 2030 Agenda for Sustainable Development* UN Doc A/RES/70/1 (21 October 2015) at [4.2]

possible regarding access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges, and the award of scholarships.⁷³

1.5.1.2 International Human Rights Law

Although there are provisions explicitly setting out the rights of refugees, international human rights instruments were drafted generally for individuals regardless of their migration status. The Universal Declaration of Human Rights (UDHR)⁷⁴ states that all human beings are born free and equally entitled to dignity⁷⁵ and rights without distinction based on race, colour, sex, language, religion, national or social origin.⁷⁶ It provides that everyone has the right to education, that it shall be free, at least in the elementary and fundamental stages, and elementary education shall be compulsory.⁷⁷

Civil and political rights are provided under the International Covenant on Civil and Political Rights (ICCPR).⁷⁸ It requires states to respect the rights of all individuals within their territory without any distinction.⁷⁹ It sets out the child's right to be protected,⁸⁰ to be registered after birth⁸¹ and to acquire a nationality.⁸² Some of the other rights that extend to everyone, including refugee children, comprise the right to life,⁸³ liberty,⁸⁴ and participation.⁸⁵ The ICCPR recognises parents' liberty to choose their children's religious education in line with their beliefs.⁸⁶ Other rights relevant to refugee children provided for in the ICCPR include non-discrimination,⁸⁷ minority rights,⁸⁸ and specific safeguards protecting aliens on their expulsion.⁸⁹ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)⁹⁰ also provides for refugee rights such as non-refoulement.⁹¹ Since human rights are interrelated and interdependent, civil and political rights can

⁷³ Refugee Convention, above n 60, at art 22(2).

⁷⁴ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR].

⁷⁵ At art 1.

⁷⁶ At art 2.

⁷⁷ UDHR, above n 74, at art 26.

⁷⁸ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

⁷⁹ At art 2.

⁸⁰ At art 24(1).

⁸¹ At art 24(2).

⁸² At art 24(3).

⁸³ At art 6.

⁸⁴ At art 9.

⁸⁵ At art 25.

⁸⁶ At art 18(4).

⁸⁷ At art 26.

⁸⁸ At art 27.

⁸⁹ At art 13.

⁹⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [CAT].

⁹¹ At art 3.

ensure that refugee children have access to education, regardless of their legal status, and prevent disruptions in their education. This can facilitate successful resettlement outcomes for these children.

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹² sets out economic, social and cultural rights that everyone is entitled to, including refugee children, such as social security,⁹³ health,⁹⁴ and an adequate standard of living.⁹⁵ Article 13(1) provides for the right to education and shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen human rights and fundamental freedoms. It further provides that education should enable all persons to participate effectively in a free society and promote understanding, tolerance, and friendship among all nations and all racial, ethnic, or religious groups. The wording of the right to education under the ICESCR demonstrates how the right is crucial for refugees and, if realised, will guarantee respect for other human rights and ensure they resettle and integrate well in the new host country.

1.5.1.3 International Children's Rights

Even though international human rights law treaties apply to children, children's rights are expressly provided for under international children's rights law due to their vulnerabilities and need for protection. Children's rights were explicitly recognised in 1924 when the League of Nations adopted the Declaration on the Rights of the Child (Geneva Declaration).⁹⁶ The Geneva Declaration recognised the duty owed to children regarding their rights to the means for development,⁹⁷ special assistance when in need,⁹⁸ priority for relief,⁹⁹ economic freedom and protection from exploitation,¹⁰⁰ and an upbringing that instils social consciousness and duty.¹⁰¹ The United Nations adopted the Declaration of the Rights of the Child in 1959,¹⁰² which also recognised children's rights, provided for the right to education and comprehensively outlined what it entails.¹⁰³

⁹² International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 03 January 1976) [ICESCR].

⁹³ At art 9.

⁹⁴ At art 12.

⁹⁵ At art 11.

⁹⁶ League of Nations Declaration of the Rights of the Child (adopted 26 September 1924).

⁹⁷ At art 1.

⁹⁸ At art 2.

⁹⁹ At art 3.

¹⁰⁰ At art 4.

¹⁰¹ At art 5.

¹⁰² United Nations Declaration of the Rights of the Child UN Doc A/RES/1386(XIV) (20 November 1959).

¹⁰³ At Principle 7. Education to promote culture and provide for equal opportunities to develop and to become a useful member of society. Further that play and recreation to be directed to same purpose as education.

The UNCROC was adopted in 1989 and provides for the rights of all children. Article 22(1) sets out rights specific to refugee children. It requires states to ensure that a refugee child or a child seeking refugee status receives appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention and other international human rights or humanitarian instruments. Article 22 thus imposes an additional obligation for states to consider any additional protection and humanitarian assistance needed for a refugee child to effectively enjoy their rights due to their distinct vulnerabilities and developmental needs.¹⁰⁴ The UNCROC further sets out rights that are relevant to children's refugee and developmental experiences.¹⁰⁵ These include the right to life, survival and development,¹⁰⁶ not to be separated from their parents,¹⁰⁷ health and well-being,¹⁰⁸ safety and protection,¹⁰⁹ and the right to have their opinion taken into account in decisions that affect them,¹¹⁰ that their best interests shall be a primary consideration in all actions concerning them.¹¹¹ The right to education is provided for by art 28 of the UNCROC, and state parties must recognise the right of the child to education, with a view to achieving it progressively and based on equal opportunity. The UNCROC also requires education to be directed towards the development of the child, human rights, cultural identity, peace and respect for the natural environment.¹¹² In considering the above international treaties, it is well established that refugee children have rights to be protected as recognised explicitly by the UNCROC and thus have special needs and are in need of legal protection.¹¹³

1.5.2 New Zealand Domestic Law and Policy

By ratifying the Refugee Convention, UNCROC and other international human rights treaties, New Zealand is under an obligation to protect the rights of refugee children. The Immigration Act 2009 provides a statutory basis for determining obligations owed by New Zealand under the Refugee Convention and the Protocol Relating to the Status of Refugees.¹¹⁴ As such, the Refugee Convention criteria are used to select refugees. Section 126 of the Immigration Act 2009 provides for the recognition of refugees selected outside New Zealand. These are quota refugees and are the majority

¹⁰⁴ Jason M Pobjoy "Article 22 Refugee Children" in John Tobin (ed) *The UN Convention on the Rights of The Child A Commentary* (Oxford University Press, Oxford, 2019) at 838.

¹⁰⁵ Jeanette Lawrence and others "The Rights of Refugee Children and the UN Convention on the Rights of the Child" (2019) 8(3) *Laws* at 4.

¹⁰⁶ UNCROC, above n 57, at art 6.

¹⁰⁷ At art 9.

¹⁰⁸ At art 24.

¹⁰⁹ At arts 22, 33, 36, 38.

¹¹⁰ At art 12.

¹¹¹ At art 3.

¹¹² At art 29.

¹¹³ Lawrence and others, above n 105, at 1.

¹¹⁴ Immigration Act, s 24(a).

of refugees in New Zealand. They are selected from the United Nations High Commissioner for Refugees (UNHCR) camps and granted refugee status before they arrive in the country.¹¹⁵ Refugee status for asylum seekers is also determined using the Refugee Convention as provided under the Immigration Act 2009. Once granted refugee status, they are referred to as convention refugees.

The Immigration Act 2009 also codifies obligations under the CAT¹¹⁶ and the ICCPR,¹¹⁷ which set out civil and political rights and determine to whom the obligations are owed.¹¹⁸ This framework is relied upon to grant refugee status to all refugees, including quota refugees, convention refugees, and asylum seekers. It is worth noting that the Act is focused on the determination and regulation of the status as a refugee and not on refugees' livelihood, which requires the guarantee of social, economic, and cultural rights of refugee children. These are not explicitly provided for within the New Zealand domestic legislation, save for the international human rights treaties that New Zealand has ratified. The accessibility of economic, social and cultural rights in New Zealand has been deemed discretionary and dependent on policies of different governments and ministries.¹¹⁹ It has also been noted that access to such rights differs depending on the region in terms of the availability and quality of mainstream and refugee resettlement services. Access is also affected by short-term funding for refugee services and discrimination due to New Zealand's failure to incorporate economic, social and cultural rights in its human rights framework.¹²⁰ This may result in refugee children's social, economic, and cultural rights not being considered in the same manner as other civil and political rights.

The right to education is provided for in the Education and Training Act 2020, which states that every domestic student is entitled to free enrolment and free education at state schools.¹²¹ Section 24(1) further provides that students who have special educational needs (whether because of disability or otherwise) have the same rights to education as others. These rights are provided to establish a system that supports students to gain the skills and knowledge needed to fully participate in the wider society by ensuring all children can exercise the right to an education and support students' health, safety, and well-being,¹²² among other things. Section 10 of the Education and Training Act 2020 defines a

¹¹⁵ Louise Humpage "Refugee Protection and Settlement Policy in New Zealand" in Steven Ratuva *The Palgrave Handbook of Ethnicity* (Springer Nature, Singapore, 2019) 1689 at 1691.

¹¹⁶ CAT, above n 90.

¹¹⁷ ICCPR, above n 78.

¹¹⁸ Immigration Act, s 24(b)(i)(ii).

¹¹⁹ Deborah Manning and Erin James "Refugees and Those in Need of Protection" in Margaret Bedggood and Kris Gledhill (eds) *Law into Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) at 227.

¹²⁰ Chris Mahony and others "Aspirational Yet Precarious: Compliance of New Zealand Refugee Settlement Policy with International Human Rights Obligations" (2017) 3 *International Journal of Migration and Border Studies* 5 at 14.

¹²¹ Education and Training Act 2020, s 33(1).

¹²² Section 32(b).

domestic student as a New Zealand citizen or a holder of a residence class visa. Once granted refugee status, refugee children acquire a permanent residence visa. As such, the Act includes refugee children in the provision for the right to education. Although this is the case, the research will delve deeper into what the provisions of the Act mean in terms of refugee children and if they adequately take into account the needs of refugee children.

In 2012, the New Zealand Refugee Resettlement Strategy, mentioned earlier, was developed as a government framework to guide the settlement of quota refugees and to assist them in becoming self-sufficient, socially integrated, and independent.¹²³ In 2023, the vision statement, outcomes and coverage were updated following the revision of the Strategy.¹²⁴ The development of new success indicators and data sources to monitor outcomes is still underway.¹²⁵ The Strategy has five intended outcomes, which were reconfirmed as fundamental aspects of successful settlement and integration, one of them being education.¹²⁶ The Strategy is aimed at ensuring that refugees “settle successfully, achieve their goals, and thrive in Aotearoa”.¹²⁷ The importance of adequate resettlement support as required by international standards to ensure that refugees can lead a full life and contribute to New Zealand’s future prosperity has been emphasised by the Human Rights Commission.¹²⁸ It notes that successful resettlement involves understanding refugees’ cultures, beliefs, backgrounds, and their challenges in settling into their new host country.¹²⁹ This research therefore seeks to determine how these factors are taken into account in the provision of education to ensure refugee children resettle well.

1.5.3 Reception of Refugees in New Zealand

New Zealand has been accepting refugees for resettlement well before the Second World War and has been doing so regularly since 1987.¹³⁰ New Zealand accepts quota refugees¹³¹ and convention

¹²³ Ministry of Business, Innovation and Employment *New Zealand Refugee Resettlement Strategy-Priorities to 2020* (April 2018) at 3.

¹²⁴ Cabinet Economic Development Committee, above n 12, at [1].

¹²⁵ At [7].

¹²⁶ At [29.2].

¹²⁷ Immigration New Zealand “New Zealand Refugee Resettlement Strategy” <www.immigration.govt.nz>. The Strategy further notes that successful settlement includes “feeling safe and well, having a sense of belonging and being able to participate in and contribute to all aspects of life (social, economic, cultural, and civic)”.

¹²⁸ Human Rights Commission “Human Rights in New Zealand Today – Ngā Tika Tangata o te Motu” (2010) HRC <www.hrc.co.nz> at 342.

¹²⁹ At 342.

¹³⁰ Ministry of Business, Innovation and Employment *Immigration Factsheets- Refugees and Asylum Seekers* (February 2021).

¹³¹ These are recognised as refugees by the UNHCR and arrive in New Zealand on a government mandated programme. See Immigration New Zealand *Claiming Refugee and Protection Status in New Zealand* (November 2022) at 17; Ministry of Business, Innovation and Employment “Refugee Quota Programme” <www.mbie.govt.nz>.

refugees,¹³² but the research will only be concerned with quota refugees because the majority of refugees are quota refugees.

A formal annual quota was established for refugees' resettlement in 1987, which was initially a quota of 800.¹³³ While this number has fluctuated over the years,¹³⁴ in 2018, it increased to 1,500 per year from July 2020.¹³⁵ Since 2014, about 10,100 quota refugees have been resettled in New Zealand.¹³⁶ Upon arrival, all refugees, including children, are enrolled in a five-week reception programme which prepares them for their new lives in New Zealand as part of the New Zealand Resettlement Strategy. The reception programme focuses on health issues and settlement planning, including orientation to working and living in New Zealand and preparing refugee children to be introduced to the New Zealand education system.¹³⁷ The Ministry of Education provides different forms of support to assist refugee children in integrating well in schools. It offers to fund up to five years of English language support to refugee students and three years for New Zealand born students of refugee parents.¹³⁸

1.6 Problem Statement

It is acknowledged that the right to education of refugee children is realised to a certain extent in New Zealand, as demonstrated above. Louise Humpage notes that despite New Zealand being recognised internationally for quality compulsory education, a refugee child's access to compulsory education may still be affected by the English language, geographic region, limited access to information technology, as well as how schools deal with bullying and discrimination, among other factors.¹³⁹ These are some of the challenges in providing education that may interfere with the right to education and, subsequently, other human rights.

There are also legal and policy issues that may limit the realisation of the right to education of refugee children. This research highlights how the Education and Training Act 2020 does not sufficiently advance the realisation of the rights of refugee children in education, as it does not clearly set out the

¹³² These are claimants who have fled from their own country because they fear persecution or harm and are recognised as a refugee or protected person in New Zealand. See Immigration New Zealand *Claiming Refugee and Protection Status in New Zealand* (November 2022) at 17; and New Zealand Government "Refugees Coming to New Zealand" <www.immigration.govt.nz>.

¹³³ New Zealand Parliament *The New Zealand Refugee Quota: A Snapshot of Recent Trends* (31 August 2020).

¹³⁴ The history on resettlement of refugee children in New Zealand is discussed in more detail in Chapter Two. See footnotes 232-234 and accompanying text.

¹³⁵ Immigration New Zealand *Immigration Factsheets- Refugees and Asylum Seekers* (September 2018).

¹³⁶ Immigration New Zealand "Refugee and Protection Statistics Pack" (31 December 2024) <www.immigration.govt.nz>.

¹³⁷ Mahony and others, above n 120, at 13.

¹³⁸ Ministry of Education "ESOL Funding" (21 December 2020) <www.education.govt.nz>.

¹³⁹ Humpage, above n 115, at 1703.

rights of children as outlined in the UNCROC. It has been argued that the reference to children's rights in the then Education and Training Bill was "vague and poorly defined" as it was unclear whether all children's rights in education or the right to attend school were to be realised.¹⁴⁰ The inclusion of a clause clearly defining children's rights in the UNCROC and other international human rights treaties in the Act was recommended.¹⁴¹ This thesis explores why including such a clause is crucial and how it is especially beneficial for refugee children.

The Ministry of Education Refugee Handbook for Schools (the Handbook) is the main document that guides education practitioners in providing education to refugee children. Although refugee children are granted permanent residence status and thus have the same rights in education as those of citizens, as noted above, the Handbook suggests that there are additional services, measures and provisions needed for refugee children. Some of the reasons are that New Zealand schools may have a completely different education style than what they were accustomed to, and most refugee children would usually have their previous education interrupted.¹⁴² The Handbook recognises the different processes and procedures schools can follow to improve successful adjustment and learning.¹⁴³ It also provides some pointers on developing a much needed school policy incorporating "reactive approaches to support students from a refugee background learning and self esteem."¹⁴⁴ There is also mention of the need for effective enrolment to ensure students of refugee backgrounds succeed in the future.¹⁴⁵ It has been argued that the document focuses more on learning differences and making students feel welcome instead of how targeted support services can be provided.¹⁴⁶ Although the Education and Training Act 2020 outlines one of the board's objectives in schools as ensuring that it gives effect to the rights of students,¹⁴⁷ the quality of education and support afforded to refugee children may be inconsistent owing to the self-governing nature of schools.¹⁴⁸ Therefore this research will help inform how rights of refugee children can be better realised in schools.

Education for refugee children is implemented and monitored by the Ministry of Education under education policies and by the Ministry of Business, Innovation and Employment (MBIE) under the Refugee Resettlement Strategy since education is one of the goals of the Strategy, as noted earlier.

¹⁴⁰ Save the Children "Submission to the Education and Workforce Committee on the Education and Training Bill" (19 February 2020), at [4].

¹⁴¹ At [4(2)].

¹⁴² Ministry of Education "Refugee Handbook for Schools" (ESOL Team, National Operations Ministry of Education Auckland 2003) at 6.

¹⁴³ At 8.

¹⁴⁴ At 10.

¹⁴⁵ At 16.

¹⁴⁶ Mahony and others, above n 120, at 14.

¹⁴⁷ Education and Training Act, s 127.

¹⁴⁸ Mahony and others, above n 120, at 13.

The integration outcome for education under the Strategy is the only one measured against a target compared to others that rely on success indicators. The only success target is the proportion of refugee school leavers receiving the National Certificate of Educational Achievement (NCEA) level 2¹⁴⁹ after five years or more in the New Zealand education system.¹⁵⁰ This target is a very narrow measure and cannot fully indicate the extent to which the right to education is realised. It does not account for educational achievement at other stages of education, and, therefore, it is difficult to determine how other refugee children are doing. This research thus aims to consider the implementation of the right to education of refugee children, assess whether it is adequately monitored and what should be done for the benefit of refugee children. There have also been concerns about the exclusion of refugee children's special needs from public policy and academic research due to the focus on migrant and multicultural education, and this demonstrates a lack of targeted policies and frameworks required to deal with the educational disadvantages of young refugees. As such, this invisibility has been seen to limit their cultural, social, and economic integration.¹⁵¹ Therefore, this research ensures that the focus shifts to make their plight more visible.

It is in the area of monitoring the implementation of the right that another issue arises. Refugee children are not well captured in official statistics. Although there are official statistics on the number of quota refugees resettled in New Zealand, the breakdown of how many of these refugees are children is not provided. The lack of comprehensive data collection on refugee children is a common problem across different states.¹⁵² Although this is the case, the lack of such information is a significant issue affecting the educational resettlement and integration of refugee children in New Zealand. This research demonstrates that the lack of readily available information on refugee children makes it difficult, or rather impossible, to determine the effectiveness of the provision of education to refugee children in New Zealand. It would be difficult, for instance, to determine whether there are any refugee children not in school if it is not clear how many refugee children are in the country. The Organisation for Economic Co-operation and Development (OECD) has noted that children's risks and vulnerabilities are not apparent and not dealt with if there is no reliable data, and further, policy design and implementation become a challenge.¹⁵³ Data collection is essential to give visibility to

¹⁴⁹ The National Certificate of Educational Achievement (NCEA) is the main qualification for secondary school students in New Zealand. Level 2 is one of three NCEA that recognise the general achievement of 16- to 19-year-old learners. See New Zealand Qualifications Authority "About NCEA" <www2.nzqa.govt.nz>. New Zealand Qualifications Authority "National Certificate of Educational Achievement (Level 2)" <www.nzqa.govt.nz> at 1.

¹⁵⁰ Immigration New Zealand "New Zealand Refugee Resettlement Strategy: Success Indicators and Measures 2023" <www.immigration.govt.nz>.

¹⁵¹ Sandra Taylor and Ravinder Kaur Sidhu "Supporting Refugee Students in Schools: What Constitutes Inclusive Education?" (2012) 16(1) *International Journal of Inclusive Education* 39 at 42.

¹⁵² OECD *Refugee Education: Integration Models and Practices in OECD Countries* (OECD Education Working Paper No 203, 13 May 2019) at 7.

¹⁵³ At 53.

potentially vulnerable populations such as children. Complete and reliable data can also be used to formulate, monitor, and evaluate policies and programmes at all stages of schooling.

The Committee on the Rights of the Child (CRC) has recommended that New Zealand develop a comprehensive data collection mechanism and disaggregate data by age, sex, disability, geographic location, ethnic origin, nationality, and socio-economic background to facilitate analysis of all children's situations, including refugee, asylum-seeking, and migrant children, and children in other conditions of vulnerability.¹⁵⁴ The CRC has also, in the past, noted its concern that activities undertaken to ensure the integration of equal opportunities for refugee children may not be entirely effective in achieving the aim of integration.¹⁵⁵ It thus recommended that "the State party continue its efforts to integrate refugee children into society and undertake an evaluation of current programmes to improve their effectiveness."¹⁵⁶

1.7 Literature Review

Having highlighted the issues that are in place affecting the right to education for refugee children, this literature review is undertaken for a number of reasons. It sets out the scope of the research, identifies research on education for refugee children in New Zealand, highlights the gaps in existing research, and the contribution to be made to literature. To achieve this, it first discusses the uniqueness of refugeehood, the various legal frameworks that protect the rights of refugee children and theorising children's rights. A consideration of the role of education in the resettlement and integration of refugee children follows.

A refugee is defined and protected by specific international refugee law and international human rights law. As noted earlier, a refugee is defined under international refugee law as a person fleeing persecution or conflict in their country of origin.¹⁵⁷ On the other hand, there is no definition of a migrant under international law. The Office of the United Nations High Commissioner for Human Rights (OHCHR) defines an international migrant as "any person who is outside a state of which they are a citizen or national, or, in the case of a stateless person, their state of birth or habitual residence."¹⁵⁸ Refugees and migrants are both entitled to the respect, protection and fulfilment of all

¹⁵⁴ Committee on the Rights of the Child (CRC) *Concluding Observations on the Fifth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016) at [10(a)].

¹⁵⁵ CRC *Concluding Observations: New Zealand Consideration of Reports Submitted by States Parties under Article 44 of the Convention* UN Doc CRC/C/15/Add.216 (27 October 2003) at [45].

¹⁵⁶ At [46].

¹⁵⁷ Refugee Convention, above n 60, at art 1A(2).

¹⁵⁸ OHCHR "Recommended Principles and Guidelines on Human Rights at International Borders" (2014) <www.ohchr.org> at 4.

human rights, regardless of status, subject to defined and limited exceptions.¹⁵⁹ Some scholars argue that although migrants and refugees are different groups, they should be afforded the same protection. Annick Pijnenburg and Conny Rijken believe that refugees and migrants should be referred to as a single overarching group entitled to rights under international human rights law to ensure more robust human rights protection.¹⁶⁰ However, the UNHCR has noted that using “migrants” to refer to or include refugees has the risk of undermining access to legal protections specific to refugees.¹⁶¹

An emphasis has been placed on the need to differentiate between the two categories. Maria Hayward notes that refugees are different in that they do not prepare to live in a new country, and the forced migration tends to result in trauma and loss.¹⁶² Kaaren Frater-Mathieson also argues that when the complicated migration process co-exists with the often traumatic and violent migration experienced by refugees, the stress is usually more than the natural coping capacities.¹⁶³ It is acknowledged that migrant children are also adversely affected by migration.¹⁶⁴ Although migrants can be in vulnerable situations, the OHCHR notes that they are not inherently vulnerable like refugees.¹⁶⁵ Miquel Angel Essomba notes that refugees share a large number of characteristics with migrants. Still, the nature of refugees’ migration process requires specific care, both during the arrival phase and throughout the prolonged integration process and their access to social and cultural rights.¹⁶⁶ It has been observed that there has been no differentiation between refugees and other migrants in countries such as New Zealand, where there are systematic policies and approaches for language education of migrants. The same education programmes tend to be provided to both groups as they are considered English language learners.¹⁶⁷

There has been caution against the increasing trend to use “migrant” as a term to include both migrants and refugees, as this can result in serious consequences for those requiring international protection.¹⁶⁸ This, therefore, provides a rationale for the need to focus on refugee children. As such, the research

¹⁵⁹ OHCHR “Differentiation between Migrants and Refugees” <www.ohchr.org>.

¹⁶⁰ Annick Pijnenburg and Conny Rijken “Moving Beyond Refugees and Migrants: Reconceptualising the Rights of People on the Move” (2021) 23(2) *Interventions* 273 at 290.

¹⁶¹ UNHCR “Emergency Handbook 4th Edition- Migrant Definition” (February 2007) <www.unhcr.org> at 1.

¹⁶² Maria Hayward “Teaching as a Primary Therapeutic Intervention for Learners from Refugee Backgrounds” (2017) 28(2) *Intercultural Education* 165 at 166.

¹⁶³ Kaaren Frater-Mathieson “Refugee Trauma, Loss and Grief” in Richard Hamilton and Dennis Moore (eds) *Educational Interventions for Refugee Children* (Routledge Falmer, London, 2004) 9 at 12.

¹⁶⁴ See generally OHCHR “Differentiation between Migrants and Refugees”, above n 159.

¹⁶⁵ See generally OHCHR “Differentiation between Migrants and Refugees”, above n 159.

¹⁶⁶ Miquel Angel Essomba “The Right to Education of Children and Youngsters from Refugee Families in Europe” (2017) 28(2) *Intercultural Education* 206 at 207.

¹⁶⁷ UNESCO AND UNICEF *Approaches to Language in Education for Migrants and Refugees in the Asia-Pacific Region* (2020) at 7.

¹⁶⁸ Shabia Mantoo ““Refugees” or “Migrants”? How Word Choices Affect Rights and Lives” (20 December 2023) <www.unhcr.org>.

only focuses on refugee children in New Zealand to the exclusion of migrants. The treatment of refugee children as migrants can result in their issues not being explored in greater depth, and this research seeks to contribute to literature by highlighting the need for extra protection for refugee children. There is also insufficient research on the impact of the provision of the same or different supports for migrant and refugee children in New Zealand. This research will significantly contribute to literature to demonstrate how this can be detrimental to the realisation of refugee children's rights.

1.7.1 International Refugee Law, International Human Rights Law and International Child Rights Law

As highlighted, the rights of refugees are provided by international refugee law through the Refugee Convention¹⁶⁹ and the 1967 Protocol Relating to the Status of Refugees,¹⁷⁰ through international human rights law¹⁷¹ and international child rights law.¹⁷² It has been highlighted earlier that there are benefits to these different areas of international law influencing one another. As noted in the background section, international refugee law establishes and determines one's status as a refugee and sets out refugee rights. There have been debates on which framework specifically provides better protection for refugees and refugee children. It has been argued that the Refugee Convention provides no enforcement mechanism for refugees.¹⁷³ Regarding the refugee law and human rights frameworks, James C Hathaway, Anne K Cusick¹⁷⁴ and Natalie Baird note that the protection afforded by the Refugee Convention tends to depend on one's refugee status.¹⁷⁵ In contrast, human rights treaties do not usually differentiate between nationals and non-nationals.¹⁷⁶ Hathaway also notes that the primary purpose of international refugee law is "to govern disruptions of regulated international migration according to the interests of states" and unlike the international human rights approach, it is not specifically intended to meet the needs of refugees.¹⁷⁷ A framework solely informed by international refugee law cannot adequately achieve the aims of this research. While it can be concluded that human rights law affords better protection to refugees, there are nonetheless arguments that the two frameworks can co-exist and afford better protection to refugees. Hathaway contends that the Refugee

¹⁶⁹ See generally Refugee Convention, above n 60.

¹⁷⁰ United Nations *Protocol Relating to the Status of Refugees* 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1976, 31 January 1967). [1967 Refugee Protocol].

¹⁷¹ See generally ICCPR, above n 78. ICESCR, above n 92. CAT, above n 57.

¹⁷² See generally UNCROC, above n 57.

¹⁷³ Natalie Baird "The Rights of Refugees" in Margaret Bedggood, Kris Gledhill and Ian McIntosh (eds) *International Human Rights Law in Aotearoa New Zealand* (Thomson Reuters, New Zealand 2017) at 397.

¹⁷⁴ James Hathaway and Anne K Cusick "Refugee Rights are Not Negotiable" (2000) 14 *Georgetown Immigration Law Journal* 481.

¹⁷⁵ Baird, above n 173, at 399.

¹⁷⁶ At 399.

¹⁷⁷ James Hathaway "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31(1) *Harvard International Law Journal* 129 at 133.

Convention is part of international human rights law and that refugee law is to be viewed as “a system for the surrogate or substitute protection of human rights” when states fail to provide human rights protection.¹⁷⁸ On the other hand, Baird notes that human rights law and refugee law cannot be considered branches of a holistic regime.¹⁷⁹ Both frameworks play different roles, but as pointed out by the UNHCR, international human rights law complements international refugee law as it defines additional standards to be met and explains other rights.¹⁸⁰ There is literature highlighting the benefit of applying a human rights-based approach to policies relating to refugee children.¹⁸¹

Although refugee children are humans and thus fall under the scope of international human rights, it has been recognised that children are vulnerable and in need of additional protection. The UNCROC affords specific provision for refugee children, requiring that they be treated like any other citizen child.¹⁸² The need for a children’s rights framework for investigating the rights of refugee children is essential as the Refugee Convention was not drafted in light of a children’s rights framework and does not explicitly identify children as beneficiaries of refugee protection.¹⁸³ This is delved into in more detail in Chapter Two. Samantha Arnold contends that children have remained invisible in historical and contemporary refugee law.¹⁸⁴ Jason Pobjoy notes that art 22 of the UNCROC suggests an acknowledgement by the international community that refugee children have distinct vulnerabilities and development needs.¹⁸⁵ The literature discussed demonstrates the need to adopt a framework that ensures children’s rights are championed. This thesis further contributes to literature by showing how adopting a child rights-based framework advances the protection of the rights of refugee children.

In reconciling international refugee law and international children’s rights law, Pobjoy cautions against focusing on the debate of which framework, between refugee law and child law, provides better protection. He is of the view that the emphasis should be on protection that responds to both the difficulties of a refugee and the child’s distinct needs and vulnerabilities; hence, the Refugee Convention should be interpreted by referencing the UNCROC.¹⁸⁶ Arnold also recognises the possibility of the Refugee Convention being interpreted through a human rights approach. She is of

¹⁷⁸ Hathaway *The Rights of Refugees Under International Law*, above 4, at 5.

¹⁷⁹ Baird, above n 173, at 398.

¹⁸⁰ UNHCR “UNHCR Resettlement Handbook” (July 2011) <www.unhcr.org> at 14.

¹⁸¹ Lucie Vanderpyl and others “The Potential of a Rights-Based Approach to Refugee-Focused Mental Health Policy in Aotearoa New Zealand” (2024) 20(4) *Kōtuitui: New Zealand Journal of Social Sciences Online* 594.

¹⁸² UNCROC, above n 57, at art 22.

¹⁸³ Samantha Arnold *Children’s Rights and Refugee Law: Conceptualising Children within the Refugee Convention* (Routledge, London, 2017) at 2.

¹⁸⁴ At 2.

¹⁸⁵ Pobjoy “Article 22 Refugee Children”, above n 104, at 826.

¹⁸⁶ Jason M Pobjoy “A Child Rights Framework for Assessing the Status of Refugee Children” in Satvinder S Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar, Cheltenham, 2013) at 94.

the view that a children's rights approach should exist alongside it.¹⁸⁷ This shows that a child rights-based framework is necessary for examining the right to education for refugee children as it enables consideration of rights under the various international instruments. The international human rights law and international children's rights law frameworks will ensure that there is an extensive examination of the extent to which the right to education of refugee children in New Zealand is realised. It is worth noting that a child rights perspective is not widely applied in refugee children's studies.¹⁸⁸ Therefore, the research will contribute towards filling this gap.

1.7.2 Child Rights and Childhood Theories

Children's rights and childhood theories have been recognised as providing a lens through which child rights researchers can further explore the realisation of children's rights. Michael Freeman notes that sociology provides understanding to those aiming to improve the status of children using a rights perspective. He notes that the sociology of childhood can shed light on the injustices children endure and provide an understanding of why these wrongs are perpetrated against children.¹⁸⁹ The usefulness of the sociological understanding of childhood in rights-based research is evidenced by the fact that it is centred on the notion that children are competent and should be regarded as participants and contributors to society. This is consistent with a rights perspective, which recognises children as active subjects.¹⁹⁰

A child-centred theory of children's rights is considered to have the potential of improving or increasing the likelihood of improved outcomes.¹⁹¹ Research on refugee education has highlighted the difference between legal rights and the actual realisation of rights in educational settings aimed at the integration of refugees.¹⁹² Lucinda Ferguson argues that a theoretical basis of children's rights is closely connected to their legal implementation.¹⁹³ As such, this thesis will be rooted in a children's rights theory informed by sociological and educational theory. A combination of different theories presents an enhanced way of studying the right to education from a legal perspective, and this will

¹⁸⁷ Arnold, above n 183, at 4.

¹⁸⁸ Ziba Vaghri and others "Refugee and Asylum-Seeking Children: Interrupted Child Development and Unfulfilled Child Rights" (2019) 6(11) *Children* 120; and Linda Mitchell and Olivera Kamenarac "Refugee Children and Families' Positioning within Resettlement and Early Childhood Education Policies in Aotearoa New Zealand" (2022) 17(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 224.

¹⁸⁹ Michael Freeman "Towards a Sociology of Children's Rights" in *Law and Childhood Studies: Current Legal Issues* (Oxford University Press, Oxford, 2012) at 36.

¹⁹⁰ Quennerstedt and Quennerstedt, above n 6, at 122.

¹⁹¹ Ferguson, above n 54, at 177.

¹⁹² Niclas Rönnerström and Klas Roth "Welcoming Refugee Children with a Moral, Rather Than Merely Legal, Right to Education: Ideas for a Cosmopolitan Design of Education" (2024) 22(5) *Policy Futures in Education* 724 at 729.

¹⁹³ Ferguson, above n 54, at 182.

add to the existing literature. It has been observed that much research on children's rights in education is not grounded or based on theory.¹⁹⁴

There are two conventional children's rights theories, and these are the will and interest theory. The will theory suggests that rights protect a child's choice and that a child only has a right if they have sufficient capacity to exercise the right themselves.¹⁹⁵ Ferguson argues that the difficulty with this theory is that young children, including infants, will lack the capacity required as such, cannot be recognised as a class holding rights.¹⁹⁶ If such a theory is relied upon, it would suggest that a child rights framework cannot possibly serve as a better framework for the rights of refugee children than the Refugee Convention.

On the other hand, the interest theory posits that a person has a right if their interests are protected "by the imposition of (legal or moral) normative constraints on the acts and activities of other people concerning the object of one's interests."¹⁹⁷ It has been argued that such a rights model supports the notion that children are no less precious because of their lack of adult capacities.¹⁹⁸ Katherine H Federle argues that even though the interest theory is advantageous as it allows reference to children's rights without considering the child's ability to obligate others, it nonetheless disadvantages children because it emphasises that children are dependent and incompetent.¹⁹⁹ Although this is the case, this research will demonstrate the usefulness of this theory in advancing the rights of refugee children.

1.7.3 Role of Education in the Resettlement and Integration of Refugee Children

Resettlement is a mechanism for providing international protection and meeting the specific needs of refugees whose fundamental rights are at risk.²⁰⁰ Education can thus facilitate successful resettlement and integration into a new society and can support the well-being of refugee-background students as they navigate the many changes and challenges resettlement brings.²⁰¹ For refugees, education is the best way of restoring a sense of purpose and dignity after the trauma of displacement.²⁰² Julie

¹⁹⁴ Ann Quennerstedt "Children's Rights Research Moving into the Future: Challenges on the Way Forward" (2013) 21(2) *The International Journal of Children's Rights* 233 at 239.

¹⁹⁵ Ferguson, above n 54, at 182.

¹⁹⁶ At 192.

¹⁹⁷ Neil MacCormick *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, New York, 1982) at 154.

¹⁹⁸ Tom Campbell "The Rights of the Minor" in Philip Alston and others (eds) *Children, Rights and the Law* (Clarendon Press, New York, 1992) at 5.

¹⁹⁹ Katherine H Federle "Rights Not Wrongs" (2009) 17(2) *The International Journal of Children's Rights* 321 at 324.

²⁰⁰ UNHCR "UNHCR Resettlement Handbook" (July 2011) <www.unhcr.org> at 3.

²⁰¹ Debbie Sutton, Alison Kearney and Karen Ashton "Improving Educational Inclusion for Refugee-Background Learners through Appreciation of Diversity" (2021) 27(6) *International Journal of Inclusive Education* 1 at 2.

²⁰² UNHCR "Stepping Up: Refugee Education in Crisis" (2019) <www.unhcr.org> at 5.

Matthews notes that educational settings are critical in providing stability in the lives of refugee students.²⁰³ It has been further stated that schools have a pivotal role in fostering a sense of belonging for refugee children.²⁰⁴ As such, education should be central to the resettlement and integration of refugee children in New Zealand. It strengthens refugee children's resilience and empowers them through knowledge and skills to live productive, fulfilling and independent lives.²⁰⁵ In addition to providing stability and setting refugee children up for the future, education has been recognised as an important vehicle for the wider and fuller achievement of human rights.²⁰⁶ The Committee on Economic, Social and Cultural Rights (CESCR) also notes that education is the main vehicle by which economically and socially marginalised adults and children can get out of poverty and participate fully in their communities."²⁰⁷

Katrien Beeckman is of the view that the right to education unlocks other human rights, and the successful implementation of the right to education depends on the simultaneous co-realisation of other human rights such as food, health, and dignity.²⁰⁸ This has also been reiterated by UNESCO.²⁰⁹ Michelle Foster contends that the deprivation of education can result in various human rights violations, not only the right to education.²¹⁰ Benjamin Mallon also notes that the denial of the right to education can compromise other rights, both in the present and in the future.²¹¹ The research contributes to existing literature by exploring how non-realisation of the right to education may violate other rights of refugee children in New Zealand.

In monitoring the extent to which the right to education of refugees is realised, some scholars have argued that education systems with high-stakes test outcomes cannot account for the needs of refugees,

²⁰³ Julie Matthews "Schooling and Settlement: Refugee Education in Australia" (2008) 18(1) *International Studies in Sociology of Education* 31 at 32.

²⁰⁴ Sandy Gifford, Ignacio Correa-Velez and Robyn Sampson *Good Starts for Recently Arrived Youth with Refugee Backgrounds: Promoting Wellbeing in the First Three Years of Settlement in Melbourne, Australia* (Melbourne, Refugee Health Research Centre & Victorian Foundation for Survivors of Torture, October 2009) at 82; and Linda Mitchell and Amanda Bateman "Belonging and Culturally Nuanced Communication in a Refugee Early Childhood Centre in Aotearoa New Zealand" (2018) 19(4) *Contemporary Issues in Early Childhood* 379.

²⁰⁵ UNHCR "UNHCR Resettlement Handbook," above n 200, at 3.

²⁰⁶ Ann Quennerstedt and Mikael Quennerstedt, "Researching Children's Rights in Education: Sociology of Childhood Encountering Educational Theory" (2014) 35(1) *British Journal of Sociology of Education* 115 at 116.

²⁰⁷ Committee on Economic, Social and Cultural Rights [CESCR] *General Comment No 13: The Right to Education (Art 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [1].

²⁰⁸ Katrien Beeckman "Measuring the Implementation of the Right to Education: Educational Versus Human Rights Indicators" (2004) 12(1) *The International Journal of Children's Rights* 71 at 76; see also CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 207, at [1].

²⁰⁹ UNESCO *The Right to Education in the 21st Century: Background Paper for the International Seminar on the Evolving Right to Education* (2021) at 7.

²¹⁰ Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007) at 215; see also Katarina Tomaševski *Human Rights Obligations in Education: The 4A Scheme* (Wolf Legal Publishers, Nijmegen, 2006) at 7.

²¹¹ Benjamin Mallon "The Right to Education" in Gerard McCann and Félim Ó hAdhmaill (eds) *International Human Rights, Social Policy and Global Development: Critical Perspectives* (Bristol University Press, Bristol, 2020) 181 at 185.

and because their aspirations for education are multi-faceted and different, they should be considered when providing education.²¹² The study further contributes to literature by establishing how best to measure educational success for refugee children in New Zealand.

Indicators and benchmarks play a crucial role in monitoring the implementation of economic, social and cultural rights such as education.²¹³ Beeckman notes that although many indicators measuring educational performance exist in the education field, there is still a need for indicators that reflect on the implementation of the child's right to education.²¹⁴ She further argues that there is a need for quantitative indicators combined with qualitative ones if the realisation of the right to education is to be adequately assessed.²¹⁵ Therefore, the research addressing the main research question seeks to demonstrate why the educational indicators currently being used are not sufficient to monitor the implementation of the right to education for refugee children and how human and children's rights can inform better indicators.

In light of the above, refugee children benefit significantly from studies that relate to their unique circumstances. The literature review buttresses the pivotal role of the right to education in the overall resettlement and integration of refugee children in New Zealand. There are many gaps in existing literature pertaining to the right to education for refugee children in New Zealand. Although necessary for ensuring adequate realisation of the rights of refugee children, there is limited research on a child rights approach to education for refugee children. It is, therefore, crucial that this research is carried out.

1.8 Methodology

The sociolegal approach is adopted to determine the extent to which the New Zealand legal framework protects refugee children's right to education. It is interdisciplinary, covers different theoretical perspectives, and includes a variety of empirical research and methodologies.²¹⁶ This approach involves legal and related social science methods. One of the main aims of sociolegal research is to produce socially informed research about the law.²¹⁷ It is well suited to answer the

²¹² Joanna McIntyre and Sinikka Neuhaus "Theorising Policy and Practice in Refugee Education: Conceptualising 'Safety', 'Belonging' and 'Participatory Parity' in England and Sweden" (2021) 47(4) *British Educational Research Journal* 1 at 5.

²¹³ Beeckman, above n 208, at 71.

²¹⁴ At 71.

²¹⁵ At 73.

²¹⁶ Socio-Legal Studies Association "Statement of Principles of Ethical Research Practice" in Reza Banakar and Max Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing, England, 2005) at 1.

²¹⁷ At 2.

research question because sociolegal studies ensure that the law is analysed in a societal context, and the role of the law in influencing societal change is emphasised.²¹⁸ This approach will be instrumental in considering gaps between legal rights in education and their actual realisation.

The sociolegal approach will be underpinned by a combination of legal, sociological and educational theory. The interconnection of the interest theory of rights, sociology of childhood and sociocultural perspectives (informed by educational theory) will enhance the understanding and interpretation of refugee children's right to education in principle and in practice. This approach addresses issues affecting refugee children beyond the legal context, resulting in a more comprehensive analysis. It demonstrates how the international and domestic legal framework underpins refugee children's rights and how social structures and processes can foster or hinder the realisation of the right to education. The combined perspectives allow for consideration of how educational systems interact with laws and how they can be tailored to meet the needs and interests of refugee children.

The research predominantly engages the legal analysis of existing laws, policies and practices adopted when providing education to refugee children. It mainly adopts the doctrinal method to examine the legal framework that establishes the right to education for refugee children in New Zealand. Primary sources relied on to establish what the law is and how it has been applied and interpreted include international treaties New Zealand has ratified, such as the UNCROC,²¹⁹ the Refugee Convention,²²⁰ and the ICESCR.²²¹ Domestic legislation is also examined, mainly the Immigration Act 2009, the Education and Training Act 2020, education policies and refugee resettlement policies, including the New Zealand Refugee Resettlement Strategy. These sources are carefully examined to determine the role the right to education plays in protecting and realising refugee children's rights and the obligations New Zealand has under international human rights and children's rights law. Secondary sources explaining, discussing, and criticising the legal rules and how they have been applied are also utilised. The sources enhance the analysis of laws and regulations as they highlight their effectiveness. The research uses journal articles, books, official state party reports, the CRC's Concluding Observations, reports by the United Nations High Commissioner for Refugees, reports from intergovernmental agencies and nongovernmental organisations.

The empirical method is also adopted to investigate how domestic law, policies, and social institutions affect the right to education for refugee children and their integration into New Zealand. The aim is

²¹⁸ David N Schiff "Socio-legal Theory: Social Structure and Law" (1976) 39(3) *The Modern Law Review* 287.

²¹⁹ See generally UNCROC, above n 57.

²²⁰ See generally Refugee Convention, above n 60.

²²¹ See generally ICESCR, above n 92.

to examine the implementation of laws and policies and the extent to which they impact the realisation of refugee children's rights to education. This is done through semi-structured interviews with various professionals working with, and for, refugee children. The empirical data supplements the existing literature on how the various stakeholders comprehend the right to education of refugee children. This method highlights how the legal framework is interpreted and understood within educational and social contexts, thus highlighting implementation gaps that may exist.

1.9 Significance

There seems to be evidence suggesting that refugee children are adequately resettling and integrating in New Zealand and succeeding at school.²²² There is, however, an apparent lack of significant research on the motivating factors behind the success and the link with children's rights. Such research is important as it has been observed that the current success indicators of refugee resettlement are no longer suitable and do not accurately reflect what successful settlement means to refugees.²²³ It has been further noted that the current indicators fail to capture aspects of successful settlement deemed important by stakeholders.²²⁴ This research will help to address this gap.

One of the resettlement priorities for 2020 was to evaluate both the reception and community orientation programmes to ascertain whether they enable refugees' successful settlement.²²⁵ The research will inform government policymakers by highlighting barriers to the adequate resettlement and integration of refugee children in education. A report by the MBIE also noted that the Strategy's effectiveness in meeting its aims must be "monitored and evaluated."²²⁶ There have been some monitoring and evaluation reports on the Refugee Resettlement Strategy.²²⁷ However, owing to the predominant focus on adults and the narrow measure of outcomes for education, there is limited adequate monitoring and evaluation of the impact on refugee children. The findings will also enable law and policymakers to develop specific and clear legal standards, quality control mechanisms for the provision of adequate resettlement programmes and protection of the right to education of refugee children.

²²² Ministry of Education *Ministry of Education Support for Refugee Background Students and Their Families in New Zealand Schools* (Presentation for Refugee Research Symposium, 3 December 2015).

²²³ Cabinet Economic Development Committee, above n 12, at [42].

²²⁴ At [42.3].

²²⁵ Ministry of Business, Innovation and Employment *New Zealand Refugee Resettlement Strategy - Priorities to 2020* (April 2018) at 8.

²²⁶ Ministry of Business, Innovation and Employment "New Land, New Life: Long-Term Settlement of Refugees in New Zealand" (August 2012) <www.mbie.govt.nz> at xiv.

²²⁷ See generally Ministry of Business, Innovation and Employment "Three Years On: English and Employment Outcomes of Former Refugees" (February 2021) <www.immigration.govt.nz>; and Ministry of Business, Innovation and Employment "New Land, New Life: Long-Term Settlement of Refugees in New Zealand", above n 226.

There is no robust formal education (and resettlement as a whole) policy that addresses the needs and issues specific to refugee children. The research provides a rationale for developing a Refugee Child Resettlement Strategy within a legal framework as required by domestic and international legal frameworks. In this way, it provides a child rights-informed framework in law that will inform refugee resettlement policies and education policies for the benefit of refugee children. The challenges that refugee children faced in their home countries and adjusting to New Zealand make them a group that would benefit from research focusing on their unique experiences.

1.10 Original Contribution

While there has been some research on refugee children's educational resettlement and integration in New Zealand from sociological and educational perspectives, this research is important as it will provide a novel, in-depth legal analysis of refugee children's educational resettlement and integration in New Zealand from a child's right perspective that has not previously been undertaken. Therefore, this research is valuable as it will emphasise the legal obligations New Zealand has and evaluate the extent to which the obligations have or have not been met.

The study contributes to the existing literature by combining different theories on childhood, education, and children's rights. This multidisciplinary approach will result in a holistic understanding and framework needed for better realisation of the right to education for refugee children. It will place aspects of childhood within a rights framework to highlight gaps and enhance the analysis.

This research will include novel empirical research on the understanding by key stakeholders (involved in the creation, implementation and monitoring of educational resettlement policies and programmes) of their legal obligations in protecting, fulfilling, and respecting the right to education of refugee children. The research will further contribute to improving the understanding, interpretation, and application of laws affecting the rights of refugee children. The study aims to demonstrate the importance of a human rights and child-centred approach to resettlement issues affecting refugee children, specifically education, to ensure maximum protection of the refugee child.

1.11 Thesis Outline

As noted earlier, the research examines how international human rights law obligations in education are implemented in New Zealand and how such obligations underpin provisions of education for refugee children. The research seeks to highlight the importance of the right to education for refugee

children to ensure they resettle well in New Zealand and thus receive the same rights as non-refugee children. The thesis is structured to meet this aim.

The first chapter is the introduction and provides a contextual background that motivates the research. It outlines the research questions, the methodology applied, the significance of the study and the original contribution to literature it provides.

Chapter Two provides a historical account of the development of the rights of refugee children generally and what led and motivated New Zealand to resettle refugee children. It includes a discussion on the achievements and setbacks in refugee children's resettlement and integration and the role of education through the decades.

The third chapter discusses theories that underpin the research and arguments therein. Since the thesis has a sociolegal approach, it utilises different theories and perspectives to support the research. It sets out a theoretical framework informed by childhood studies and educational perspectives that provides a deeper understanding and context of the child rights-based approach. In theorising childhood and children's rights, the chapter identifies themes that may be useful or hinder the realisation of the right to education for refugee children.

Chapter Four identifies the sources of refugee children's rights under international human rights law, including international children's rights law. It includes a discussion on the normative content of the rights specified and what they mean with respect to refugee children. A detailed study on the right to education and how it realises other rights of refugee children forms part of this chapter. The obligations New Zealand has under international human rights law in this regard will be emphasised.

Chapter Five considers the domestic laws and policies underpinning the right to education of refugee children. It discusses the legislative context in New Zealand upon which the development of policy for the inclusion of refugee children in education is based. The impact of education legislation and policies will be assessed as this points out the extent to which New Zealand realises the rights of refugee children in education. In addition to this, the implementation and monitoring of the right to education of refugees will be discussed.

A thematic analysis of the empirical data collected on how the right to education for refugees is understood and realised by different key players at the planning, implementation, and monitoring stages of the right is presented in Chapter Six. The chapter outlines the research design and explains how many participants were selected, how, and why they were selected. The chapter highlights key themes identified in the implementation of refugee children's rights to education.

With all the information gathered, Chapter Seven discusses the implications of the findings from both the doctrinal and empirical research on the realisation of the right to education of refugee children and how they affect the resettlement and integration of refugee children in New Zealand. In light of the above, the chapter will determine the extent to which New Zealand laws and policies respect, protect, and fulfil refugee children's rights to education using the UNCROC Guiding Principles as an analytical framework.

Chapter Eight summarises all significant findings and provides recommendations. It will discuss how a child rights-based approach informed by conceptions of childhood and educational perspectives offers a holistic framework that will guide the implementation of the rights of the refugee child in education. It will discuss recommendations on how the existing legal and policy framework can be improved to ensure better realisation of the rights of refugee children in education required for the optimal resettlement and integration of refugee children. Chapter Nine will provide concluding reflections and identify areas for further research.

2. THE HISTORICAL DEVELOPMENT OF THE RIGHTS OF REFUGEE CHILDREN

2.1 Introduction

This chapter provides the overall context for the research and a basis on which the legal framework for the protection of the right to education was developed in New Zealand. It discusses the historical development of the rights of refugee children and their resettlement in New Zealand. It will also explore how international refugee law developed in terms of a child's rights response as well as international human rights and children's rights law. Furthermore, New Zealand's legal and policy response to refugees and children's rights within this context will be examined. By tracing the historical development of refugee resettlement and attitudes towards refugee children, this chapter highlights the foundations that continue to influence how their rights are understood and realised. This contextual background is essential to understanding why the right to education remains inadequately realised.

2.2 Development of Refugee Law

States have been accepting refugees for centuries,¹ and the introduction of laws governing and regulating their entry began in the 1880s.² Refugee law was originally viewed as a way for states to facilitate the selection of new inhabitants who could contribute to the nation rather than addressing the needs of fleeing individuals.³ States' self-serving interests influenced hesitancy over international cooperation on refugee issues.⁴ 1921 marked a pivotal time in the development of modern international refugee law following a request to the League of Nations for intervention by the Czechoslovakian Government for assistance with the relief and settlement of Russian refugees. The need for joint government action was expressed.⁵ The first High Commissioner for refugees, Dr Fridtjof Nansen, was appointed. He was instrumental in drafting a multilateral agreement to protect refugees in 1922 through the "Nansen Passports" system. It gave refugees a legal identity and

¹ James Hathaway "Evolution of Refugee Status in International Law: 1920-1950" (1984) 33(2) *The International and Comparative Law Quarterly* 348.

² Alison Bashford and Jane McAdam "The Right to Asylum: Britain's 1905 Aliens Act and the Evolution of Refugee Law" (2014) 23(2) *Law and History Review* 42.

³ James Hathaway "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31(1) *Harvard International Law Journal* 129 at 136.

⁴ Gil Loescher "The International Refugee Regime: Stretched to the Limit" (1994) 47(2) *Journal of International Affairs* 351.

⁵ Louise W Holborn "The Legal Status of Political Refugees, 1920-1938" (1938) 32(4) *The American Journal of International Law* 680 at 682.

permitted them to travel internationally.⁶ Before this agreement, refugees had been treated like ordinary aliens, and there were no legal provisions permitting travel without the necessary documentation.⁷

The League of Nations drafted and adopted agreements that dealt with travel documents and the classifications of refugees under the Nansen system. Initially, the Arrangement with Respect to the Issue of Certificates of the Identity to Russian Refugees of 5 July 1922⁸ and the Arrangement of 31 May 1924 for the issue of Certificates of Identity to Armenian Refugees only dealt with the issue of identity certificates.⁹ The Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees, 12 May 1926,¹⁰ classified refugees and had one provision relating to children. It provided for children under 15 years to be included on their parents' identity certificates.¹¹ The 30 June 1928 agreement extended the scope of the 1926 agreement.¹² The 1933 Convention Relating to the International Status of Refugees¹³ was the first legally binding instrument dealing with refugees. The preamble noted the desire for refugees to be ensured of the enjoyment of civil rights, access to the courts, security and stability of work, the movement of persons, and admission to schools and universities. This Convention was also the first to make provision for refugee children. Article 9 provided that refugees, including children whose upkeep is made either by their families or by third parties, shall receive the most favourable treatment accorded to nationals in respect of such relief and assistance as they may require, including medical attendance and hospital treatment. The Convention further provided the right to education in that refugees were to enjoy in the schools, courses, faculties, and universities treatment as favourable as other foreigners in general. They were to particularly benefit to the same extent as other foreigners by total or partial remission of fees, charges and the award of scholarships.¹⁴ International refugee law continued to develop as more agreements were drafted and concluded. However, they had geographical limitations, such as the Provisional

⁶ Shauna Labman "Looking Back, Moving Forward: The History and Future of Refugee Protection" (2010) 10 Chicago-Kent Journal of International and Comparative Law at 3.

⁷ Paul Weis "The Development of Refugee Law" (1982) 3 Michigan Journal of International Law 27 at 28.

⁸ League of Nations *Arrangement with Respect to the Issue of Certificates of Identity to Russian Refugees* League of Nations Treaty Series Vol XIII No 355 (5 July 1922).

⁹ League of Nations *The Secretary General of the League of Nations (Drummond) to the Secretary of State* CL 72(a) (10 June 1924).

¹⁰ League of Nations *Arrangement Relating to the Issue of Identify Certificates to Russian and Armenian Refugees* League of Nations Treaty Series Vol LXXXIX No 2004 (12 May 1926).

¹¹ At art 4.

¹² League of Nations *Arrangement Relating to the Legal Status of Russian and Armenian Refugees* League of Nations Treaty Series Vol LXXXIX No 2005 (30 June 1928).

¹³ League of Nations *Convention Relating to the International Status of Refugees* League of Nations Treaty Series Vol CLIX No 3663 (28 October 1933).

¹⁴ At art 12.

Arrangement concerning the Status of Refugees from Germany of 4 June 1936¹⁵ and the 1938 Convention concerning the Status of Refugees coming from Germany.

Although the official documents lacked sufficient refugee statistics,¹⁶ it has been noted that a relatively sizeable number of refugees were accepted in New Zealand during the inter-war period.¹⁷ New Zealand also provided financial support to the League of Nations budget for the administration of various refugee offices.¹⁸ Of the 300,000 European refugees that emigrated from Europe between 1933 and 1941, 1,100 refugees resettled in New Zealand.¹⁹ As the issue of forced migration worsened in Europe after the Second World War, the International Refugee Organisation (IRO)²⁰ was established in 1946.²¹ It was created to coordinate the international response to the “urgent problem” of refugees.²² Part of its mandate was to provide care and assistance, legal and political protection and the resettlement and reestablishment of persons concerned.²³ The focus was resettlement, and over one million refugees were resettled between 1947 and 1951.²⁴ Although the IRO did not have a set quota system, it was determined to negotiate with governments and other interested agencies with the aim of finding solutions for the care and permanent settlement of refugees.²⁵ Governments that could offer resettlement were also to be asked to admit refugees and displaced persons.²⁶ This was to be in line with the IRO Constitution, which provided that the functions of the organisation, which included settlement and re-establishment in capable countries, would be done in terms of the purposes and principles set out in the UN Charter.²⁷ The IRO had the power “to conclude agreements with countries able and willing to receive refugees and displaced persons for the purpose of ensuring the protection of their legitimate rights and interests.”²⁸

¹⁵ League of Nations *Provisional Arrangement Concerning the Status of Refugees Coming from Germany* League of Nations Treaty Series Vol CLXXI No 3952 (4 July 1936).

¹⁶ Owing to the fact that refugees had to go through the same immigration process as immigrants.

¹⁷ Anton Binzegger *New Zealand's Policy on Refugees* (New Zealand Institute of International Affairs, Wellington, 1980) at 8.

¹⁸ At 8.

¹⁹ Revel Anson Lochore *From Europe to New Zealand* (AH & AW Reed, in conjunction with the New Zealand Institute of International Affairs, 1951) at 71.

²⁰ United Nations International Refugee Organization Constitution 18 UNTS 3 (opened for signature 15 December 1946, entered into force 20 August 1948) [IRO Constitution].

²¹ Erika Feller “International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future” (2001) 83(843) IRRIC 581 at 584.

²² IRO Constitution, above n 20, at preamble.

²³ At art 2(1).

²⁴ Dennis Gallagher “The Evolution of the International Refugee System” (1989) 23(3) *International Migration Review* 579.

²⁵ *Refugees and Displaced Persons Note by the Secretary General* UN Doc A/C.3/528 (26 October 1949) at [4].

²⁶ At [6].

²⁷ IRO Constitution, above n 20, at art 2(1).

²⁸ At art 2(2)(j).

The IRO contributed significantly to the development of refugee law and provided a more extensive definition of a refugee.²⁹ It was observed that the term refugee was used to define a person who had left their country, but also related to a person who did not enjoy the protection of their country, whether inside or outside their own country.³⁰ The IRO Constitution extended the definition of a refugee to include children under 16 years of age who were unaccompanied, war orphans or whose parents had disappeared and were outside their countries of origin.³¹ It also set out the requirement for children to be given all possible priority assistance, including assistance with repatriation when their nationality could be determined.³² The needs of refugee children were thus recognised in the early stages of international refugee law. New Zealand supported the establishment of the IRO and signed its constitution without reservation in March 1947.³³ It was one of the few UN member states that became members of the organisation.³⁴ The country's involvement extended to financial contribution towards the operational expenses but did not include contribution to costs related to the large scale resettlement of the IRO, which were on a voluntary basis.³⁵

It was clear that the extensive mandate of the IRO meant that the international effort could not be wound up. After the Second World War, there was also a growing need to resolve problems relating to refugees that required a multilateral approach.³⁶ It was clear that there was a need for more to be done for refugees internationally under the umbrella of the United Nations.³⁷ In December 1949, the General Assembly passed a resolution³⁸ to establish the UNHCR.³⁹ It would replace the IRO from 1 January 1951. Its mandate was to provide international protection to refugees as recognised by its founding Statute, seek permanent solutions for the problem of refugees, and assist governments and private organisations in facilitating the voluntary repatriation or assimilation of refugees.⁴⁰ The mandate was broader than that of the IRO and would seemingly suggest better assistance to refugees. The scope of the UNHCR included persons defined as refugees under the 1926 and 1928 Arrangements or the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14

²⁹ At Annex 1 art 4.

³⁰ Economic and Social Council [ECOSOC] *Summary Record of the Second Meeting of the Committee of the Whole on Refugees and Displaced Persons* UN Doc E/74 (17 June 1946) at 18.

³¹ IRO Constitution, above n 20, at Annex I art 4.

³² At art 4.

³³ EV Paul "Constitution of the International Refugee Organization and Agreement on Interim Measures To Be Taken in respect of Refugees and Displaced Persons" (1947) AJHR A-2D at 4.

³⁴ Binzegger *New Zealand's Policy on Refugees*, above n 17, at 12.

³⁵ Paul, above n 33, at 20-21; UN Yearbook 1946-47 *International Refugee Organisation* (December 1947) at 818; and IRO Constitution, above n 20, at art 10(4).

³⁶ Erika Feller *The United Nations and the Protection of Human Rights - The Evolution of the International Refugee Protection Regime* (UNHCR, 18 November 2000).

³⁷ UN Office of the High Commissioner for Human Rights (OHCHR) "Fact Sheet No 20, Human Rights and Refugees" (July 1993) <www.ohchr.org>.

³⁸ *Refugees and Stateless Persons* UN Doc A/319/IV (3 December 1949).

³⁹ *Statute of the Office of The United Nations High Commissioner for Refugees* UN Doc A/428/V (14 December 1950).

⁴⁰ At Annex Chapter 1 [1].

September 1939 and the Constitution of the IRO, which included children.⁴¹ New Zealand voted for the establishment of the UNHCR,⁴² and its support of the UNHCR was an illustration of New Zealand's commitment to the ongoing international refugee work.⁴³

The draft Convention Relating to the Status of Refugees was concluded and signed in July 1951 following a conference of plenipotentiaries intended to address the issue of displaced persons during the Second World War and account for the increasing refugee problem.⁴⁴ New Zealand did not engage much in the drafting process during the Conference of Plenipotentiaries. However, when commenting on the draft Convention relating to the Status of Refugees⁴⁵ and the draft Protocol relating to the Status of Stateless Persons,⁴⁶ New Zealand was of the view that the objects of the draft Convention and the draft Protocol were not very relevant to New Zealand because the treatment and rights of displaced persons were the same as other aliens admitted in the country for permanent residence.⁴⁷ It further stated that the general rule was that all aliens (including stateless persons) lawfully admitted to New Zealand were to receive national treatment, subject to a few exceptions, and were to enjoy the same rights and privileges as British subjects.⁴⁸ Another reason for New Zealand's view was that the drafts were directed at resolving problems that existed in other countries because the standards proposed in the draft Convention and the draft Protocol were already being met in New Zealand practice. In essence, the New Zealand Government did not recognise the need for special or differential treatment of refugees because it would not accept provisions in the draft Convention or the draft Protocol requiring discrimination in favour of refugees or stateless persons against other aliens.⁴⁹

The draft Convention on Refugees and Stateless Persons was adopted as the 1951 Convention Relating to the Status of Refugees (1951 Convention).⁵⁰ The 1951 Convention consolidated previous international instruments relating to refugees and codified the rights of refugees at an international

⁴¹ At [6].

⁴² RE Owen "New Zealand, The United Nations Report of the New Zealand Delegation on the Fourth Regular Session of the General Assembly Held at New York, 20 September to 10 December, 1949" (1950) AJHR A2 at 86.

⁴³ Binzegger, above n 17, at 19.

⁴⁴ United Nations Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 189 UNTS 137 (25 July 1951).

⁴⁵ United Nations Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

⁴⁶ United Nations Protocol Relating to the Status of Refugees 606 UNTS 267 (opened for signature 31 January 1967, entered into force 4 October 1967) [1967 Refugee Protocol].

⁴⁷ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons *Comments of Governments on the Draft Convention Relating to the Status of Refugees and the Draft Protocol Relating to the Status of Stateless Persons - New Zealand* UN Doc A/CONF.2/6/Add.2 (11 June 1951).

⁴⁸ Above n 47.

⁴⁹ Above n 47.

⁵⁰ Refugee Convention, above n 45.

level. This was the first and only universally binding legal instrument for the protection of refugees but it was limited to refugee status determination to the exclusion of solutions or causes.⁵¹

Human rights influenced the drafting of the Convention, which is evident in the preamble, which referred to the principle that human beings shall enjoy fundamental rights and freedoms without discrimination as affirmed by the Charter of the United Nations (UN Charter)⁵² and the Universal Declaration of Human Rights (UDHR).⁵³ It further noted the concern for refugees and the efforts by the United Nations to assure refugees the widest possible exercise of these fundamental rights and freedoms.⁵⁴ The human rights influence can also be seen in the “persecution” grounds in the Convention; these include race, religion, nationality, political opinion or membership of a particular social group and have been compared to the discrimination grounds under international human rights standards.⁵⁵ The Convention was also meant to serve as a full-length treaty to give effect to art 14 of the UDHR,⁵⁶ aimed at providing international protection and finding permanent solutions for the problem of refugees.⁵⁷

Unlike earlier international refugee agreements and instruments, which targeted specific refugees, the 1951 Convention established a universal definition of the term “refugee.”⁵⁸ The definition of a refugee contained in the 1951 Convention was restricted to persons who became refugees as a result of events occurring before 1 January 1951, and states had to declare whether they would apply the definition only to events that took place in Europe or also to events in other parts of the world. The 1967 Protocol to the Convention was adopted to deal with emerging refugee problems during the 1950s and early 1960s as they would not fall within the limited scope of the 1951 Convention.⁵⁹ It is important to note that resettlement is voluntary, and there is no legal obligation under the Refugee Convention and the 1967 Protocol to resettle refugees.⁶⁰

⁵¹ Feller “International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present and Future”, above n 21, at 585.

⁵² Charter of the United Nations 1 UNTS XVI (24 October 1945) [UN Charter].

⁵³ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR]; and Refugee Convention, above n 45, at preamble.

⁵⁴ At preamble.

⁵⁵ Paul Weis *The Refugee Convention, 1951- The Travaux Préparatoires Analysed, with a Commentary by the Late Dr Paul Weis* (University Press, Cambridge, 1995) at 8.

⁵⁶ Everyone has the right to seek and to enjoy in other countries asylum from persecution.

⁵⁷ Patricia Tuitt “Human Rights and Refugees” (1997) 1(2) *The International Journal of Human Rights* 66 at 80.

⁵⁸ Refugee Convention, above n 45, at Introductory Note.

⁵⁹ Frances Nicholson and Judith Kumin *A Guide to International Refugee Protection and Building State Asylum Systems*, (Inter-Parliamentary Union and the United Nations High Commissioner for Refugees, 2017) at 16.

⁶⁰ Miah Gibson “An International Convention on Refugee Resettlement” (2019) 24 *Deakin Law Review* 175 at 178.

During the drafting of the 1951 Convention, the explicit reference or inclusion of children was brought up in respect of unaccompanied children by the USA delegation.⁶¹ It was, however, not included because its relevance was questioned after the Second World War⁶² as it would be perceived to weaken the guardian's role pertaining to war orphans.⁶³ As such, the Convention does not have a specific provision on refugee children and their right to protection. This is interesting as the IRO constitution explicitly prioritised refugee children and their need for protection. Pobjoy notes that taking into account the IRO Constitution and how it operated, it can be concluded that the absence of special protection measures for children within the 1951 Convention is not cognisant of its historical context.⁶⁴ Samantha Arnold also notes that the developments in children rights law when the Convention was being drafted and the fact that children required special protection and assistance did not influence the development of the 1951 Convention.⁶⁵

The 1951 Convention places an obligation on states to cooperate with the UNHCR in exercising its functions and facilitating its duty of supervising the application of the Convention.⁶⁶ The UNHCR has continued to consider refugee children and established a Working Group on Refugee Children at Risk to focus on all activities relating to refugee children.⁶⁷ It published its first Note on Refugee Children in 1987, which emphasised that children have “special needs to be identified and met.”⁶⁸ While the UNHCR recognises refugee children's particular needs and rights, the absence of child-specific legislation in the main international refugee law instruments means refugee children do not have the best legal protection.

As international refugee law developed and the rights of refugee children were considered, children's rights were also emerging. However, the current legal framework of refugee law does not explicitly recognise children's rights. It can thus be concluded that while international refugee law plays an important role in defining refugees and regulating their determination, it does not provide adequate legal protection to refugee children.

⁶¹ Ad Hoc Committee on Statelessness and Related Problems *United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)* USA UN Doc E/AC.32.2 (18 January 1950).

⁶² Jane McAdam “Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection” (2006) 14(3) *The International Journal of Children's Rights* 251 at 252; see also Samantha Arnold *Children's Rights and Refugee Law: Conceptualising Children Within the Refugee Convention* (Routledge, London, 2017) at 82.

⁶³ McAdam, above n 62, at 252; see also Arnold, above n 62, at 82. It is worth reiterating that war orphans fell within the ambit of the IRO Constitution as one of the four refugee categories: see IRO Constitution, above n 20, at Annex I art 4.

⁶⁴ Jason M Pobjoy “A Child Rights Framework for Assessing the Status of Refugee Children” in Satvinder Singh Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar Publishing, Gloucestershire, 2013) at 91.

⁶⁵ Arnold, above n 62, at 79.

⁶⁶ Refugee Convention, above n 45, at art 35(1).

⁶⁷ UNHCR *Note on Refugee Children* UN Doc EC/SCP/46 (9 July 1987) at [6].

⁶⁸ At [1].

2.3 *Development of International Human Rights Law*

Human rights have been used to enhance the protection available to refugees.⁶⁹ It has been generally accepted that refugee law has given way to a more generalised understanding of international human rights norms as mechanisms wherein refugees' rights can best be protected.⁷⁰ It is, therefore, worthwhile to examine the extent to which refugees were considered during the drafting and adoption of human rights arrangements and initiatives. Prior to the Second World War, human rights were considered a matter of domestic concern that fell within state domestic jurisdiction.⁷¹ International law subsequently developed to include human rights through the UN Charter⁷² due to the outbreak of the war and its aftermath. Louis Henkin noted that:⁷³

The UN Charter ushered in a new international law of human rights. The new law buried the old dogma that the individual is not a 'subject' of international politics and law and that a government's behaviour toward its own nationals is a matter of domestic, not international concern... It gave the individual a part in international politics and rights in international law, independently of his government. It also gave the individual protectors other than his government, indeed protectors and remedies against his government.

The UN Charter was signed on 26 June 1945 and was created to codify the major principles of international relations, from sovereign equality of states to the prohibition of force in international relations. It was adopted at the San Francisco Conference, where the four allied powers⁷⁴ invited states to meet for the purpose of setting out a guide on the relations between states moving forward.⁷⁵ The draft proposal that was to be considered at the Conference was prepared by the allied powers with the aim of having an agreed understanding and recommendations on the establishment of an International Organisation.⁷⁶ The need for respect for human rights was first introduced in the draft proposal. It was recognised that there should be promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, language, religion or sex.⁷⁷

⁶⁹ Brian Gorlick "Human Rights and Refugees: Enhancing Protection through International Human Rights Law" (2000) 69(2) *Nordic Journal of International Law* 117.

⁷⁰ Tuitt, above n 57, at 66.

⁷¹ David P Forsythe *Human Rights in International Relations* (3rd ed, Cambridge University Press, Cambridge, 2012).

⁷² Charter of the United Nations 1 UNTS XVI (24 October 1945).

⁷³ Louis Henkin "Introduction" in *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) at 6.

⁷⁴ Delegations from the United States, the United Kingdom, the Soviet Union, and the Republic of China.

⁷⁵ Farrokh Jhabvala "The Drafting of the Human Rights Provisions of the UN Charter" (1997) 44(1) *Netherlands International Law Review* at 1.

⁷⁶ Bruno Simma and others *The Charter of the United Nations A Commentary* (3rd ed, Oxford University Press, Oxford, 2012) at 14.

⁷⁷ United Nations Conference on International Organization [UNCIO] *Amendments Proposed by the Governments of The United States, The-United Kingdom, Soviet Union, and China* UN Doc 2 G/29 (5 May 1945) 622 at [3].

The inclusion of human rights was discussed at the San Francisco conference, where New Zealand participated in the early stages of the development of the Charter, specifically the promotion of human rights in the document. The proposed paragraph by New Zealand emphasised the need for the preservation, protection and promotion of human rights and fundamental freedoms with a specific focus on the right of freedom from want, fear, speech, and worship to be included in one of the earliest drafts.⁷⁸ It will be demonstrated in subsequent chapters that New Zealand's response to education and refugee children shows its early commitment to the protection of fundamental freedoms are evidenced, to a certain extent, by the legal frameworks and mechanisms in place. Some other states advocated for the inclusion of a human rights charter in the preamble.⁷⁹ From the comments submitted, there was a desire for a clear and strong statement of purpose reflecting the principle of human rights. The Charter accordingly affirmed human rights and fundamental freedoms,⁸⁰ aiming for international cooperation in promoting and encouraging respect for them.⁸¹

The further elaboration of a human rights declaration was delegated to the General Assembly.⁸² It is noteworthy that the first reference to refugee rights within international human rights was when the General Assembly addressed the displacement of people after the Second World War. In resolution 8(I)⁸³ on the question of refugees, the urgency and the need to differentiate genuine refugees and displaced persons from war criminals, quislings and traitors were emphasised.⁸⁴ The Economic and Social Council (ECOSOC) was tasked with ensuring that such persons would not fall within the scope of an international body relating to refugees.⁸⁵ It was also tasked with preparing a draft international bill of rights. In the draft Declaration of Human Rights by the Commission of Human Rights,⁸⁶ each state would have the right to grant asylum to political refugees.⁸⁷

New Zealand played an active role in the drafting process of the Declaration of Human Rights.⁸⁸ One of the issues raised by the New Zealand delegation was the need to emphasise the centrality of economic and social rights to the realisation of other rights. It was noted that rights such as to work, a standard of living adequate for health and well-being, the right to social security, education, the

⁷⁸ UNCTAD *Amendments to the Dumbarton Oaks Proposal (Document 1 G/1) Submitted by the Delegation of New Zealand* UN Doc 2, G/14(f) (2 May 1945) 486 at [III].

⁷⁹ Simma, above n 76, at 130.

⁸⁰ UN Charter, above n 52, at preamble.

⁸¹ At art 1(3).

⁸² Simma, above n 76, at 103.

⁸³ *Question of Refugees* UN Doc A/Res/8(I) (12 February 1946).

⁸⁴ Sibylie Kapfere "Article 14(2) of the Universal Declaration of Human Rights and Exclusion from International Refugee Protection" (2008) 27 *Refugee Survey Quarterly* 53 at 56.

⁸⁵ *Question of Refugees*, above n 83, at [(c)(ii)].

⁸⁶ Established by the Economic and Social Council [ECOSOC].

⁸⁷ Draft Declaration of Human Rights UN Doc E/CN.4/21 (1 July 1947) at Annex F art 14.

⁸⁸ See generally Draft International Declaration of Human Rights New Zealand: Amendment to Article 1 of the Draft Declaration (E/800) UN Doc A/C.3/245 (9 October 1948).

right to rest and leisure, and the right to participate in the cultural life of the community freely could give the individual the normal conditions of life which make for more freedom.⁸⁹

The UDHR⁹⁰ was adopted on 10 December 1948 and included the right to seek and enjoy asylum from persecution in other countries.⁹¹ Though not exclusive to refugees, it set out rights and freedoms that protect refugees without distinction on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.⁹² This landmark provision was the springboard for the 1951 Convention, the main international refugee law instrument.⁹³ Although a separate treaty on refugees' rights was created following the Second World War and developed under international refugee law, refugees remained an issue of concern under human rights law.⁹⁴ Hence, it has been argued that the isolation of international refugee law from developing human rights norms and institutions has meant that refugees and asylum-seekers have not always had recourse to the full range of rights they are entitled to,⁹⁵ as demonstrated by this research.

The core human rights treaties such as the ICCPR,⁹⁶ CAT,⁹⁷ and ICESCR⁹⁸ do not explicitly provide for the right to seek asylum. While this is the case, it is noteworthy that during the drafting process of these treaties, there was consideration of issues pertaining to refugees. Their respective monitoring bodies expand on refugees' rights through documents such as General Comments as well as Concluding Observations on states' obligations. Only some Committees have discussed New Zealand's obligations pertaining to refugees.

The Human Rights Committee (HRC) is instrumental in the interpretation of the ICCPR. It has issued a General Comment setting forth the rights of aliens.⁹⁹ It specified that the rights prescribed in the Covenant apply to "all individuals within its territory and subject to state parties' jurisdiction."¹⁰⁰ It further noted that the general rule is "that each one of the rights of the Covenant must be guaranteed

⁸⁹ RE Owen "Report of the New Zealand Delegation on the First Part of the Third Regular Session of the General Assembly Held at Paris, 21 September to 12 December 1948" (1949) AJHR A2 at 102.

⁹⁰ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR].

⁹¹ At art 14.

⁹² At art 2.

⁹³ Alice Edwards "Human Rights, Refugees, and the Right 'To Enjoy' Asylum" (2005) 17(2) International Journal of Refugee Law 293 at 296.

⁹⁴ At 299.

⁹⁵ At 299.

⁹⁶ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

⁹⁷ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85 (opened for signature 10 December 1984, entered into force 26 June 1987) [CAT].

⁹⁸ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 03 January 1976) [ICESCR].

⁹⁹ Human Rights Committee (HRC) *CCPR General Comment No 15: The Position of Aliens Under the Covenant* UN Doc HRI/GEN/1/Rev.6 (11 April 1986).

¹⁰⁰ At [1].

without discrimination between citizens and aliens.”¹⁰¹ Therefore, asylum-seekers and refugees can benefit from protection under the ICCPR at different stages of their migration process.¹⁰² The HRC has also made recommendations on New Zealand’s obligations regarding refugees.¹⁰³ Some of them include the need for claimants’ rights to privacy and confidentiality to be guaranteed when verifying their information.¹⁰⁴ Furthermore, policies relating to interviewing children during the refugee determination process should be limited to circumstances where an interview is necessary to determine the child’s claim and where the child wishes to be heard.¹⁰⁵

The CAT also has provisions that set out the rights of refugees. The obligation to promote, respect and observe human rights and freedoms was taken into account when the Convention was drafted and is central to its interpretation and application.¹⁰⁶ Refugees were also considered during the drafting process, specifically art 3, which sets out the state parties’ duty of non-refoulement.¹⁰⁷ It was pointed out that the application of this principle was not to solely depend on the general characteristics of the situation but rather that there should be an emphasis on individual circumstances.¹⁰⁸ The CAT Committee, in response to periodic reports by New Zealand, has issued Concluding Observations that the state should further advance the realisation of the rights of refugees with regard to detention,¹⁰⁹ as well as the incorporation of art 3 in immigration legislation.¹¹⁰ The CAT Committee has also issued a General Comment that expands the meaning and application of the non-refoulement principle and emphasise the duty to consider specific human rights situations where the principle applies.¹¹¹

Like the HRC, the Committee on Economic, Social and Cultural Rights (CESCR) has expanded on the scope of the ICESCR and noted that the Covenant rights apply to everyone, including non-nationals, such as refugees, asylum-seekers and stateless persons, *inter alia*, regardless of legal status

¹⁰¹ At [2].

¹⁰² Santhosh Persaud *Protecting Refugees and Asylum Seekers Under the International Covenant on Civil and Political Rights* (UNHCR, Research Paper 132, 2006) at 6.

¹⁰³ HRC *Concluding Observations on the Sixth Periodic Report of New Zealand* UN Doc CCPR/C/NZL/CO/6 (24 March 2016); and HRC *Concluding Observations of the Human Rights Committee Consideration of Reports Submitted by States Parties under Article 40 of the Covenant New Zealand* UN Doc CCPR/C/NZL/CO/5 (7 April 2010).

¹⁰⁴ HRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 103, at [36(b)].

¹⁰⁵ At [36(c)].

¹⁰⁶ CAT, above n 97, at preamble.

¹⁰⁷ At art 3(a) states that no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

¹⁰⁸ Margit Ammer and Andrea Schuechner “Article 3 Principle of Non-Refoulement” in Manfred Nowak and others (eds) *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (Oxford University Press, Oxford, 2019) at 109.

¹⁰⁹ CAT *Concluding Observations on the Sixth Period Report of New Zealand* UN Doc CAT/C/NZ/CO/6 (2 June 2015) at [18(d)].

¹¹⁰ CAT *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention* UN Doc CAT/C/CR/32/4 (11 June 2004) at [6(a)] and [4(b)].

¹¹¹ CAT *General Comment No 4 on the Implementation of Article 3 of the Convention in the Context of Article 22* UN Doc CAT/C/GC/4 (4 September 2018) at [9] – [16] and VIII.

and documentation.¹¹² It further expanded on the grounds for discrimination, stating that nationality should not be used as a ground for discrimination and that all children have a right to receive education and access to adequate food and affordable health care.¹¹³

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)¹¹⁴ is the main international human rights instrument defining and prohibiting racial discrimination. Although this Convention does not have a specific provision on refugees, the Committee on the Elimination of Racial Discrimination (CERD) also emphasises the need for the realisation of refugee rights through General Recommendations,¹¹⁵ highlighting issues affecting and interfering with the rights of refugees.¹¹⁶ It notes the state parties' responsibilities towards refugees¹¹⁷ and Concluding Observations of various state parties.¹¹⁸ The CERD has, through Concluding Observations, emphasised the need for equal access for asylum seekers and refugees in New Zealand to enjoy their economic, social and cultural rights fully.¹¹⁹ Some of the other human rights instruments that dealt with refugee issues are the Vienna Declaration on Human Rights and Programme of Action,¹²⁰ which reaffirmed the right to seek and enjoy asylum in 1993.¹²¹ The Declaration on the Human Rights of Individuals Who are Not Nationals of the Country they Live in has also specifically outlined the rights of "aliens."¹²²

UN human rights treaty bodies have, been recognised as a "well-developed and articulated legal foundation which adds support to advocacy efforts on behalf of refugees."¹²³ Although this is the case, it has been argued that international human rights instruments did not take children into account when they were drafted and do not reflect current knowledge and experience with regard to children's

¹¹² Committee on Economic, Social and Cultural Rights [CESCR] *General Comment No 20 Non-discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20 (2 July 2009) at [30].

¹¹³ At [30].

¹¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (21 December 1965) [ICERD].

¹¹⁵ Committee on the Elimination of Racial Discrimination [CERD] *General Recommendation XXX on Discrimination Against Non Citizens* (1 October 2002).

¹¹⁶ At preamble.

¹¹⁷ At [19].

¹¹⁸ CERD *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of Japan* UN Doc CERD/C/JPN/CO/7-9 (29 August 2014) at [23]; and CERD *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Cameroon* UN Doc CERD/C/CMR/CO/15-18 (30 March 2010) at [14].

¹¹⁹ CERD *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand* UN Doc CERD/C/NZL/CO/21-22 (25 August 2017) at [31].

¹²⁰ Vienna Declaration and Programme of Action UN Doc A/CONF.157/23 (12 July 1993).

¹²¹ At [23].

¹²² *Declaration on the Human Rights of Individuals Who are Not Nationals of the Country They Live In* UN Doc A/RES/40/144 (13 December 1985).

¹²³ Gorlick, above n 69, at 136.

issues.¹²⁴ As such, it is important to consider how international children's rights law has filled this gap.

2.4 *International Children's Rights Law*

The origins and development of children's rights stemmed from issues affecting children during and after World War I.¹²⁵ In 1919, a prominent child advocate, Eglantyne Jebb, began her historic campaign to secure special protection and recognition for children in the aftermath of World War I.¹²⁶ She believed that "all wars, whether just or unjust, disastrous or victorious, are waged against children."¹²⁷ She was instrumental in drafting the Declaration of the Rights of the Child, which was presented to the League of Nations by the British delegation.¹²⁸ The Declaration was adopted unanimously in 1924 and subsequently known as the Declaration of Geneva.¹²⁹ This is the first international document, though not binding, that enunciated children's rights. Children's rights were being recognised and were developing, but it has been argued that this did not seem to significantly influence the development of mainstream human rights and refugee law, as demonstrated above.¹³⁰

The United Nations General Assembly established the United Nations International Children's Emergency Fund (UNICEF) in 1946 to respond to the refugee crisis and to assist children who were victims of aggression,¹³¹ with a focus on child health generally.¹³² The Fund was established in line with universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion as set out in the preamble.¹³³ In 1959, the Declaration of the Rights of the Child¹³⁴ was developed and adopted following the examination of the protection of children's rights assured in the UDHR. It was an extension of the 1924 Declaration, and ten principles were agreed to. These principles formed the foundation of children's rights, which were later codified in the 1989 Convention on the Rights of the Child.¹³⁵ None of the principles recognised the specific needs of refugee children despite the harrowing aftermath of the Second World War. Some of the principles nonetheless directly applied to the conditions that refugee children were facing,

¹²⁴ Sharon Detrick *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff, Dordrecht, 1992) at 29.

¹²⁵ Pobjoy "A Child Rights Framework for Assessing the Status of Refugee Children", above n 64, at 91.

¹²⁶ Geraldine Van Bueren *The International Law on Rights of the Child* (Martinus Nijhoff Publishers, London, 1998) at 8.

¹²⁷ Mariam Kirolos and others *The War on Children* (Save the Children International, 2018) at 3.

¹²⁸ Van Bueren, above n 126, at 8.

¹²⁹ Geneva Declaration of the Rights of the Child (adopted 26 September 1924).

¹³⁰ Arnold, above n 62, at 74.

¹³¹ *Establishment of an International Children's Emergency Fund* UN Doc A/RES/57 (I) (11 December 1946) at [1(a)].

¹³² At [1(c)].

¹³³ At preamble.

¹³⁴ *Declaration of the Rights of the Child* UN Doc A/RES/1386 (XIV) (20 November 1959) [1959 Declaration].

¹³⁵ Rita Joseph *Human Rights and the Unborn Child* (Martinus Nijhoff Publishers, Leiden, 2009) at 1.

such as the right to equality,¹³⁶ the right to be among the first to receive relief,¹³⁷ and special protection for the child's development.¹³⁸

In 1989, the UNCROC¹³⁹ was adopted, and it set out a complete set of children's rights. In the preamble, the UNCROC noted that the need to extend particular care to the child had been stated in previous children's rights declarations, recognised in the International Bill of Rights and the statutes and relevant instruments of specialised agencies and international organisations concerned with the welfare of children. It also sets out children's rights and notes they are to be respected without discrimination of any kind, irrespective of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status of the child or their parents or legal guardians.¹⁴⁰

The drafting of the UNCROC commenced when Poland presented to the United Nations a new draft convention on the rights of the child in 1978.¹⁴¹ The proposal was sent to governments and international organisations for consideration.¹⁴² Several governments were hesitant about the idea of a convention on the rights of the child. In the initial stages, less than 30 countries were participating in the Working Group meetings that had been established to facilitate the completion of the work on a draft convention on the rights of the child.¹⁴³ In the comments relating to the first Polish draft of the Convention, some UN member states noted and emphasised that the focus should be on the rights of children in difficult situations, such as those disabled, refugee children, children who had infringed the law and orphans.¹⁴⁴ New Zealand particularly commented on the child's age and the need for clarity on when childhood begins and ends.¹⁴⁵ New Zealand was also in support of the need for a provision for education and special treatment for the disabled.¹⁴⁶ It noted its preference for a non-discrimination by family size clause regarding social security,¹⁴⁷ and recommended the inclusion of sex as a ground of discrimination.¹⁴⁸ This draft did not contain a specific provision for refugee

¹³⁶ 1959 Declaration, above n 134, at principle 1.

¹³⁷ At principle 8.

¹³⁸ At principle 2.

¹³⁹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

¹⁴⁰ At art 1.

¹⁴¹ UN Commission on Human Rights *Report on the 34th session Question of a Convention on the Rights of the Child* UN Doc E/1978/34 (6 February -10 March 1978) at [2].

¹⁴² Detrick, above n 124, at 21.

¹⁴³ At 23.

¹⁴⁴ OHCHR *Legislative History of the Convention on the Rights of the Child Volume I* (2007) at xxxviii.

¹⁴⁵ *Question of a Convention of the Rights of the Child, Report of the Secretary General, Addendum, New Zealand* UN Doc E/CN.4/1324/Add.5 (22 January 1980) at art IV.

¹⁴⁶ At art V.

¹⁴⁷ At art VI.

¹⁴⁸ At art X.

children. However, as discussions on further drafts continued, the inclusion of refugee children was suggested by the Women's International Democratic Federation, which proposed including an article on the protection of migrant workers and children of refugees.¹⁴⁹ Denmark proposed that the following paragraph be added:¹⁵⁰

The refugee child, whether unaccompanied or in company with his family, guardian or relatives, needs special protection and assistance. The State parties to the present Convention undertake to assist the refugee child in every possible way and also undertake to, as soon as possible, investigate whether the child has a family or other close relations, and recognize the right of the refugee child to be reunited with his guardians or relatives. In cases where no close relatives have been found the child shall, if possible, be placed within his own cultural and linguistic group. The best interest of the child shall in every case be the guiding principle.

A few amendments were made to the above paragraph before the working group considered it.¹⁵¹ It is worth noting that the proposal to introduce a provision for the protection and assistance of refugee children (art 11 bis) was welcomed and strongly supported by many speakers who were also of the view that the working group should approach the subject of refugee children in a purely humanitarian spirit.¹⁵² New Zealand was not part of any of the drafting groups established to elaborate on proposals made regarding art 11 bis. It also did not make any comments, recommendations, or proposals regarding the draft art. This may arguably explain, in part, the lack of attention paid to refugee children in New Zealand.

During discussions on the proposed art 11 bis, some of the issues raised related to the need to specify what a refugee child meant, that is, those who already had refugee status and those without, to ensure the wording was broad and not limited to unaccompanied children.¹⁵³ Though rejected, there was also a proposal to include a provision of adequate access to and receiving education and training.¹⁵⁴ Taking into account the contributions from member states and NGOs, the working group discussed and adopted the article in the United Nations Draft Convention on the Rights of the Child. It provided

¹⁴⁹ *Question of a Convention of the Rights of the Child, Written Statement submitted by the Women's International Democratic Federation, a Non-Governmental Organization in Category I Consultative Status* UN Doc E/CN.4/NGO/244 (19 February 1979) at 4.

¹⁵⁰ *Report of the Working Group on the Draft Convention on the Rights of the Child* UN Doc E/CN.4/L.1575 (17 February 1981) at [125(c)].

¹⁵¹ Detrick, above n 124, at 320.

¹⁵² *Report of the Informal Open-ended Working Group on the Rights of the Child* UN Doc E/1982/12/Add.1 (15 March 1982) at [92].

¹⁵³ *Report of the Working Group on a Draft Convention on the Rights of the Child* UN Doc E/CN.4/1989/48 (2 March 1989) at [394].

¹⁵⁴ At [379].

that state parties are to take appropriate measures to ensure that a child seeking refugee status or who is considered a refugee shall, whether unaccompanied or accompanied, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention and other international human rights or humanitarian instruments. It further provided that states are to cooperate in any efforts aimed at protecting and assisting such a child. This includes tracing the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with his family. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment.¹⁵⁵

The final draft provision concerning refugee children, formerly art 11 bis, is to be found in art 22 of the UNCROC. It has been noted that art 22 of the UNCROC is the only human rights treaty provision that deals specifically with refugee children and children seeking refugee status.¹⁵⁶ The existence of a specific provision for refugee children arguably supports the idea that refugee children have specific needs and interests that need to be taken into account when realising their rights. It therefore suggests the need for a nuanced understanding of the right to education for refugee children. The development of international children's rights in relation to refugee children did not cease after the adoption of the UNCROC. The UN General Assembly affirmed the need to prioritise the protection of refugee children more recently.¹⁵⁷

The CRC monitors compliance and the implementation of the UNCROC¹⁵⁸ and examines the progress made by states parties in meeting obligations under the Convention.¹⁵⁹ The CRC further sets out expectations for states parties concerning general measures of implementation.¹⁶⁰ It has been instrumental in developing and implementing the rights of refugee children through General Comments, Concluding Observations and Recommendations, and reports. The General Comments issued by the CRC provide a comprehensive analysis of the Convention's provisions and specific issues affecting children's rights.¹⁶¹ One of the General Comments provides particular recommendations on general measures of implementation for state parties.¹⁶² It also expressly

¹⁵⁵ At [377].

¹⁵⁶ Jason M Pobjoy *The Child in International Refugee Law* (Cambridge University Press, Cambridge, 2017) at 21.

¹⁵⁷ *Assistance to Refugees, Returned and Displaced Persons in Africa* UN Doc A/RES/65/193 (10 February 2011).

¹⁵⁸ Detrick, above n 124, at 29.

¹⁵⁹ UNCROC, above n 139.

¹⁶⁰ Andressa M Gadda and others "Human Rights' Monitoring and Implementation: How to Make Rights 'Real' in Children's Lives" (2019) 23(3) *The International Journal of Human Rights* 317.

¹⁶¹ Linda C Reif "The Future of Thematic Children's Rights Institutions in a National Human Rights Institution World: The Paris Principles and the UN Committee on the Rights of the Child" (2015) 37(2) *Houston Journal of International Law* 433 at 438.

¹⁶² *CRC General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [2].

advances the rights of “particularly vulnerable” children by highlighting the complex challenges with access to and enjoyment of children’s rights.¹⁶³ There is also guidance on the standard required for the protection, care and proper treatment of unaccompanied and separated children who are outside the country of their origin.¹⁶⁴ Refugee children fall under this guidance in some instances.

Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child provides authoritative guidance on the appropriate measures to be taken to fully protect the rights of children in the context of international migration and ensure full compliance with the obligations under the Conventions.¹⁶⁵ The Joint General Comment is instrumental in ensuring the needs and interests of refugee children are considered in the realisation of refugee rights. The right to education is not explicitly explained in as much detail as other rights mentioned in the Joint General Comment. This research will contribute towards filling that gap by exploring how the right to education for refugee children, in particular, should be understood and implemented.

In addition to General Comments, states parties are to submit periodic reports to the CRC on the measures adopted to realise the rights in the UNCROC, the progress made on the enjoyment of rights,¹⁶⁶ and any factors and difficulties affecting the fulfilment of the obligations under the UNCROC.¹⁶⁷ The CRC examines each report required from state parties on the implementation of the UNCROC and addresses concerns and recommendations through Concluding Observations. The Convention’s implementation mechanism is enhanced as it allows the CRC to accept information on the implementation of the UNCROC from sources other than the state parties’ reports, such as UNICEF and other UN organs and bodies.¹⁶⁸ Some of these, such as UNICEF provide expert advice and assistance on the implementation of the UNCROC,¹⁶⁹ review state parties’ reports,¹⁷⁰ and participate in the CRC’s review of submitted reports.¹⁷¹ Others may have expertise in refugee issues and can further address and highlight the needs of refugee children, thus advancing the realisation of

¹⁶³ CRC *General Comment No 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin* UN Doc CRC/GC/2005/6 (1 September 2005) at [1].

¹⁶⁴ At Part V.

¹⁶⁵ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child 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 2017) at [7].

¹⁶⁶ UNCROC, above n 139, at art 44(1).

¹⁶⁷ At art 44(2).

¹⁶⁸ Detrick, above n 124, at 637.

¹⁶⁹ UNCROC, above n 139, at art 45(a).

¹⁷⁰ At art 45(b).

¹⁷¹ UNICEF *UNICEF’s Role in Promoting and Supporting the Convention on the Rights of the Child* <www.unicef.org>.

their rights. For instance, the UNHCR provides valuable data and reports on issues affecting refugee children,¹⁷² thus complementing state party reports.

2.5 *New Zealand Resettlement, Policy and Legislative Developments*

An examination of resettlement, policy, and legislative developments reveals how the needs of refugee children have often been overlooked and considered intermittently, thus highlighting ongoing gaps within existing frameworks. Situating these developments within their historical and policy contexts helps explain how current frameworks have evolved and why they continue to fall short in adequately addressing children's experiences, thus providing important background for understanding on going issues.

The acceptance of refugees in New Zealand dates back to 1870, with the arrival of refugees from Denmark due to Germany's suppression of their language and culture.¹⁷³ From the 1880s, Jews escaping persecution in Tsarist Russia arrived in New Zealand.¹⁷⁴ At the time, immigration laws distinguished between British and non-British subjects.¹⁷⁵ British subjects were granted automatic entry into New Zealand, while non-British subjects faced restrictions.¹⁷⁶ Under the Naturalization Act 1860, non-British subjects could apply for naturalisation after settlement in New Zealand.¹⁷⁷ The Alien Act 1880 subsequently formalised the process of naturalisation, and the rights of naturalised aliens. Despite these legal developments, data on refugees were not accurately captured before the Second World War. This was due to the lack of differentiation between refugees and migrants in official records and the difficulty in identifying the nationality of those fleeing Hitler's persecution. Their passports and travel documents did not reflect nationalities but only the escape routes from Europe.¹⁷⁸

Between 1933 and 1941, 1,100 European refugees arrived in New Zealand.¹⁷⁹ New Zealand's approach to accepting refugees continued to disregard the distinction between refugees and migrants, as such many victims were not classified as refugees.¹⁸⁰ Although groups of refugees arrived, they

¹⁷² UNHCR *Unlocking Potential: The Right to Education and Opportunity* (UNHCR Refugee Education Report, 2023).

¹⁷³ Ann Beaglehole "Refugees" *Te Ara - the Encyclopaedia of New Zealand* (8 February 2005) <www.TeAra.govt.nz>.

¹⁷⁴ See Beaglehole, above n 173.

¹⁷⁵ Alexander Gillespie and Claire Breen *People, Power, and Law: A New Zealand History* (Hart Publishing, Oxford, 2022) at 85.

¹⁷⁶ At 85.

¹⁷⁷ Naturalization Act 1860, s 3.

¹⁷⁸ Ann Beaglehole *Facing the Past: Looking Back at Refugee Childhood in New Zealand 1940s–1960s* (Bridget Williams Books, Wellington, 1990) at 8.

¹⁷⁹ Binzegger, above n 17, at 8.

¹⁸⁰ Ann Beaglehole "The Response of the New Zealand Government to Jewish Refugees and Holocaust Survivors" <www.holocaustcentre.org.nz> at 2.

could not be classified as such because they were required to undergo the normal immigration pathway to resettle in New Zealand.¹⁸¹ During this time, refugees were subject to the Immigration Restriction Amendment Act 1931. Under this legislation, the Minister of Customs was responsible for issuing a permit to land, subject to conditions imposed by the Minister or officials. As such, they had the discretion to decide who was suitable to enter New Zealand.¹⁸² The Act explicitly provided that the requirement for a permit to land would only apply to non-British.¹⁸³ In addition to this, non-British and “aliens” could not be accepted if they did not have guaranteed employment, enough money or skills that would enable them to rehabilitate without affecting New Zealand residents.¹⁸⁴ As a result, the acceptance of non-British refugees in New Zealand was considered “inconspicuous.”¹⁸⁵ This suggests that their acceptance was seamless and based on the perception that they could be easily integrated due to their self-sufficiency. This approach is echoed in the current refugee resettlement process where most refugees resettling in New Zealand are referred by the UNHCR under the quota system. While the specific selection criteria are not publicly clear, the selection may implicitly favour those likely to integrate easily. As subsequent chapters will show, this may have significant implications for refugee children, particularly in informing measures taken to meet their needs and to realise their rights.

The Government had reservations about accepting refugees due to economic interests and resistance from prominent groups. While this was the case, there was also pressure on the Government from various individuals and community groups to resettle more Jewish refugees.¹⁸⁶ Support and lobbying for more assistance to refugees increased.¹⁸⁷ In March 1939, the Christchurch Refugees Emergency Committee lobbied the Government to admit more refugees. It provided a list of refugees (with skills that the New Zealand Government desired) who wanted to come to New Zealand.¹⁸⁸ The Wellington Diocesan Synod of the Anglican Church also urged the Government to act on behalf of refugees. The Society of Friends New Zealand actively tried to influence Government policy and assisted refugees who later came to New Zealand.¹⁸⁹

¹⁸¹ Binzegger, above n 17, at 8.

¹⁸² Immigration Restriction Amendment Act 1931, s 3(1).

¹⁸³ Section 3(2).

¹⁸⁴ Ann Beaglehole *Refugee New Zealand: A Nation's Response to Refugees and Asylum Seekers* (Otago University Press, Dunedin, 2013) at 31.

¹⁸⁵ Binzegger, above n 17, at 9.

¹⁸⁶ Beaglehole “The Response of the New Zealand Government to Jewish Refugees and Holocaust Survivors”, above n 180, at 4.

¹⁸⁷ Beaglehole *Refugee New Zealand: A Nation's Response to Refugees and Asylum Seekers*, above n 184, at 34.

¹⁸⁸ At 33.

¹⁸⁹ Ann Beaglehole *A Small Price to Pay Refugees from Hitler in New Zealand, 1936-46* (Allen & Unwin New Zealand and Department of Internal Affairs, Wellington, 1988) at 19.

The approach of the New Zealand Government towards the resettlement of refugees was predominantly influenced by economic interests, as seen from skill preference rather than humanitarian reasons.¹⁹⁰ It will be considered later in the thesis whether this is the current approach to refugee resettlement and its connection to the realisation of refugee children's right to education. Groups like the League of Nations Unions and Peace Pledge Union lobbied for a humanitarian immigration policy.¹⁹¹ In 1944, the refugee resettlement programme was formally commenced in New Zealand.¹⁹² An initial 733 non-Jewish Polish children and their guardians were accepted and settled in a Polish camp in Pahiatua, which had their own Polish schools.¹⁹³ As Polish children were Roman Catholic, they had to attend Catholic schools¹⁹⁴ A group of 22 arrived at a later date.¹⁹⁵

To have better chances at further study or work, some children wanted to attend New Zealand (Catholic) schools to obtain the New Zealand School Certificate.¹⁹⁶ Furthermore, by going to a New Zealand school, they would be able to learn English more quickly.¹⁹⁷ The Prime Minister at the time reassured the children that they would be cared for by the New Zealand Government and provided with the education required.¹⁹⁸ Polish orphans who were sufficiently interested were promised payment for their school fees at secondary and higher education, and work would be made available to them.¹⁹⁹ It was observed that younger students in convent schools performed better than the older ones, who struggled to keep up with the standard of the classes due to a lack of sufficient understanding of English.²⁰⁰ Several New Zealand teachers were subsequently appointed to teach English in Polish schools to address the English language barrier. As a result of the English teaching in the Polish primary schools, children made better progress in New Zealand schools later on and improved their access to trade and higher education.²⁰¹ This historical account highlights challenges such as language barriers and educational integration that refugee children continue to face in the present. This research is therefore crucial as it helps inform efforts to address such issues.

¹⁹⁰ Beaglehole *Refugee New Zealand: A Nation's Response to Refugees and Asylum Seekers*, above n 184, at 33.

¹⁹¹ At 9.

¹⁹² Beaglehole *A Small Price to Pay Refugees from Hitler in New Zealand, 1936-46*, above n 189, at 5.

¹⁹³ Krstyna Skwarko *The Invited: The Story of 733 Polish Children Who Grew Up in New Zealand* (Millwood Press, Wellington, 1974) at 78.

¹⁹⁴ At 60.

¹⁹⁵ At 78.

¹⁹⁶ At 60. The New Zealand convent schools that some went to included Sacred Heart Convent in Auckland, Wellington and Saint Mary's Convent in Wellington.

¹⁹⁷ At 60.

¹⁹⁸ At 65.

¹⁹⁹ At 68.

²⁰⁰ At 78.

²⁰¹ At 78.

After the Second World War, New Zealand needed to increase its population, but discrimination continued against those regarded as “unsuitable” based on racial, national and economic grounds.²⁰² Those vested with the responsibility of selection were said to be racially biased, as was seen from the communication of the Minister on the intake of displaced persons in New Zealand, who said:²⁰³

Preference should be given to racial types which are likely to be easily assimilated into New Zealand industries... It is considered that the most suitable types are likely to be found amongst races other than Jews or Slavs.

New Zealand had been unwilling to accept refugees from European camps. As time progressed and following negotiations with the International Refugee Organisation (IRO) in 1948, New Zealand agreed to a quota of 1,000 displaced people comprising 200 unaccompanied children and 300 single women.²⁰⁴ As they could not meet the quota, the composition was changed, and 906 refugees were settled in New Zealand. Only six unaccompanied children and 130 single women formed part of the total number of refugees resettled.²⁰⁵ It has been noted that New Zealand had agreed to accept a few displaced people, provided that it could make a selection of those considered to fall within its least unsuitable category.²⁰⁶ This category comprised unskilled young people willing to work on farms as domestic workers and in hospitals.²⁰⁷ Orphans between 5 and 12 were also greatly desired, as children presented the least assimilation related issues.²⁰⁸

During this time, refugee children were under the Child Welfare Amendment Act 1948 mandate. The Child Welfare Division had the administrative responsibility for the Polish children who came during the war and those previously resettled at the Polish camps in Pahiatua.²⁰⁹ The Child Welfare Act 1925 did not make specific provisions for refugee children. The Child Welfare Amendment Act 1948 was the only piece of domestic legislation that referred to the refugee child at the time. The passing of this Act resulted in two schemes in terms of how immigrant and refugee children were defined.²¹⁰ Section 2(1) of the Child Welfare Amendment Act 1948 defined an “immigrant child” as a child who had not attained the age of 18 years, who was either a refugee child or a child who came to live in New

²⁰² Beaglehole, *A Small Price to Pay Refugees from Hitler in New Zealand*, above n 189, at 5.

²⁰³ “Memo for Minister of Employment from Director of Employment” National Archives, LI 22/1/27, part 1, (23 December 1947) as cited in Beaglehole *A Small Price to Pay Refugees from Hitler in New Zealand*, above n 190, at 6.

²⁰⁴ HL Bockett “Department of Labour and Employment (Report of the) For the Year Ended 31st March 1949” (1949) Session I AJHR H11 at 17.

²⁰⁵ At 17.

²⁰⁶ Beaglehole *A Small Price to Pay Refugees from Hitler in New Zealand*, above n 189, at 5.

²⁰⁷ At 5.

²⁰⁸ At 5.

²⁰⁹ RE Owen “Education: Child Welfare, State Care of Children, Special Schools and Infant-Life Protection (In Continuation of E-4, 1949)” (1950) AJHR session I E04 at 2.

²¹⁰ At 1.

Zealand in accordance with an arrangement between the government of New Zealand, and the parents or guardian of the child subject to provisions of the Act. Such a child could be placed in the care of suitable persons by the Superintendent and guardianship could be transferred to them.²¹¹ A refugee child was defined as any child who came to New Zealand as an immigrant pursuant to an arrangement made between the Government of New Zealand and the International Refugee Organisation.²¹² Under this scheme, refugee children would be available for adoption.²¹³ The definitions above demonstrate that, while there was a difference between a migrant and a refugee in terms of both definitions, there was no difference in terms of their arrival and acceptance into New Zealand. This was consistent with New Zealand's immigration approach, where, as a general rule, all aliens lawfully in New Zealand had the same rights and principles as British subjects except for treatment relating to alien registration requirements, voting restrictions and employment in jobs reserved for British subjects. Besides the employment and residency conditions, there was no discrimination between different groups of aliens.²¹⁴ This suggests that refugee children were perceived as no different from other migrants, an issue that currently exists, with refugee and migrant children being grouped together. As noted in Chapter One, this may result in the unique circumstances of refugee children being overlooked.²¹⁵

The Child Welfare Amendment Act's scope was limited to unaccompanied children as s 2(2) provided that a person coming to New Zealand accompanied by and in charge of his parent or relatives would not be deemed either an immigrant child or a refugee child. Unaccompanied children were placed in the care of a suitable person by the Superintendent or officer of the Child Welfare Division. Such persons bore the responsibility of maintaining the child at their own cost.²¹⁶ An orphan benefit, which the Commissioner determined, was available to the person having the care and control of the child or to some other reputable person and was to be applied towards the maintenance or education of the child or otherwise for his benefit.²¹⁷ This section applied to a child under the age of 16 years, provided that both parents were dead,²¹⁸ that the child was born in New Zealand and that the last surviving parent was resident in New Zealand for not less than three years immediately preceding the death of that parent,²¹⁹ and that the child is not being maintained in any state institution.²²⁰ Such a

²¹¹ Child Welfare Amendment Act 1948, s 4(1).

²¹² Section 2.

²¹³ Section 10; see also Owen, above n 209, at 2.

²¹⁴ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons *Comments of Governments on the Draft Convention Relating to the Status of Refugees and the Draft Protocol Relating to the Status of Stateless Persons - New Zealand* UN Doc A/CONF.2/6/Add.2 (11 June 1951).

²¹⁵ See Chapter One footnotes 161 – 168 and accompanying text.

²¹⁶ Child Welfare Amendment Act 1948, s 4.

²¹⁷ Social Security Act 1938, s 26(5).

²¹⁸ Section 26(1)(a).

²¹⁹ Section 26(1)(b).

²²⁰ Section 26(1)(c).

child could be a step-child or an adopted child.²²¹ No person would be entitled to a family benefit for children who were not orphans unless the child of whom the benefit is claimed was born in New Zealand or has been permanently resident in New Zealand for more than a year.²²² The benefit was to be exclusively used towards the maintenance or education of the children.²²³

Between 1948 and 1952, the New Zealand Government's preferred criteria were set aside to deal with the need for labourers.²²⁴ The gradual shift from immigration policy characterised by restrictions towards accepting non-British people had been attributed to economic factors, as a study in 1950 concluded that a population increase was required to meet the shortage of labour.²²⁵ During this time, 4,582 displaced Europeans were accepted as refugees and displaced people arriving on International Refugee Organisation ships.²²⁶ Following an uprising in Hungary, the Government agreed to a quota of 1,000 Hungarian refugees in 1956. The quota was later increased to 1,300.²²⁷ From 1956 to 1957, 1,100 refugees from the Hungarian uprising arrived in New Zealand. These were carefully selected to ensure that "while giving the appearance of fulfilling international and humanitarian obligations," New Zealand received settlers who would most easily integrate without the need for much assistance.²²⁸ It was observed that:²²⁹

The criteria used for admitting refugees have been a mixture of economic, political and humanitarian considerations with one or the other dominating at various times. In general, intake has been greatest where it coincided with economic benefits for New Zealand, and least where only humanitarian considerations are involved.

There are echoes of this approach in more recent refugee resettlement eligibility criteria, which indicate a preference for those perceived to integrate easily. One of the factors considered in the Refugee Quota Programme has been settlement.²³⁰ It requires consideration of refugees who do not have settlement issues that may be unmanageable or result in unreasonable strain on resources.²³¹ Consequently, it could be argued that this approach eliminates the need to implement additional or

²²¹ Social Security Act 1938, s 26(3).

²²² Section 29.

²²³ Section 32.

²²⁴ Binzegger *New Zealand's Policy on Refugees*, above n 17, at 14.

²²⁵ At 14.

²²⁶ Parliamentary Library *Immigration Chronology: Selected Events 1840–2008* (Research Paper, 2008/01, 15 April 2008) at 4.

²²⁷ At 5.

²²⁸ At 6.

²²⁹ Binzegger *New Zealand's Policy on Refugees*, above n 17, at 107.

²³⁰ Other factors considered are Immigration New Zealand Policy, credibility, risk and medical; and "UNHCR Resettlement Handbook, Country Chapters New Zealand" (March 2018) <www.unhcr.org> at 5.

²³¹ At 6.

specific measures to address needs and interests beyond those already considered. It can be further contended that the perceived educational success of refugee students, even in the absence of targeted educational interventions, is attributable not only to their own efforts or the support mechanisms within schools, but also to resettlement policies that predetermine which refugees are more likely to integrate easily into the education settings.

Over time, different groups of refugees have been resettled in New Zealand.²³² In 1959, New Zealand became one of the first countries in the world to accept refugee families with “handicapped” members. “Handicapped” refugees were those regarded as hard to settle for various reasons. These included ill health, disability, advanced age, or having large numbers of dependent children.²³³ Since then, refugee children (accompanied) could only resettle in New Zealand if their parents met the different criteria that were in place. The following year, New Zealand ratified the 1951 Convention, and the refugee policy was based on the obligations therein, mainly to offer protection to refugees. For refugees to be accepted thereafter, the criteria were that they had to have a maximum of four dependent children, be trained or experienced in an occupation likely to make adaptation to working in New Zealand a reasonable hope and for all family members to be in good health and character. Refugees who did not meet the criteria were to be given sympathetic consideration.²³⁴

The Government tabled a review of the immigration policy in 1986.²³⁵ This was a comprehensive policy statement on immigration and a presentation of the new Immigration Bill by the Minister of Immigration.²³⁶ The review meant a departure from the immigration policy of the selection based on a preference of the British over other nationalities towards a selection criterion based on personal merit rather than national or ethnic background. Four categories of potential migrants were established being, occupational, business, family, and humanitarian.²³⁷ When presenting the review, the Minister noted that refugees were accepted for humanitarian reasons instead of skills and employment grounds, thus endorsing a commitment by the Government to resettle refugees in New Zealand.²³⁸ He also noted that when the majority of refugees arrive (quota refugees), the UNHCR would have already determined their status and, in most cases, their personal circumstances clarified

²³² These include, Danes, Jews, Refugees from Nazism, Polish refugees, Displaced persons from Europe, Hungarian, Chinese, Russian Christians from China, Czechoslovak and Asians from Uganda. See Ann Beaglehole “Refugees - 1950s–1970s: Refugee Groups” Te Ara - The Encyclopaedia of New Zealand <www.TeAra.govt.nz> at 3-4.

²³³ Parliamentary Library *Immigration Chronology: Selected Events 1840–2008* (Research Paper, 2008/01, 15 April 2008) at 5.

²³⁴ Binzegger *New Zealand's Policy on Refugees*, above n 17, at 72.

²³⁵ Kerry Burke “Review of Immigration Policy August 1986” (1987-87) AJHR G42 at 23.

²³⁶ Richard Bedford and others “The Immigration Policy Review, 1986: A Review (New Zealand)” (1987) 13(1) *New Zealand Population Review* at 48.

²³⁷ Paul Merwood “Migration Trends 2006-7” (Department of Labour, 2008) at 4.

²³⁸ Burke, above n 235, at 26.

during the preliminary process by immigration.²³⁹ While the policy acknowledged humanitarian reasons for refugee settlement, it did not explicitly reference international law obligations or the rights of children, suggesting that, historically, the specific needs and rights of refugee children may not have been fully considered in immigration policy. Following the review, an annual quota of 800 refugees was established.²⁴⁰ It is worth noting that prior to the establishment of the annual quota, there had been no quota system for refugees in the strict sense, as the Government would agree to accept different quotas of refugees on an ad hoc basis depending on the circumstances at each particular time.²⁴¹

Eventually, the Immigration Act 1987 was enacted as a result of the review. Part 6A of the Act dealt with refugees, and the purpose was to provide a statutory basis for the system for New Zealand to meet its obligations under the Refugee Convention.²⁴² In line with functions of determination and regulation of one's refugee status, the Act referred to quota refugees to the extent that the said functions also applied to persons recognised as refugees outside New Zealand who have travelled to New Zealand as mandated refugees. Like the Refugee Convention, the Immigration Act 1987 and all subsequent amendments²⁴³ did not make any special provision for refugee children. It can thus be inferred that the same processes and rights that adult refugees had would apply to children because they were human beings entitled to human rights and fundamental freedoms in the Refugee Convention. This highlights the invisibility of refugee children and a gap in the legislative framework protecting the rights of refugee children in New Zealand at the time.

The current Immigration Act 2009, like the previous 1987 Act, codifies and refers to the Refugee Convention. The Act is focused on the determination and regulation of one's status as a refugee. Quota refugees are referred to in the Act and must be recognised as refugees without the need for submission and determination of a claim under the Act if they have been recognised as refugees outside New Zealand and brought under a government-mandated programme on the basis of that recognition.²⁴⁴ They are also subject to some provisions in the Act, such as the cessation²⁴⁵ and cancellation of a refugee or protected person's recognition.²⁴⁶ It is worth noting that the focus on all the New Zealand immigration legislation is not on refugee children or their livelihood. The focus

²³⁹ At 23.

²⁴⁰ Anna Gruner and Wendy Searle "New Zealand's Refugee Sector: Perspectives and Developments, 1987–2010 Quota Refugees Ten Years on Series" (Department of Labour, 2011) at 4.

²⁴¹ Binzegger, *New Zealand's Policy on Refugees*, above n 17, at 70.

²⁴² Immigration Act 1987, s 129A.

²⁴³ Immigration Amendment Acts of 1991, 1995, 2002 and 2004.

²⁴⁴ Immigration Act 2009, s 126.

²⁴⁵ Section 143(iii).

²⁴⁶ Section 146(1)(iii).

remains on the determination and regulation of one's status as a refugee. While New Zealand has continued to resettle children and their families, domestic legislation does not mention, or at least acknowledge, the special protection that refugee children require. Therefore, it can be concluded that refugee children have been and continue to be invisible in the New Zealand immigration legal framework. This is consistent with New Zealand's attitude to issues relating to refugee children during the drafting process, as shown above. This research therefore seeks to enhance the recognition of refugee children and bring their needs and interests into sharper focus within the existing legal framework

Although New Zealand has a long history of refugee resettlement, and despite resettlement being a significant part of refugees' lives, domestic legislation has no resettlement provisions. From 1975, the Inter-Church Commission on Immigration and Refugee Resettlement (ICCI), which later became the Refugee and Migrant Commission, was the main coordinator of refugees. It was funded annually by the Government as there was recognition that it played an essential role in New Zealand's response to issues affecting refugees and their resettlement.²⁴⁷ Its mandate was to promote and support refugee resettlement by churches and community groups and provide advocacy and policy advice on matters relating to refugees.²⁴⁸ The resettlement of refugees was subsequently secularised, with the ICCI changing to the Refugee and Migrant Service (RMS) in 1990.²⁴⁹ It was later changed to Refugee Services Aotearoa New Zealand, in 2008.²⁵⁰ The Refugee Services Aotearoa New Zealand had a central role in supporting refugee resettlement, and it provided support from refugees' arrival through their first 12 months of resettlement.²⁵¹ In 2012, the Refugee Services Aotearoa New Zealand, became a part of the New Zealand Red Cross,²⁵² the current primary provider of community refugee settlement programmes.²⁵³ There had been no guidance for organisations supporting refugees prior to 2012.

It was only in 2012 that the New Zealand Resettlement Strategy, a whole-of-government approach, was developed to focus efforts on five intended outcomes to ensure effective resettlement as mentioned in the previous chapter.²⁵⁴ Two of these (health and education), though limited, directly

²⁴⁷ Burke, above n 235, at 23.

²⁴⁸ New Zealand Red Cross "Migration Scoping Report: Identifying Current and Emerging Issues in Key Migration Population Groups in New Zealand" (May 2021) at 33.

²⁴⁹ At 33.

²⁵⁰ Anna Gruner and Wendy Searle "New Zealand's Refugee Sector: Perspectives and Developments, 1987–2010 Quota Refugees Ten Years on Series" (Department of Labour, 2011) at 13.

²⁵¹ At 13.

²⁵² New Zealand Red Cross "Refugee Services and Red Cross" <www.redcross.org.nz>.

²⁵³ New Zealand Red Cross "Pathways to Resettlement" <www.redcross.org.nz>.

²⁵⁴ Ministry of Business, Innovation and Employment *New Zealand Refugee Resettlement Strategy-Priorities to 2020* (April 2018) at 3.

relate to refugee children.²⁵⁵ No reference is made to human rights or children’s rights in the Strategy, and it does not explicitly consider the unique needs of refugee children, such as protection and development. It predominately focuses on resettlement issues affecting adults. It has been noted that not much of the resettlement strategy is based on law but rather on policies agreed to by the Cabinet every three years.²⁵⁶ In 2023, revisions to the Strategy were made to “ensure they reflect the community and government’s vision and aspirations for successful settlement in Aotearoa New Zealand.”²⁵⁷ While this is timely, this aim supports the idea that the Strategy is not based on law and in addition by children’s rights. While the vision statements, outcome areas and descriptions for the Strategy have been updated, the new success indicators are yet to be finalised.²⁵⁸ This research is therefore important as it will inform how success indicators can be revised to ensure adequate realisation of the right to education and consequently, other refugee children’s rights.

2.6 Conclusion

The rights of refugee children are captured in various international refugee, human rights and children rights law. However, the historical development of these three areas demonstrates the limitations to the protection of the rights of refugee children. While refugee law recognises human rights and fundamental freedoms, the current key legal framework fails to adequately recognise and provide for refugee children’s rights. The rights of children have also been emphasised in different human rights bodies and mechanisms. International human rights as a body of law provides a robust foundation for promoting and protecting refugees’ rights. International children’s rights law nonetheless offers the best protection as it explicitly recognises the refugee child and provides a set of rights that consider all the needs and interests of refugee children. Although New Zealand has ratified the different international treaties that protect the rights of refugee children, it is slow to incorporate and apply the rights of refugee children in domestic immigration legislation and policy. It will be demonstrated in subsequent chapters how this results in the particular needs of refugee children not being met.

²⁵⁵ At 1.

²⁵⁶ New Zealand Red Cross “Migration Scoping Report: Identifying Current and Emerging Issues in Key Migration Population Groups in New Zealand”, above n 248, at 36.

²⁵⁷ Cabinet Economic Development Committee “Refreshing the Refugee Resettlement and Migrant Settlement Strategies” (15 September 2023) DEV-23-MIN-0147 at [1].

²⁵⁸ At 1.

3. A CONCEPTUAL FRAMEWORK FOR EXAMINING THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN

3.1 Introduction

This chapter sets out a theoretical framework that provides a deeper understanding and context of the child rights-based approach adopted in this research. As noted earlier, the main aim of the study is to examine how the New Zealand legal framework underpins the provision of education to refugee children and how the framework implements the obligations arising from the right to education for refugee children. One of the objectives is how the realisation of the right to education necessary for the resettlement and integration of refugee children in New Zealand can be measured or monitored. A theoretical framework will thus provide analytical tools for determining the extent to which the right to education for refugee children is implemented within the existing legal framework. It also provides context, which is necessary for implementing rights. The theoretical framework adopted in this research comprises concepts from three different disciplines relating to children and their education, these being the legal, sociological, and education perspectives. It includes the interest theory of rights, sociology of childhood theory, and sociocultural theory, which, as a collective, will enhance the understanding and interpretation of refugee children's right to education. The interest theory of rights provides a foundation for recognising refugee children as rights-holders with interests correlating with the right to education. The childhood theories are also useful as they recognise the importance of context in children's lives, and considering the historical and cultural background of childhood, thus informing the various ways of understanding and relating to children.¹ As such, the social, economic, and cultural experiences of refugee children can be placed within a rights framework. A theory informed by an education perspective is important in this research as it informs the determination of the extent to which refugee children are treated as full members of society, capable of participating and interacting as rights-holders in school.

For the present purpose, the said theories will be used as a guide to understand and advance research on the rights of refugee children. In particular, they will be discussed and applied to explain and understand the normative content of refugee children's rights in education and how the perception of children, particularly refugee children and their childhood within educational settings, aligns with children's rights. The theories adopted will also be used to critically analyse the extent to which

¹ Anne Smith (ed) *Enhancing Children's Rights: Connecting Research, Policy and Practice* (Palgrave Macmillan, London, 2015) at 9.

children's rights inform the domestic laws and policies on education. As such, the theories will inform how duty bearers responsible for realising the right to education should understand and implement refugee children's rights. The theoretical framework lays a foundation for the means of measuring the realisation of their rights where there is a need for improvement.

While a theoretical basis in the study of refugee children's rights is important, it has been noted that not much research on children's rights in education is grounded or based on theory.² Some scholars have urged for more critical legal research to examine the limitations or shortcomings of legal provisions and the legal approach. It has been suggested that this can be done by critiquing the legal framework of children's rights as set out internationally, considering how they could be framed, and thinking about how children's rights law can contribute to social change.³ Wouter Vandenhoe further notes that this may result in an increased understanding of how children's rights law and social realities interact.⁴ Therefore, engaging in critical legal research will enhance the understanding of the normative content of the rights of refugee children, how duty bearers should understand them, and how the rights of refugee children in education can be framed in the domestic legal framework. This will result in a clearer shared understanding of the provision of education to refugee children in a manner that ensures their enjoyment of the right to education.

3.2 *Children's Rights Theory*

Although the UNCROC⁵ sets out children's rights and has been used as a theoretical and analytical framework,⁶ there have been debates on whether children have rights, which will be discussed in this chapter. These debates are relevant in this research as they show how some conceptions about children's rights, particularly relating to children's capability, may interfere with the enjoyment of their rights. Theories that support the notion that children have rights inform the understanding that refugee children have rights and can help ascertain the content of those rights. While the UNCROC reflects a consensus that children have rights, the way rights are defined and understood determines how such rights are realised. There has been an emphasis on the fact that determining whether

² Ann Quennerstedt "Children's Rights Research Moving into the Future: Challenges on the Way Forward" (2013) 21(2) *The International Journal of Children's Rights* 233 at 239.

³ Wouter Vandenhoe "Children's Rights from a Legal Perspective: Children's Rights Law" in Wouter Vandenhoe and others (eds) *Routledge International Handbook of Children's Rights Studies* (Routledge, London, 2015) at 39.

⁴ At 40.

⁵ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

⁶ Matias Cordero Arce "Maturing Children's Rights Theory: From Children, With Children, Of Children" (2015) 23(2) *The International Journal of Children's Rights* 283.

children have rights “reveals a great deal about our evaluative outlook.”⁷ In this sense, some scholars rely on this determination conventionally to justify the conceptual approach to children. At the same time, some engage in such a discourse to defend the value and importance of children. A theoretical basis for the definition of a right is important because a right not underpinned by a theoretical/conceptual foundation can be problematic as its interpretation can be subjective or motivated by other agendas.⁸ The definition and understanding of a right is also crucial as it determines who is a bona fide rights-holder.⁹ Therefore, this research will be underpinned by a child rights theory and is particularly relevant for refugee children as refugee students tend to be viewed as victims and vulnerable and afforded assistance on this basis,¹⁰ not as rights-holders entitled to protection. It has also been observed that refugees are usually at risk of being excluded from full legal protection by states.¹¹ As such, a theoretical framework justifies attributing rights to refugee children and this crucial for ensuring that they receive the full legal protections they are entitled to.

Theories defining rights (in terms of function of the rights), have been widely debated, especially as they relate to children’s rights. The will and interest theories are the main concepts that have been considered in relation to advancing children’s rights. The discussion below seeks to outline the main arguments of the theories and how they underpin an understanding of children’s rights.

3.2.1 Will Theory of Rights

There is a great body of scholarship on the will theory of rights, with several scholars focusing their discussion on how the theory relates to children.¹² This theory is based on concepts of rationality and autonomy, which were the basis of theories of human rights by earlier philosophers¹³ such as Immanuel Kant, who was of the view that rights are based on the rational capacities of human

⁷ Tom D Campbell “The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult” in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) at 2.

⁸ John Tobin “Justifying Children’s Rights” (2013) 21(3) *The International Journal of Children’s Rights* 395 at 398.

⁹ David Frydrych “The Theories of Rights Debate” (2018) 9(3) *Jurisprudence* 566 at 568.

¹⁰ Amanda Keddle “Refugee Education and Justice Issues of Representation, Redistribution and Recognition” (2012) 42(2) *Cambridge Journal of Education* 197 at 200.

¹¹ Kurt Willems and Jonas Vernimmen “The Fundamental Human Right to Education for Refugees: Some Legal Remarks” (2018) 17(2) *European Educational Research Journal* 219 at 221.

¹² HLA Hart “Are There Any Natural Rights?” (1955) 64(2) *Philosophical Review* 175; HLA Hart *Essays on Bentham Studies in Jurisprudence and Political Theory* (Clarendon Press, Oxford, 1982); LW Sumner *The Moral Foundation of Rights* (Clarendon, Oxford, 1987) at 204–205; and Hillel Steiner “Working Rights” in Matthew Kramer, Nigel Simmonds and Hillel Steiner *A Debate Over Rights* (Oxford, Clarendon Press, 1998) at 259.

¹³ Some other philosophers who based their understanding on autonomy and rationality include John Locke and Jean-Jacques Rousseau: John Locke *Two Treatises of Government* (Thomas I Cook (ed), Hafner Publishing Company, New York, 1947) [first published 1689]; John Locke *An Essay Concerning Human Understanding* (Peter H Nidditch (ed), Clarendon Press, Oxford, 1979) [first published 1689]; and Jean-Jacques Rousseau *Emile* (Barbara Foxley (translator), JM Dent and Sons, London, 1921) [first published as *Émile, ou De l'éducation*, 1762].

beings.¹⁴ He was of the view that one has a right if they have the capacity to obligate others and the power to compel performance of that obligation.¹⁵ John Locke also shared the same understanding and noted that “the freedom then of man, and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will.”¹⁶ These ideas influenced HLA Hart’s thinking on rights.¹⁷ Hart argued that rights are associated with the capacity to make a choice under the will theory of rights.¹⁸ He argued that a legal right affords one with the power of control to enforce or not to enforce duties correlative to the right.¹⁹ As such, there is the notion that where there is no means of control, no right exists.²⁰ The will theory recognises as rights-holders those who have the capacity to make a choice regarding their actions and on the duties of others.²¹ Therefore, a right in this sense cannot be extended to those who are incompetent and lack capacity.²² Several theorists argue that according to the will theory, which requires one to have the capacity to have a right, children do not have rights as they do not have the capacity to make a rational choice.²³ Consequently, children cannot be recognised as rights-holders with a bona fide claim.²⁴ Several writers have argued against the will theory being extended to children,²⁵ while others have argued that children have rights even if they are incompetent.²⁶ Although there is still a perception that children cannot have rights, the will theory of rights cannot be said to support a child rights-based approach as it does not recognise children as rights-holders and therefore cannot underpin the research.

¹⁴ Immanuel Kant *The Metaphysical Elements of Justice: Part I of The Metaphysics of Morals* (John Ladd (ed), Bobbs-Merrill, Indianapolis, 1965) [first published 1797] at 43-45.

¹⁵ At 36.

¹⁶ Locke, above n 13, at 126.

¹⁷ Hart argues that children are excluded from the class of moral rights-holders. He argues that if a right exists, it must be a right to freedom and it is from this freedom that one can voluntarily limit their liberty to create rights: Hart “Are There Any Natural Rights?”, above n 12, at 180-181 and 189-191.

¹⁸ Hart *Essays on Bentham: Studies in Jurisprudence and Political Theory*, above n 12, at 188-189.

¹⁹ At 183 and 188.

²⁰ Paul Graham “The Will Theory of Rights: A Defence” (1996) 15(3) *Law and Philosophy* 257 at 260. Frydrych, above n 9, at 581.

²¹ Lief Wenar “The Analysis of Rights” in Matthew Kramer and others (eds) *The Legacy of H.L.A Hart: Legal, Political, and Moral Philosophy* (Oxford University Press, Oxford, 2008) at 253.

²² At 348.

²³ Neil MacCormick “Children’s Rights: A Test-Case for Theories of Right” in *Legal Right and Social Democracy* (Clarendon Press, Oxford, 1982) at 154; Steiner, above n 12, at 259; and Matthew Kramer “Rights Without Trimmings” in Matthew Kramer, Nigel E Simmonds and Hillel Steiner (eds) *A Debate Over Rights* (Clarendon Press, Oxford, 1998) at 69.

²⁴ Katherine Hunt Federle “On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle.” (1993) 42(3) *The De Paul Law Review* 983; and Lucinda Ferguson “Not Merely Rights for Children but Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights” (2013) 21(2) *The International Journal of Children’s Rights* 177 at 192.

²⁵ Some arguments against this theory have been set out in: Matthew H Kramer “Some Doubts About Alternatives to the Interest Theory of Rights” (2013) 123(2) *Ethics* 245; Katherine Hunt Federle “Rights Flow Downhill” (1994) 2(4) *The International Journal of Children’s Rights* 343 at 348; and Graham, above n 20, at 257.

²⁶ Onora O’Neil argued that children should not be denied rights because they cannot claim their rights for themselves: Onora O’Neil “Children’s Rights and Children’s Lives” (1988) 98(3) *Ethics* 445; see also Cohen Howard *Equal Rights for Children* (Rowman & Littlefield Publishers, Totowa, 1980) at 57.

3.2.2 Interest Theory of Rights

The interest theory of rights, on the other hand, better underpins the idea that children have rights. This theory suggests that one has a right if they have an interest to be protected. One of the proponents of the interest theory of rights, Michael Freeman, asserts that children's rights are explained better by the interest theory and that before having wills to claim, children have interests.²⁷ According to Joseph Raz, all rights are based on interests,²⁸ and a right exists where interests of the right-holders are sufficient to obligate another person.²⁹ David Archard explains a right under the interest theory as "the protection of an interest of sufficient importance to impose on others certain duties whose discharge ensures the enjoyment by the rights-holder of the interest in question."³⁰ Matthew Kramer, on the other hand, defines rights as "modes of protection for interests that are treated as worthy of protection."³¹ He further posits that the essence of a legal right is to protect the interest of a right-holder.³² Tom Campbell is of the view that if rights are defined as interests protected by laws, then children have rights because they have interests.³³

As shown above, interest theorists share the understanding that rights are based on interests. While refugee children have needs and interests in common with other children, refugee children, owing to their migratory experiences and different cultures, have different interests relating to their wellbeing and development. They are to be afforded protection and the means to develop as autonomous human beings. Studies on refugee children in New Zealand have shown that their education can be affected by bullying, discrimination, and cultural and language barriers, among other things.³⁴ Therefore, the interest theory of rights will be applied to establish what children's rights mean, particularly those of refugee children, how they should be understood and implemented by key actors in practice, and how they protect the interests of refugee children.

Unlike the will theory, where a right is dependent on capacity, children's rights are founded on their interests under the interest theory.³⁵ Federle asserts that because the interest theory affords one a right without relying on one's capacity to exercise the right, it supports the idea of children having rights.³⁶

²⁷ Michael Freeman "The Human Rights of Children" (2010) 63(1) *Current Legal Problems* 1 at 22.

²⁸ Joseph Raz "On the Nature of Rights" (1984) *Mind* 194 at 213.

²⁹ At 208.

³⁰ David Archard *Children: Rights and Childhood* (Routledge, New York, 1993) at 58.

³¹ Matthew Kramer "Rights Without Trimmings", above n 23, at 79.

³² Matthew Kramer "Refining the Interest Theory of Rights" (2010) 55(1) *American Journal of Jurisprudence* 31 at 33.

³³ Campbell, above n 7, at 2.

³⁴ Louise Humpage "Refugee Protection and Settlement Policy in New Zealand" in Steven Ratuva (ed) *The Palgrave Handbook of Ethnicity* (Springer Nature, Singapore, 2019) 1689 at 1703.

³⁵ Tobin "Justifying Children's Rights", above n 8, at 397; and Wenar, above n 21, at 255.

³⁶ Federle "Rights Flow Downhill", above n 25, at 352.

As such, children are rights-holders, and Campbell notes that this is not limited by their lack of development. He further argues that the child's lack of capacity and the implications of protecting the right should not be the focus.³⁷ This point is particularly relevant regarding the right to education because education tends to be focused on the future, that is, a child "becoming" an adult in the future, which may result in children being overlooked as rights-holders in their capacity as human "beings" in the present.

Campbell also notes that, under the interest theory of rights, children have rights if their interests are the basis for rules requiring others to behave in certain ways with respect to their interests.³⁸ This understanding will inform the inquiry on whether the laws and policies regarding the provision of education require key duty bearers such as teachers to take additional measures to meet the interests peculiar to refugee children, taking into account their need for protection, integration and development. It is important to note that the right exists regardless of the performance of an obligation correlating with the right. Thus, Federle illustrates that if the child's right to education is justified by an interest to be cared for and nurtured, the right exists regardless of who has an obligation to provide the education.³⁹ While this is the case, MacCormick contends that the recognition of a right includes the imposition of a duty on another.⁴⁰ Kramer also explored the component of obligating others under the interest theory and notes that if it is established that a person has a legal right that correlates to a duty, then the person owed a duty is a right-holder.⁴¹ Focusing on the duty arising from the interest, John Tobin also expands on the interest theory, notably referring to it as a social interest theory to recognise the social and deliberative manner of creating rights.⁴² He notes that the social interest theory considers interests of children that give rise to rights and focuses on the duty that corresponds with the interests to be protected by rights. He emphasises that under a social interest theory, for an interest to be justified as a right, the obligation correlating to the interest should be accepted by the duty bearer.⁴³

Rights based on interests and obligations have been presented as elements of the interest theory, and they serve as analytical tools to explain and expand on the normative content of the legal rights of children.⁴⁴ In the context of this research, they will inform a legal analysis and understanding of what

³⁷ Campbell, above n 7, at 12.

³⁸ At 5.

³⁹ Katherine Federle "Do Rights Still Flow Downhill?" (2017) 25(2) *The International Journal of Children's Rights* 273 at 352.

⁴⁰ MacCormick "Children's Rights: A Test-Case for Theories of Right", above n 23, at 163.

⁴¹ Kramer "Refining the Interest Theory of Rights", above 32, at 32.

⁴² Tobin "Justifying Children's Rights", above n 8, at 409.

⁴³ At 409.

⁴⁴ Lars-Goran Sund and Marie Vackermo "The Interest Theory, Children's Rights and Social Authorities" (2015) 23(4) *The International Journal of Children Rights* 752 at 758.

those bearing the responsibility of implementing the right to education, such as policymakers, teachers, and key personnel working with refugee children, are obliged to do to ensure that the rights of refugee children are adequately realised.

Although the interest theory has been attributed to establishing children's rights by virtue of their interests, there is still a need to determine which interests justify rights, as some interests are not sufficient to obligate another.⁴⁵ Several interest theorists are of the view that the interests that give rise to rights are the ones usually required for the benefit of any human being or group of people.⁴⁶ Therefore, in the case of children, the interests giving rise to their rights would be those generally common among children, such as care, protection and development and, in the context of this research, those relating to refugee children in particular. While refugee children have additional interests owing to their experiences, as highlighted above, they also have interests that are beneficial for children in general. The point of difference, it is argued, is how those interests are understood as they relate to refugees. Other categories of interests identified by interest right theorists include basic, developmental, or autonomy interests set out by John Eekelaar⁴⁷ or interests relating to the provision for children's needs, protection against potential harm to children, or participation in expressing their wishes and feelings.⁴⁸ Other proponents of the interest theory have also presented varying accounts of interests on which children's rights are based.⁴⁹ Taking childhood into account, the rights of the child are seen to also stem from children's interests in being cared for, protected from harm and afforded security.⁵⁰ The need for protection is a common interest identified by interest theorists when discussing which interests of children justify rights, and it is particularly relevant and necessary for refugee children. Tobin points out that most of the different accounts of the theory by interest theorists suggest that rights are underpinned by those interests required for one to be recognised as a human being with dignity and self-worth. They are also underpinned by the role of rights in recognising one as a human being.⁵¹ This emphasises the need to examine how the right to education advances the interests of refugee children as autonomous human beings in their own right.

⁴⁵ Wenar, above n 21, at 255; and Campbell, above n 7, at 7.

⁴⁶ Neil MacCormick "Rights in Legislation" in PMS Hacker and Joseph Raz (eds) *Law, Morality and Society: Essays in Honour of HLA Hart* (Clarendon Press, Oxford, 1977) 194 at 202; and Matthew Kramer and Hillel Steiner "Theories of Rights: Is There a Third Way?" (2007) 27(2) *Oxford Journal of Legal Studies* 281 at 289–90.

⁴⁷ John Eekelaar "The Emergence of Children's Rights" (1986) 6(2) *Oxford Journal of Legal Studies* 161 at 171–176.

⁴⁸ Michael Freeman *Article 3: The Best Interest of the Child* (Martinus Nijhoff, Leiden, 2007) at 31.

⁴⁹ They identify different fundamental interests that form a basis for human rights. Some of them include those identified by John Finnis as forms of human good justifying rights such life and capacity to development, gaining knowledge, sociability and friendships, various forms of capacity: John Finnis *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980). Michael Freeman identifies welfare, protective rights, those grounded in social justice and rights based on children's claim to more freedom and more autonomy: See Michael Freeman "The Limits of Children's Rights" in Michael DA Freeman and Philip E Veerman *The Ideologies on Children's Rights* (Martinus Nijhoff, Dordrecht, 1992).

⁵⁰ Campbell, above n 7, at 21.

⁵¹ Tobin "Justifying Children's Rights", above n 8, at 408.

Although the interest theory has been said to justify that children have rights, some scholars have noted shortcomings in the theory that may limit children's position as rights-holders. It has been contended that the interest theory is not sufficiently child-centred and may not result in improved outcomes for children in that they most likely do not inform the content of interests at issue, thus affecting the empowerment of children.⁵² Therefore, it has been emphasised that the process of identifying interests giving rise to rights must be undertaken with the child being recognised as an active collaborator and not a passive object of inquiry.⁵³ In line with the aim of examining how the New Zealand legal framework underpins the provision of education for refugee children, it will be examined how refugee children are conceptualised under the New Zealand education system. If a refugee child is seen as a rights-holder with interests that give rise to rights, then in terms of the right to education, they should be afforded the right to express their interests and needs in the education they receive. This will be analysed by considering whether refugee children are viewed as legal rights-holders and seen as passive or active actors in formulating and applying education laws and policies affecting them. Recognising refugee children as rights-holders is important for refugee children as they tend to be treated as "alien others" excluded from domestic recognition protection, and their refugee status can be used to discriminate among them as a group.⁵⁴ Recognising children as rights-holders can result in responsive legal and policy frameworks that address the needs of children at all their different developmental stages.⁵⁵

According to the interest theory, refugee children, like other children, are rights-holders and should be seen as such. As noted in previous chapters, refugee children particularly have an interest in being protected due to the effects of forced migration. As such, being a refugee does not preclude children from being rights-holders. Therefore, it can be concluded that refugee children have rights, including the right to education. When discussing the rights set out in various international legal frameworks, attention will be on exploring how the specific interests of refugee children are protected and what the legal standards mean with regard to refugee children specifically. This is because the research is undertaken on the basis that refugee children have different needs and interests. As a result, their rights may have a different meaning and application. For instance, providing education to refugee children may require additional means (such as language support, psychosocial support and meeting cultural needs) to ensure that the child resettles and integrates well in a new school.

⁵² Ferguson, above n 24, at 193.

⁵³ Tobin "Justifying Children's Rights", above n 8, at 415.

⁵⁴ Jeanette A Lawrence and others "The Rights of Refugee Children and the UN Convention on the Rights of the Child" (2019) 8(3) *Laws* 1 at 8.

⁵⁵ Jonathan Todres "Confronting Categorical Exclusions Based on Age: The Rights of Children and Youth" (2023) 36(2) *Harvard Human Rights Journal* 283 at 296.

While there have been debates on whether children have rights, as demonstrated above, there is enough consensus to conclude that they have rights. Engaging in these debates is useful as it has been shown that the interest theory understanding of children's rights provides analytical tools for undertaking the research. With the interests of refugee children central to the research and inquiry, the normative content of refugee children's rights in education (as set out in international legal framework) will be critiqued in terms of what rights refugee children should have, how such rights are to be understood by policymakers, teachers and key personnel working with refugee children to enhance the realisation of the rights of refugee children. The interest theory further allows the consideration of how the right to education protects the interests of refugee children, who tend to be characterised and identified by their age, migratory experiences, and cultural backgrounds.

3.2.3 Interest Theory of Rights as a Basis for a Child Rights-Based Approach

Like the interest theory, which demonstrates that children have rights, the existence of the UNCROC has been interpreted as showing a consensus that children have rights.⁵⁶ The UNCROC also reflects the interest theory of rights as it recognises children as persons in their own right. It requires that children are not only to be seen as "passive objects of protection" but also as active bearers of rights.⁵⁷ It codifies an understanding of children as "rights holders."⁵⁸ As such, children are conceptualised as having evolving capacities, expertise, agency, and insight into matters affecting them.⁵⁹ Although it has been widely ratified, it has been argued that there is no universal understanding of children's rights as a concept.⁶⁰ This lack of clarity can influence how specific rights are interpreted and applied. Therefore, it is worth considering whether there is a coherent understanding of the right to education as it relates to refugee children in New Zealand and, if such understanding is absent, how it can be attained to ensure that it is adequately realised. It has been demonstrated earlier in this chapter that the interest theory of rights can enhance the study of the rights of children and refugee children. This theory will be used as a basis for analysing the UNCROC. In outlining how the social interest theory justifies rights under the UNCROC, Tobin is of the view that it can be used to interpret and understand rights in a manner that is culturally sensitive, dynamic, inclusive, and relational. This can ensure that

⁵⁶ Ann Quennerstedt, Carol Robinson and John I'Anson "The UNCRC: The Voice of Global Census on Children's Rights?" (2018) 36(1) *Nordic Journal of Human Rights* 38 at 39.

⁵⁷ Eugene Verhellen "The Convention on the Rights of the Child: Reflections from a Historical, Social Policy and Educational Perspective" in Wouter Vandenhoele and others *Routledge International Handbook of Children's Rights Studies* (Routledge, London, 2015) at 50; and Anne Smith *Understanding Children and Childhood: A New Zealand Perspective* (Bridget Williams Books, Wellington, 2013) at 16.

⁵⁸ Verhellen, above n 57, at 51.

⁵⁹ Margaret Coady and John Tobin "Understanding Children's Rights in Early Childhood Policy and Practice in Australia" in Jane Murray, Beth Blue Swadener and Kylie Smith (eds) *The Routledge International Handbook of Young Children's Rights* (Routledge, New York, 2019) at 43.

⁶⁰ John Tobin "Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?" (2009) 33(2) *Melbourne University Law Review* 579 at 583.

refugee children's unique interests are taken into account and, thus their rights adequately realised. He further notes that applying the theory will address shortcomings related to Western, adult-centred and individualistic conceptions of human rights.⁶¹ In this way, children's rights can be understood and interpreted in a manner that takes into account their specific circumstances. The interest theory will accordingly be used to study the content of refugee children's rights under the UNCROC and its application in the New Zealand domestic legal framework.

Establishing that children have rights is central to the child rights-based approach based on the UNCROC.⁶² Recognising children as rights-holders is often considered the first hurdle when applying a rights-based approach.⁶³ Margaret McCallin notes that a child rights-based perspective requires the empowerment of rights-holders so that they actually claim their rights. Therefore, children's rights should be empowering.⁶⁴ The UNCROC has noted that "children, including the very youngest children, be respected as persons in their own right" and that "young children should be recognized as active members of families, communities and societies, with their own concerns, interests and points of view."⁶⁵ It has been observed that groups of children, like immigrants, tend not to be treated as rights-holders due to them being regarded as needing protection, their migration status, and the focus on enforcement measures.⁶⁶ Therefore, the research will consider the conception or attitude towards refugee children within the laws, policies, and practices to determine if it aligns with them being rights-holders.

Drawing on the interest theory of rights, this research adopts a child rights-based approach as it recognises children as rights-holders, rather than passive recipients of protection. This approach reframes children as subjects of law rather than objects of concern, with legally grounded entitlements that guide and constrain state action as a duty bearer.⁶⁷ Anchored in the UNCROC, a child rights-based approach requires that laws, policies and practices are informed by binding international

⁶¹ Tobin "Justifying Children's Rights", above n 8, at 397.

⁶² UNCROC, above n 5.

⁶³ Olga Bryne "A Child Rights-Based Approach to Immigration in the United States" (2018) 32(1) *Georgetown Immigration Law Journal* 59 at 73; and Wouter Vandenhoe "Child Poverty and Children's Rights: An Uneasy Fit?" (2013) 22(2) *Michigan State International Law Review* 609.

⁶⁴ Margaret McCallin "Children's Needs or Children's Rights? The Convention on the Right of the Child as a Framework for Implementing Psychosocial Programmes" (2008) 6(2) *Intervention* 154 at 157. See also Laura Lundy 'Voice' Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child (2007) 33(6) *British Educational Research Journal* 927.

⁶⁵ UN Committee on the Rights of the Child [CRC] *General Comment No 7 (2005): Implementing Child Rights in Early Childhood* UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) at [5].

⁶⁶ Bryne, above n 63, at 73.

⁶⁷ Laura Lundy and Lesley McEvoy "Childhood, the United Nations Convention on the Rights of the Child, and Research: What Constitutes a 'Rights-Based' Approach?" in Michael Freeman (ed) *Law and Childhood Studies* (Oxford University Press, Oxford 2012) at 80-81; and Karin Arts "Children's Rights and the Sustainable Development Goals in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) at 543.

standards. Within this framework, the four Guiding Principles of the UNCROC⁶⁸ are widely recognised as distinct features.⁶⁹ The approach also structures decision-making to ensure that children’s rights shape aims, processes and outcomes, with corresponding responsibility placed on duty-bearers to realise those rights.⁷⁰ Accountability is therefore a key component of a child rights-based approach. Where obligations are not met, mechanisms must exist to monitor implementation and provide remedies for violation of children’s rights.⁷¹

Although the UNCROC applies universally, a child rights-based approach requires context-specific interpretation.⁷² In the case of refugee children, forced migration can give rise to distinct legal, linguistic, psychosocial and structural barriers that affect how the same rights are realised in practice.⁷³ A child rights-based approach therefore provides a framework for recognising these differences. By affirming refugee children as rights-holders, this approach highlights the empowering potential of the UNCROC and ensures that the different interests and experiences of refugee children are acknowledged within a coherent rights-based framework.

The interests of children advanced by the child rights-based approach are those protected by the four Guiding Principles of the UNCROC, which are explored further in the next chapter. The UNCROC has a critical role in a child rights-based approach and the application of the interest theory of rights as it provides a clear analytical framework for the protection and realisation of children’s rights.⁷⁴ The UNCROC recognises that refugee children are to be afforded appropriate protection and assistance in the enjoyment of their rights.⁷⁵ Key duty bearers can thus be obligated to protect refugee children’s rights as required by the UNCROC. As such, this thesis examines what additional protection and assistance may be required to fully realise the right to education for refugee children. The key principles of a rights-based approach under the Convention include the right to non-

⁶⁸ The right to non-discrimination, the requirement that the best interests of the child be upheld, the right to life, survival and development, and the child’s right to be heard.

⁶⁹ Karin Arts “Children’s Rights and the Sustainable Development Goals in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) at 543.

⁷⁰ Bronagh Byrne and Laura Lundy “Children’s Rights-Based Childhood Policy: A Six-P Framework” (2019) 23 (3) *The International Journal of Human Rights* 357 at 358.

⁷¹ *CRC General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [24-25]; United Nations *Guidance Note of the Secretary-General Child Rights Mainstreaming* (31 July 2023) at 5; and Jeffrey Goldhagen and others “Thirtieth Anniversary of the UN Convention on the Rights of the Child: Advancing a Child Rights-Based Approach to Child Health and Well-Being” (2020) 4(1) *BMJ Paediatrics Open* 1 at 3.

⁷² Karin Arts “Children’s Rights and the Sustainable Development Goals” in Ursula Kilkelly and Ton Liefaard (eds) *International Human Rights of Children* (Springer, Singapore, 2019) at 543.

⁷³ Toby Measham and others “Refugee Children and Their Families: Supporting Psychological Well-Being and Positive Adaptation Following Migration” (2014) 44 *Current Problems in Paediatric and Adolescent Health Care* 208.

⁷⁴ Bryne, above n 63, at 77.

⁷⁵ UNCROC, above n 5, at art 22(1).

discrimination,⁷⁶ the right for the best interests of the child to be upheld,⁷⁷ the right to life, survival and development,⁷⁸ and the right to be heard.⁷⁹ The right to be heard is particularly key in viewing a child as a rights-holder. In expressing this, Eekelaar stated that:⁸⁰

No society will have begun to perceive its children as rightholders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.

All these principles are to be applied to guide the treatment of refugee children.⁸¹ As noted by Anne Smith, using the Convention is much more persuasive in bringing about policy change than using theory on its own,⁸² hence why the interest theory will be used to analyse the UNCROC as it relates to refugee children. With the interest theory underpinning the research, the Guiding Principles of the UNCROC will be applied to analyse the extent to which the right to education for refugee children is realised in New Zealand, specifically whether laws recognise them as rights-holders and if policies are targeted at their interests and needs. A rights-based approach is premised on the notion that rights are interdependent and indivisible. As such, the realisation of one right is linked to the realisation of other children's rights. For instance, this has been illustrated when examining the provision of education for Indigenous children or children from minority groups. The quality of the education may be compromised if there are no additional measures to protect their language and cultural beliefs.⁸³ In addition to educational interests, the research will consider other interests and rights that may need to be protected for the adequate realisation of the rights of refugee children and evaluate whether the laws and policies adequately take them into account.

The UNCROC not only sets out an analytical framework for a child rights approach but is also valuable for identifying what should be studied and how the data can be analysed and reported.⁸⁴ It has also been used to study the extent to which early childhood education policy documents advance

⁷⁶ At art 2.

⁷⁷ At art 3.

⁷⁸ At art 6

⁷⁹ At art 12.

⁸⁰ John Eekelaar "The Importance of Thinking that Children have Rights" in Phillip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992) at 228.

⁸¹ Christoph Bierwirth "The Protection of Refugee and Asylum-Seeking Children, The Convention on The Rights of The Child and The Work of The Committee on The Rights of The Child" (2005) 24(2) *Refugee Survey Quarterly* at 101.

⁸² Anne Smith "Children Rights and Early Childhood Education-Links to Theory and Advocacy" (2007) 32(3) *Australasian Journal of Early Childhood* 1 at 3.

⁸³ John Tobin "Understanding a Human Rights based Approach to Matters Involving children: Conceptual Foundations and Strategic Considerations" in Antonella Invernizzi and Jane Williams (ed) *The Human Rights of Children* (Routledge, London, 2011) at 82.

⁸⁴ Anne Smith "Conclusion: Challenges for Research on Children's Rights" in *Enhancing Children's Rights: Connecting Research, Policy and Practice* (Palgrave Macmillan, UK, 2015) at 259.

a conception of children consistent with a rights-based approach.⁸⁵ From the refugee child's perspective, a rights-based framework based on the UNCROC has been used and recognised as an effective approach for developing policies on refugee resettlement and early childhood education policies.⁸⁶ As such, a child rights-based approach will be adopted to critique New Zealand education laws and policies to determine if they foster adequate resettlement and integration of refugee children.

3.2.4 An Intersectional Approach to the Interest Theory of Rights

The intersectionality theory can be used to critically analyse how refugee children's varying interests are protected by the right to education as set out in the international legal framework and the domestic laws and policies. To accommodate and take into account the different needs and interests that refugee children have, there has been an emphasis on combining rights approaches with cultural, socioeconomic, and political contexts and contextualising rights to children's lives within these contexts.⁸⁷ The intersectionality theory enables this as it posits that the different characteristics that one has should all be examined as intersecting with each other simultaneously.⁸⁸

This theory is appropriate for the research because, as highlighted, refugee children are characterised and identified by their age, migratory experiences, and cultural backgrounds. The intersectionality theory will thus form part of the theoretical framework. It will be used to inform the understanding and interpretation of the rights of refugee children who have different needs and interests and to further enhance the analysis of the implementation of the rights of refugee children. Intersectionality allows an examination of how the various components of identity (that tend to be considered separately) are connected.⁸⁹ It considers the unique individuality created by one belonging to different categories simultaneously.⁹⁰ The intersectionality approach has been applied to the study of the rights of children as rights-holders and their similarities and differences.⁹¹ It has been argued that the unique

⁸⁵ Coady and Tobin, above n 59, at 44; and Linda Mitchell and Olivera Kamenarac "Refugee Children and Families Positioning Within Resettlement and Early Childhood Education Policies in Aotearoa" (2021) 17(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* at 1.

⁸⁶ Mitchell and Kamenarac, above n 85, at 15.

⁸⁷ Anne Trine Kjørholt "‘Vi er en nasjon vi med?’ ‘We are a Nation, We?’: Children's Rights in Norway – Research, Policies and Practices" in A Smith (ed) *Enhancing Children's Rights: Connecting Research, Policy and Practice* (Palgrave Macmillan, UK, 2015) at 240.

⁸⁸ Edvina Bešić "Intersectionality: A Pathway Towards Inclusive Education?" (2020) 49(3-4) *Prospects* 111 at 114.

⁸⁹ Kimberle Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" (1991) 43(6) *Stanford Law Review* 1241.

⁹⁰ Aisha Nicole Davis "Intersectionality and International Law: Recognizing Complex Identities on the Global Stage" (2015) 28(1) *Harvard Human Rights Journal* 205 at 208.

⁹¹ Noam Peleg and Karl Hanson "Waiting for Children's Rights Theory" (2020) 28(1) *The International Journal of Children Rights* 15 at 25.

needs and social difficulties of a specific group of children should inform law reform.⁹² When focussing on refugees, education systems should consider this multidimensional context and provide educational services tailored to the particular circumstances of refugees, who might have had harmful experiences before reaching their host countries.⁹³ Pobjoy notes that the protection afforded to refugee children should address the difficulties linked with refugeehood as well as the distinct needs and vulnerabilities of childhood.⁹⁴ Intersectionality, as a basis of this research, will inform how the right to education of refugee children should be understood and realised. It requires considering their unique needs, such as social inclusion, protection from discrimination, the need to address language barriers, cultural differences and the health effects of forced migration, which may present differently for each refugee child.

Intersectionality has been used as an analytical tool to better understand children's commonalities and the diversity of childhood.⁹⁵ Noam Peleg and Karl Hanson have questioned the treatment of children as a homogenous group. They note that such treatment can result in the disregard of violations of children's rights based on criteria other than age, like social and economic conditions, gender, sexual orientation, nationality, ethnicity, race, or social origins. An illustration given in comparison with a universalised child⁹⁶ was that the guarantee of the right to quality education could be more challenging for poor children, girls, poor girls, and children belonging to ethnic or cultural minorities and children with more than two characteristics than it is for a white, middle-class boy in a Western European country.⁹⁷ Therefore, they suggest that intersectionality in the context of children's rights allows the consideration of other variables in childhood, such as identity, personality, poverty, ethnicity, race, religion, gender, sexuality and social background, as well as the intersections of these variables.⁹⁸

Intersectionality has also been used as a lens in inclusive education to identify the connection of various factors that may lead to discriminatory school processes towards different student groups⁹⁹ and in refugee research.¹⁰⁰ It has been argued that the use of intersectionality within education results

⁹² Nancy E Dowd *Reimagine Equality – A New Deal for Children of Color* (New York University Press, New York, 2018) as cited in Peleg and Hanson, above 84, at 26.

⁹³ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective* (Working Papers on Education Policy No 8, 2019) at 56.

⁹⁴ Jason M Pobjoy *The Child in International Refugee Law* (Cambridge University Press, Cambridge, 2017) at 15.

⁹⁵ Peleg and Hanson, above n 91, at 26.

⁹⁶ As seen under the UNCROC. Berry Mayall notes that the universal child under the Convention on the Rights of the Child is a child who is on a particular developmental trajectory: Berry Mayall "The Sociology of Childhood in Relation to Children's Rights" (2000) 8(3) *The International Journal of Children Rights* 243 at 245.

⁹⁷ Peleg and Hanson, above n 91, at 25.

⁹⁸ At 27.

⁹⁹ Bešić, above n 88, at 111.

¹⁰⁰ Dina Taha *Intersectionality and other Critical Approaches to Research* (Local Engagement Refugee Research Network Paper No 3 – December 2019).

in an examination of simultaneous interactions of factors such as race, migration background, gender, class and disability for an individual child and the interaction between individuals with one of the characteristics or a combination of them and the responses to them.¹⁰¹ Hence, intersectionality helps explain how students encounter exclusion differently in schools by considering the extent to which schools address the intersection of their various identities.¹⁰² This has been illustrated in an instance where a school would meet a disabled child's needs with the appropriate disability services and provide language support or trauma experience support to a refugee child. Intersectionality thus requires a consideration of how the needs of a child who is a refugee and also has a disability can be met.¹⁰³

There has also been support for an intersectionality perspective when considering the differences within the refugee and migrant children groups to eliminate the risk of dealing with children based on just their migratory experiences.¹⁰⁴ The need for researchers to be clear on how they view children and their rights from a theoretical perspective when undertaking research relating to migration has been emphasised.¹⁰⁵ This theoretical underpinning is useful for the research because refugee children are usually homogenised without taking into account their religion, context, gender, culture, and dis/ability. As a result, the intersecting characteristics are rarely analysed.¹⁰⁶ The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has emphasised the need for an intersectional approach to address the many challenges, such as health, psychological support, and housing, that arise beyond education when dealing with new arrivals.¹⁰⁷ The intersectional approach can inform how education laws and policies can protect refugee children's distinct and individual interests and how this can be executed in practice. The intersectionality theory will, therefore, enhance the research as it will be used to identify the rights and interests of refugee children.

A rights-based framework informed by the interest theory, the UNCROC and the intersectionality theory, will be useful in critically analysing the implementation of the right to education for refugee children. This framework provides analytical tools to identify and explain violations of the right to education in school settings and policies. This research adopts a socio-legal approach. As noted in

¹⁰¹ Carl A Grant and Elisabeth Zwier "Intersectionality and Student Outcomes: Sharpening the Struggle Against Racism, Sexism, Classism, Ableism, Heterosexism, Nationalism, and Linguistic, Religious, and Geographical Discrimination in Teaching and Learning" (2011) 13(4) *Multicultural Perspectives* 181.

¹⁰² Federico R Waitoller and Elizabeth B Kozleski "Working in Boundary Practices: Identity Development and Learning in Partnerships for Inclusive Education" (2013) 31(3) *Teaching and Teacher Education* 35 at 36.

¹⁰³ Bešić, above n 88, at 117.

¹⁰⁴ Ruth Brittle and Ellen Desmet "Thirty Years of Research on Children's Rights in the Context of Migration" (2020) 28(1) *The International Journal of Children's Rights* 36 at 52.

¹⁰⁵ At 52.

¹⁰⁶ Edvina Bešić, Lisa Paleczek and Barbara Gasteiger-Klicpera "Don't Forget About Us: Attitudes Towards the Inclusion of Refugee Children With(out) Disabilities" (2020) 24(2) *International Journal of Inclusive Education* 202.

¹⁰⁷ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 86, at 56.

Chapter One, the approach requires that the legal analysis is directly linked to the analysis of the social situation to which the law applies. The role of the law in shaping and changing the situation should also be identified.¹⁰⁸ Under a socio-legal approach, how one understands the law should be studied.¹⁰⁹ Therefore, in addition to examining legal rights, there must be consideration of how the view of the child and childhood in schools and society can guarantee or interfere with the full enjoyment of the right to education for refugee children. Law and society are not separate realities, and legal solutions are derived from a social context. In line with assessing the realisation of the right to education for refugee children, studying the law in a societal context is important. It informs how non-legal actors such as teachers understand and relate to the law and how they perceive their obligations relating to the right to education. An interdisciplinary theoretical framework will explain some conceptions and complexities that may interfere with refugee children's status as rights-holders.

3.3 *Theories of Childhood*

This section demonstrates how sociological conceptions of children or childhood promote a child rights-based approach and are crucial to the implementation of refugee children's rights. There are views that the implementation of international standards requires contributions from social science perspectives to ensure that their intended purpose is realised and is beneficial for children.¹¹⁰ Some scholars are of the view that an understanding of the law relating to children based on formal written law is a limited perspective.¹¹¹ Therefore, childhood studies provide theoretical perspectives that enhance the interpretation of the UNCROC and the analysis of childhood in different contexts.¹¹² Tobin notes that the varying ways childhood is conceptualised influence the identification of children's interests that can justify recognition as human rights.¹¹³ Although this is the case, it has been argued that understanding childhood and child development has rarely been linked to the definition, implementation, and evaluation of rights.¹¹⁴ This research seeks to achieve this because, as noted, refugee children have unique childhoods compared to other children due to the trauma they experience, the need to integrate into a new environment and to learn a new language, among others. As mentioned in the first chapter, the United Nations General Assembly emphasised refugee

¹⁰⁸ David N Schiff "Socio-legal Theory: Social Structure and Law" (1976) 39 *The Modern Law Review* 287 at 289.

¹⁰⁹ At 287.

¹¹⁰ Susan Bissell and others "Rethinking Child Protection from a Rights Perspective: Some Observations for Discussion 1" (2017) at 14.

¹¹¹ Marieke Janne Hopman "A New Model for the Legal Pluralist Study of Children's Rights, Illustrated by a Case Study on the Child's Right to Education in the Central African Republic" (2019) 51(1) *The Journal of Legal Pluralism and Unofficial Law* 72.

¹¹² Bodil Rasmusson *Bridging the Gap Between Theory and Practice Implementation of the Convention on the Rights of the Child in International Perspective* (Paper presented at the 1st International Conference on Child-Friendly Education (ICCE)) 2016 at 3.

¹¹³ Tobin "Justifying Children's Rights", above n 8, at 408.

¹¹⁴ Susan Bissell and others, above n 110, at 14.

children's need for protection due to their age, development, and social status. The forced displacement and integration in a new host country increases their risks and thus their need for protection.¹¹⁵ Theories on childhood can thus provide means of assessing whether the education they receive is adaptable and accessible in light of their childhood. They can provide explanations for barriers to the enjoyment of the right to education for refugee children and thus indicate the extent to which the right to education is realised.

As noted above, children's rights and childhood studies complement one another in research relating to children. As such, examining children's rights within the wider interdisciplinary field of childhood studies has been encouraged.¹¹⁶ Identifying a suitable theory underpinning childhood is vital to the study because education forms a substantial part of it. A combination of children's rights, theories from social sciences such as the sociology of childhood, childhood studies and sociocultural theories have been used in several studies to examine children's rights in early childhood education.¹¹⁷ These will be explored for how they can enhance the legal analysis of refugee children's rights at all schooling stages based on the notion that refugee children are rights-holders and have interests to be protected.

It has been posited that children's rights theory should take into account not only the education of children under the international framework but also how children's identities and social positions differ across diverse societies.¹¹⁸ While it can be accepted that the legal framework recognises these identities and personalities, it is worth engaging in a critical analysis of the right to education, particularly as it relates to refugee children and considering how other disciplines, such as social sciences and education, can inform the meaning of the right. This is crucial for refugee children who have different historical and cultural backgrounds and varying migratory experiences that affect their education differently. A theory or an understanding of childhood will enhance, take into account and contextualise the childhood of refugee children.

Childhood theories have been recognised as useful in examining the nature, role, and purpose of education, specifically early childhood education.¹¹⁹ Linda Mitchell notes that constructions of

¹¹⁵ *Assistance to Refugees, Returnees and Displaced Persons in Africa: Resolution adopted by the General Assembly UN Doc A/Res/169/154* (22 January 2015) at [9].

¹¹⁶ Matias Cordero Arce "Maturing Children's Rights Theory: From Children, With Children, Of Children" (2015) 23(2) *The International Journal of Children's Rights* 283 at 287.

¹¹⁷ See generally Linda Mitchell "Constructions of Childhood in Early Childhood in Early Childhood Education Policy Debate in New Zealand" (2010) 11(4) *Contemporary Issues in Early Childhood* 328; and Smith, above n 75.

¹¹⁸ Peleg and Hanson, above n 91, at 31.

¹¹⁹ Mitchell "Constructions of Childhood in Early Childhood Education Policy Debate in New Zealand", above n 117, at 330.

childhood are particularly important and relevant to early childhood education policy because early childhood education tends to be perceived as a support service to parents and a rescue service to the disadvantaged. As a result, children are usually not involved and are invisible at times.¹²⁰ She argues that an understanding of children as participants in society and autonomous beings impacts the formulation of early childhood education policy.¹²¹ Childhood theories are thus useful because they explain how teachers and policymakers perceive children, and this impacts the provision of educational services to children.¹²² While childhood theories have been applied to early childhood education, they can also explain how refugee children are perceived in educational policy and how teachers recognise refugee children, considering their needs and interests at different stages of education.

Childhood is the main feature of childhood studies and is seen as a social construction.¹²³ In line with the conception that children are autonomous rights-holders with interests underpinning their status as rights-holders, childhood studies require children to be perceived as social actors and holders of rights instead of passive and dependent on the family.¹²⁴ They are to be seen as active contributors in shaping their environments and society.¹²⁵ One key element of childhood studies is that they highlight the problematic generalisation of children's experiences without looking at the intricacies of their lives within specific contexts.¹²⁶ This thinking aligns with the intersectional approach to the interests underpinning refugee children's rights, which will be applied in this research. Children's separate identities are to be taken into account to ensure that their interests and needs are represented.¹²⁷

A theoretical underpinning of childhood is necessary for the research because the UNCROC tends to be understood as promoting a Western model of childhood.¹²⁸ While this understanding does not align with the constructs of refugee children, most articles therein are flexible and can be interpreted differently. This is consistent with the emphasis in the UNCROC that traditions and cultural values

¹²⁰ At 330.

¹²¹ At 330.

¹²² Coady and Tobin, above n 59, at 43.

¹²³ Chris Jenks (ed) *The Sociology of Childhood* (Batsford, London, 1982); and Martin Woodhead "Childhood Studies: Past, Present and Future" in Mary Jane Kehily (ed) *An Introduction to Childhood Studies* (Open University Press, Maidenhead, 2008) at 19.

¹²⁴ See generally Jens Qvortrup "Childhood Matters: An Introduction" in Jens Qvortrup and others (eds) *Childhood Matters: Social Theory, Practice and Politics* (Aldershot, Avebury, 1994); and Berry Mayall *Towards a Sociology for Childhood: Thinking from Children's Lives* (Open University Press, Buckingham, 2002).

¹²⁵ Florian Esser and others *Reconceptualising Agency and Childhood: New Perspectives in Childhood Studies* (Routledge, New York, 2016) at 16.

¹²⁶ Smith *Understanding Children and Childhood: A New Zealand Perspective*, above n 57, at 19.

¹²⁷ Jens Qvortrup "A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard" in Alison James and Alan Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press, London, 1997) at 85.

¹²⁸ Virginia Morrow and Kirrily Pells "Integrating Children's Human Rights and Child Poverty Debates: Examples from Young Lives in Ethiopia and India" (2012) 46(5) *Sociology* 906 at 908; and Mayall, above n 96, at 245.

should be taken into account.¹²⁹ Therefore, childhood theory provides more analytical tools on how the rights in the UNCROC can be understood and implemented in a manner that accommodates the different constructs of refugee childhood. There has been an emphasis on the fact that practices directed towards refugee children can be critically examined when discussions of childhood are based on historical, cultural, and socio-economic contexts.¹³⁰

As it has been established that the research is premised on the view that refugee children are rights-holders, the conception of children as agents and social actors and how children perceive their own lives is crucial for ensuring better conditions of childhood.¹³¹ Anne Smith endorsed a combination of both the children's rights perspective and childhood studies theory as an effective analytical tool to make changes in the provision of early childhood education.¹³² When discussing the concept of childhood under childhood studies, she notes that the fact that children are viewed as agents does not suggest that they do not require support but rather that the vulnerability attributed to children acknowledges their need for guidance and direction.¹³³ Taking childhood conceptions into consideration is thus important because the manner in which refugee children are viewed as children and as refugees determines how their rights are recognised and represented in legal and immigration systems.¹³⁴

Martin Woodhead contends, however, that childhood studies should not be regarded as a new discipline but "more as an interdisciplinary focus or "meeting place", a forum for critical analysis, research and debate."¹³⁵ Therefore, while principles of childhood studies and the conceptions of childhood therein are useful and support a child rights-based approach, it may be too broad for the research as it is more of an integrated approach. Childhood studies nonetheless provide a valuable foundation for understanding childhood. They complement the concepts of the new sociology of childhood, which are essential for examining the experiences and rights of refugee children.

¹²⁹ UNCROC, above n 5, at preamble and art 30.

¹³⁰ Charles Watters *Refugee Children Toward the Next Horizon* (Routledge, London, 2007) at 23.

¹³¹ Smith, above n 82, at 4.

¹³² At 7.

¹³³ Anne Smith *Enhancing Children's Rights Connecting Research, Policy and Practice* (Palgrave Macmillan, London, 2015) at 82.

¹³⁴ Jeanette Lawrence and others "The Rights of Refugee Children and the UN Convention on the Rights of the Child" (2019) 8(3) *Laws* 1 at 2.

¹³⁵ Woodhead, above 123, at 30.

3.3.1 The (New) Sociology of Childhood

As the research focuses on education policies and practices undertaken by non-legal actors, the sociology of childhood theory will help explain and understand how children are viewed in society by key actors within educational settings and can support the view of the refugee child as an autonomous rights-holder with intersectional interests. Using the theory will show, beyond the international legal standards, how the rights of refugee children may not be adequately realised or may be violated. The sociology of childhood is a narrower discipline that developed within the broader field of childhood studies. This “new” paradigm of sociology of childhood, which emerged in the 1980s and 1990s,¹³⁶ had a significant impact on the development and theorising of childhood studies.¹³⁷ The sociology of childhood informs how a child is viewed and understood, which differs depending on the time and society. It also serves to explain the injustices against children specifically.¹³⁸ Berry Mayall further posits that a better understanding of the social conditions of childhood provides a strong foundation for implementing children’s rights.¹³⁹ The theorising of sociology of childhood is critical and valuable for the research as it is a “catalyst in the changing perspectives of the child and childhood.”¹⁴⁰ This is because children tend to be viewed as becoming, that is, adults in the making and not as human beings in their own right. Such a perspective interferes with or contradicts children’s status as rights-holders with interests to be protected. This may thus result in children’s rights not being understood and adequately realised as demonstrated in this research.

Under this theory, sociological facts about children are to be considered, and this provides evidence to support the right for a child to be treated in law as an autonomous person in their own right.¹⁴¹ Respect for children and their rights is thus promoted.¹⁴² It has been argued that a sociological approach to processes, practices and structures can explain the various political, economic, social and cultural barriers to the implementation of the international legal framework.¹⁴³ Using the new sociology of childhood theory to underpin the research thus helps identify how the enjoyment of the rights of refugee children can be interfered with as it provides a holistic interpretation of the injustices

¹³⁶ Jenks, above n 123; and James and Prout, above n 127.

¹³⁷ Madeleine Leonard *The Sociology of Children, Childhood and Generation* (Sage Publications, London, 2016) at 23.

¹³⁸ Mayall, above n 96, at 248.

¹³⁹ At 243.

¹⁴⁰ Ann Quennerstedt and Mikael Quennerstedt “Researching Children’s Rights in Education: Sociology of Childhood Encountering Educational Theory” (2014) 35(1) *British Journal of Sociology of Education* 115 at 118.

¹⁴¹ Michael King “The Child, Childhood and Children Rights within Sociology” (2004) 15(2) *Kings Law Journal* 273.

¹⁴² Berry Mayall *A History of the Sociology of Childhood* (IOE Press, UCL, 2013) at 2.

¹⁴³ Morrow and Pells, above n 128, at 907.

suffered by children.¹⁴⁴ It also offers theoretical scrutiny that can enrich the study of children's human rights¹⁴⁵ by applying the ideas discussed below.

There are key ideas of the “new” sociology of childhood that are useful in examining the legal rights of refugee children in the New Zealand education system. As Alan Prout and Allison James point out, childhood is viewed as socially constructed rather than static, universal and immutable and that societies and cultures have interpreted childhood differently at different times.¹⁴⁶ This suggests that historical, cultural, and social factors shape and construct childhood; therefore, social settings such as the family and education are different depending on the context.¹⁴⁷ Structures such as the family and education may hence differ across varying circumstances. This theoretical understanding allows for the identification of refugee childhood complexities that can interfere with the realisation of their rights when examining the laws, policies and practices relating to the provision of education. In the context of this research, this requires focusing on what characterises childhood for refugees, considering the migration process they have undergone, their cultural differences, and acknowledging the difference in their childhoods as not all forced migratory experiences are the same.

Childhood is also considered a variable of social analysis, that is, it cannot be separated from other variables such as class, gender, or ethnicity.¹⁴⁸ In line with this thinking, Prout and James further note that childhoods vary, and there is no universal idea of childhood.¹⁴⁹ This principle moves from the view of childhood as a homogeneous stage of life and challenges the conceptualisation of childhood as an “undifferentiated category.”¹⁵⁰ It is noteworthy that factors such as gender, class, and ethnicity impact how childhood is experienced and refugeehood, which varies at different stages of the migration process. “Migrant/refugee children” are usually considered and studied as a group, resulting in a disregard for the differences within the group. In studies relating to perceptions of childhood among policymakers and different research participants, it has been observed that tension arises when children are both a “child” in legal terms and a “migrant”/asylum seeker/refugee accompanied or unaccompanied.¹⁵¹

As noted earlier, the research is premised on the fact that refugee children are rights-holders with different needs, interests and rights that should be realised. The research considers the different

¹⁴⁴ Mayall, above n 96, at 248.

¹⁴⁵ Quennerstedt and Quennerstedt, above n 140, at 112.

¹⁴⁶ Prout and James, above n 127, at 7.

¹⁴⁷ Leonard, above n 130, at 24.

¹⁴⁸ Prout and James, above n 129, at 7.

¹⁴⁹ At 7.

¹⁵⁰ Leonard, above n 137, at 24.

¹⁵¹ Brittle and Desmet, above n 104, at 50.

variables highlighted above to establish how they impact the realisation of the right to education of refugee children. This element of the theory also informs how laws and policies should be framed. It allows consideration of how refugee children are categorised if, for instance, the refugee resettlement strategy accounts for the unique needs and interests of refugee children, whether the provisions in education laws, policies, and practices take into consideration the historical, cultural differences and individual needs of refugee children.

Another element of the sociology of childhood is that children are to be seen as active actors in constructing and determining their own social lives, those around them, and the societies in which they live and not passive subjects of social structures and processes.¹⁵² The sociology of childhood, in this way, theoretically strengthens the view that children are rights-holders¹⁵³ and, as such, aligns with a rights-based approach that requires children to have a voice and participate in issues affecting them.¹⁵⁴ Consequently, when scrutinising the implementation of the rights of refugee children to education, there should be an assessment of whether refugee children are involved in the creation of laws, policies and practices relating to the provision of their education as active agents or whether they are considered as passive subjects of such laws, policies and practices. Children are to be considered as beings, in their own right, under the sociology of childhood.¹⁵⁵ Their experiences of childhood are to be studied in the present moment and not in terms of the future adults they will become.¹⁵⁶ This future-oriented view of childhood portrays children as incomplete and dependent on adults, rather than recognising them as agents in their own right. A view, which it has been argued, also suggests children are inadequate, inexperienced, and immature.¹⁵⁷

Sociological understanding of childhood as a framework is beneficial in rights-based research like this one because refugee children are to be viewed as competent and seen as participants and contributors in society. How refugee children are viewed in a societal context cannot be separated from the understanding that they are rights-holders. With a view of examining the legal framework governing all stages of education for children, the sociology of childhood framework is useful in explaining how educators, the community, and policymakers view refugee children to establish if this limits the realisation of the right to education of refugee children. The UNCROC reinforces this theoretical reframing of childhood and promotes the visibility of childhood in law and society.¹⁵⁸

¹⁵² At 7.

¹⁵³ Ann Quennerstedt “Young Children’s Enactments of Human Rights in Early Childhood Education” (2016) 24 *International Journal of Early Years Education* 5 at 8.

¹⁵⁴ UNCROC, above n 5, at art 12.

¹⁵⁵ Michael Freeman *Law and Childhood Studies: Current Legal Issues* (Oxford University Press, Oxford, 2011) at 30.

¹⁵⁶ Leonard, above n 137, at 23.

¹⁵⁷ Freeman, above n 155, at 1.

¹⁵⁸ Smith *Understanding Children and Childhood: A New Zealand Perspective*, above n 57, at 16.

Several education researchers have applied theories of childhood to further understand and place the child in context within an educational setting.¹⁵⁹ The sociology of childhood is thus applied to understand refugee childhood and highlight refugee children's interests in schools. It has been recognised that the conceptions of children and childhood and the assumptions about learning and knowledge influence how education is understood, and they should be considered in terms of the curriculum, teaching, and the relationship between the teacher and the student.¹⁶⁰ Furthermore, the different perspectives of childhood where children are seen as "becomings" and beings shape the provision of education, which forms a substantial part of children's daily lives.¹⁶¹ Linda Mitchell has argued that social constructionism (as an element of the sociology of childhood) as a theoretical framework is useful in demonstrating how children and childhood are to be viewed and understood in education. Some of the sociology of childhood elements discussed were used as a theoretical framework to analyse constructions of childhood in early childhood education policy.¹⁶² She notes that constructing the "child as a citizen within a social community" prioritises children's rights and agency and acknowledges the interdependence of care and education.¹⁶³

In light of the above discussion, a combination of the interest theory of rights and the sociology of childhood will form part of the theoretical framework of the research. The combination has been proven to advance the rights of children, and it has been noted that:¹⁶⁴

Both paradigms recognise that children construct their social worlds; that they have agency; that they are participants in social processes; that they are persons not property; that they constitute multiple voices rather than a collective and undifferentiated class, and that childhood should be given as high (if not higher) priority.

Although sociological concepts of childhood have been applied to the examination of education policies and practices,¹⁶⁵ it has been argued that sociological theories do not particularly consider the unique situation of schools. Depending on them alone results in inadequate explanations of school

¹⁵⁹ Mitchell "Constructions of Childhood in Early Childhood Education Policy Debate in New Zealand", above n 110, at 328; Mitchell and Kamenarae, above n 110, at 1; and Quennerstedt and Quennerstedt, above n 133, at 115.

¹⁶⁰ Jingyi Huang "Being and Becoming: The Implications of Different Conceptualizations of Children and Childhood in Education" (2019) 10(1) Canadian Journal for New Scholars in Education 99 at 102.

¹⁶¹ At 99.

¹⁶² Mitchell "Constructions of Childhood in Early Childhood Education Policy Debate in New Zealand", above n 117, at 330.

¹⁶³ At 328.

¹⁶⁴ Anne Smith "Children and Young People's Participation Rights in Education" (2007) 15(1) The International Journal of Children's Rights 147 at 151.

¹⁶⁵ Mitchell "Constructions of Childhood in Early Childhood Education Policy Debate in New Zealand", above n 117, at 328. Smith, above n 82, at 1.

processes.¹⁶⁶ It has been proposed that theories in education be used when analysing children's rights in education to situate rights issues within the specific context and knowledge interest of education.¹⁶⁷

3.4 Educational Theory

While a theoretical framework based on childhood studies and the sociology of childhood is commonly used in education research, the need for a specific education theory or perspective has been emphasised.¹⁶⁸ Some educational researchers are of the view that the sociology of childhood lacks sufficient educational perspectives. As such, there is a need for the critical analysis of education issues in children's rights from a perspective that considers education processes and an educational perspective on sociological approaches, as demonstrated above.¹⁶⁹ While education can be formal or non-formal, this study focuses on education in a formal setting as it is regulated and monitored clearly by the laws and policies that are examined in this research. Although this is the case, it is worth acknowledging that while there is an emphasis on formal education under art 28 of the UNCROC,¹⁷⁰ it has been argued that education should not be limited to education levels or types provided in formal places of learning such as schools, colleges and universities.¹⁷¹ Formal education is understood as a system that is organised, delivered by the state and officially recognised.¹⁷² It includes education planned by recognised private bodies.¹⁷³ Non-formal education on the other hand includes institutionalised and organised learning outside the formal system.¹⁷⁴ Although different from formal education, it is understood as supplementary, alternative or complementary to it. It is also to guarantee the right to education for all.¹⁷⁵ Engaging in non-formal education can result in enrolment in formal education,¹⁷⁶ and can also be used to fill gaps in the formal education system¹⁷⁷ States have thus been urged to recognise non-formal education as an adaptable and cost-effective mechanism that can deliver quality education and support states in fulfilling their obligations related to the right to education.¹⁷⁸

¹⁶⁶ Maureen T Hallinan "Introduction" in *Handbook of Sociology of Education* (Springer, USA, 2000) at 2.

¹⁶⁷ Quennerstedt "Children's Rights Research Moving into the Future: Challenges on the Way Forward", above n 2, at 241.

¹⁶⁸ Quennerstedt and Quennerstedt, above n 140, at 115.

¹⁶⁹ At 119.

¹⁷⁰ Christian Curtis and John Tobin "Article 28 The Right to Education" in John Tobin (ed) *The UN Convention on the Rights of the Child* (Oxford University Press, Oxford, 2019) at 1063.

¹⁷¹ At 1064.

¹⁷² *Report of the Special Rapporteur on the Right to Education: Realizing the Right to Education through Non-Formal Education* UN Doc A/HRC/35/24 (2 June 2017) at [14].

¹⁷³ UNESCO *International Standard Classification of Education ISCED 2011* (UNESCO Institute for Statistics, Montreal, 2012) at [36].

¹⁷⁴ *Report of the Special Rapporteur on the Right to Education*, above n 165, at [14].

¹⁷⁵ UNESCO, above 166, at [39].

¹⁷⁶ *Report of the Special Rapporteur on the Right to Education*, above n 165, at [15].

¹⁷⁷ At [34].

¹⁷⁸ At 1.

It is essential to consider educational theories because they explain how education is understood and what its aims are. It is worth noting that art 29 of the UNCROC sets out the aims of education from a rights perspective. These are discussed and applied in later chapters. The usefulness of theories in education has been noted as providing valuable information on what underpins learning and thus providing us with evaluative tools to enhance the learning potential¹⁷⁹ and, consequently, the realisation of the right to education. There has been an emphasis that educational aims are likely to be met if there is a shared understanding and collaborative work in attaining them.¹⁸⁰ Nel Noddings notes that focusing on the aims of education provides tools that can be used to examine the goals, objectives, and subject content.¹⁸¹ An educational theoretical basis offers tools to determine what aims underpin the provision of education and whether they align with a child rights-based approach. It has been observed that there are varying accounts of what education is, what its aims and purposes should be and whether education should differ depending on natural interests, abilities and concepts on the government's role in education.¹⁸² While these ideas were considered decades ago, they are still debated today.¹⁸³

This research is premised on education as a right; however, it has also been viewed as an investment.¹⁸⁴ Some have argued that when education is considered an investment, the focus is on quantity, such as enrolment rates, and this can affect the quality of education provided.¹⁸⁵ Education has been linked to economic growth, which is attributed to human capital. The Human Capital Theory stresses that education is a means of individual financial accumulation and is also seen as a way of contributing to economic growth. As such, investing in education will benefit both individuals and the economy.¹⁸⁶ It has been argued, however, that such an approach can result in the aims and goals of education being overridden by economic goals and individuals being perceived as "human capital".¹⁸⁷ According to this theory, government investment decisions related to educational outcomes can result in long-term economic growth.¹⁸⁸ Other issues with such an approach include the fact that governments can reduce funding for additional support required by disadvantaged groups to improve their education during challenging economic times.¹⁸⁹ Consequently, equity, fairness and

¹⁷⁹ Sarah Te One "Defining Right: Children's Rights in Theory and in Practice" (2007) He Kupu 41.

¹⁸⁰ John White *The Aims of Education Restated* (Psychology Press, London, 1982) at 106.

¹⁸¹ Nel Noddings *Happiness and Education* (Cambridge University Press, Cambridge, 2003) at 89.

¹⁸² At 89.

¹⁸³ At 1.

¹⁸⁴ Maria Ron-Balsera "Does the Human Capital Discourse Promote or Hinder the Right to Education? The Case of Girls, Orphans and Vulnerable Children in Rwanda" (2011) 23(2) *Journal of International Development* 274 at 281.

¹⁸⁵ At 281.

¹⁸⁶ Donald Gillies "State Education as High Yield Investment: Human Capital Theory in European Policy Discourse" (2011) 2(2) *JOP* 224 at 225.

¹⁸⁷ At 225.

¹⁸⁸ At 229.

¹⁸⁹ At 239.

access to education may not be the focus.¹⁹⁰ The conception of education as an investment may conflict with the right to education.¹⁹¹ The view of education as a right is the opposite of education as human capital. The human capital view is focused on efficiency, while the rights view focuses on “justice-as-rights.”¹⁹² This translates to how people are viewed, in this case, refugee children. They would be viewed as inputs for economic growth from a human capital perspective, while a rights approach sees them as the focus of moral and political concerns.¹⁹³ Although individuals also benefit from such an approach it has been noted that “education for all, when founded on rights, is a much more principled and secure position when compared to one merely conditional on notional investment returns.”¹⁹⁴

Some other arguments presented by education theorists on the aims of education are centred on autonomy and some on the child’s development,¹⁹⁵ which is consistent with the aims set out in the UNCROC.¹⁹⁶ Both these aims are important and can inform how refugee children should be viewed as autonomous rights-holders in educational settings and the role of duty bearers in realising their rights. More specifically, they underpin inquiries on whether schools are settings where refugee children are recognised as rights-holders and whether they are empowered to exercise those rights in school settings. The ideas discussed below advance the recognition of children as rights-holders in education settings. While acknowledging that education should be aimed at developing inherent natural gifts,¹⁹⁷ Kant posited that education for children is to be aimed at their irrationality and that they should be afforded freedom from earliest childhood.¹⁹⁸ It is noteworthy that earlier theorists on educational aims based their ideas on an understanding of childhood. One of the earlier philosophers on education theory, Locke, believed that children should be moulded and treated as rational beings.¹⁹⁹ His theory on education emphasised the development of reason to produce an individual

¹⁹⁰ At 240.

¹⁹¹ Ron-Balsera, above n 184, at 275.

¹⁹² Ingrid Robeys “Three Models of Education Rights, Capabilities and Human Capital” (2006) 4(1) *Theory and Research in Education* 69 at 75.

¹⁹³ At 75.

¹⁹⁴ Gillies, above 186, at 240.

¹⁹⁵ See generally John Dewey *Democracy and Education* (Free Press, New York, 1916); Maria Montessori *The Montessori Method* (Anne E George (translator), Frederick A Stokes Company, New York, 1912); and Immanuel Kant *Kant on Education (Über Pädagogik)* (Annette Churton (translator), D.C Health & Co. Publishers, Boston, 1900) [translated from Immanuel Kant *Über Pädagogik* (Theodor Rink (ed), Friedrich Nicolovius, Königsberg, 1803)]. Other aims considered include critical thinking, national identity, self-determination, and wellbeing. See also Emile Durkheim *Moral Education: A Study in the Theory and Application of the Sociology of Education* (Everett K Wilson and Herman Schnurer (translators), The Free Press New York, 1961) [translated from Émile Durkheim *L'éducation Morale* (F Alcan, Paris, 1925)]; and Rousseau, above n 13.

¹⁹⁶ At art 29.

¹⁹⁷ Kant, above 195, at 11.

¹⁹⁸ At 28.

¹⁹⁹ John Locke *Some Thoughts Concerning Education* (John W Yolton and Jean S Yolton (eds), Clarendon Press, Oxford, 1989) [first published 1693] at 142.

with a sound mind.²⁰⁰ He was of the notion that education should result in the full independence of children as they grow to become adults.²⁰¹ Jean-Jacques Rousseau focused on development as well as its intended goal and provided a reason for childhood as separate from adulthood.²⁰² He cautioned against children being viewed as adults in the making but that they should be regarded as human beings.²⁰³ According to Rousseau, children should be allowed to develop naturally without constraints imposed by society. As such, education is to be aimed at development according to the child's natural abilities and capacities, with the role of adult educators.²⁰⁴

John Dewey argued that “the aim of education is to enable individuals to continue their education – or that the object and reward of learning is continued capacity for growth.”²⁰⁵ He further noted that the educational process is one of continued reorganising, reconstructing, and transforming.²⁰⁶ In emphasising that children are to take an active part in their education, Dewey believed that “growth is not something done to them [children]; it is something they do”²⁰⁷ as such, children are to be seen as taking an active part in their growth.²⁰⁸ Therefore, when education is understood as growth, schools are to be examined in terms of whether they are settings where children grow as human rights-holders.²⁰⁹ The research seeks to consider if this is the case in New Zealand by examining the laws, policies and practices against this inquiry and considering if refugee children have an active role in the education they receive and whether the experiences of refugee children in schools can be improved by their status as rights-holders being central to the policies and laws.

The above discussion demonstrates that the aims of education are predominantly based on how childhood is understood and the child's development. These ideas are still prevalent today.²¹⁰ Bi notes that the interest theory of rights considers rights a “means to human development, that is, the

²⁰⁰ At 142.

²⁰¹ John Locke *The Two Treatise of Government* (Peter Laslett ed, Cambridge University Press, 1988) [first published 1689] at 55.

²⁰² “Mankind has its place in the sequence of things; childhood has its place in the sequence of human life; the man must be treated as a man and the child as a child”: Rousseau, above n 13, at 44.

²⁰³ At 44.

²⁰⁴ At 179.

²⁰⁵ Dewey, above n 195, at 100.

²⁰⁶ At 59.

²⁰⁷ At 42.

²⁰⁸ Ann Quennerstedt and Mikael Quennerstedt “Researching Children's Rights in Education: Sociology of Childhood Encountering Educational Theory” (2014) 35(1) *British Journal of Sociology of Education* 115 at 127.

²⁰⁹ At 128.

²¹⁰ Alti Hardarson argues that education is to be targeted at making people intellectually independent: See Alti Hardarson “Why the Aims of Education Cannot be Settled” (2012) 46(2) *Journal of Philosophy* 223 at 225. In contrast, John White has argued that the main aim of education is that the learner becomes a morally autonomous person. Therefore, to realise this aim, the child should have “certain capabilities, understanding and dispositions.” He further notes that working towards this aim will thus focus on other issues not directly connected with pedagogy, such as economic, health and other necessary conditions: John White *The Aims of Education Restated* (Psychology Press, London, 1982) at 101.

development of goods and interests.”²¹¹ Therefore, the concepts of education theory discussed here complement a child rights-based approach, and the theoretical understanding of childhood sought to be relied upon in the research, which views children as beings (social actors). Children are at the centre of education under such an approach because they are recognised as human beings capable of constructing their own development and life. A child rights approach helps determine further if such children are passive recipients or engaged actors. As postulated above, adults’ knowledge and learning objectives are not to be imposed on children. Educators are to provide settings where students can pursue ideas that interest them, thus contributing to their individual growth in different ways as human beings.²¹² Education is to be understood as being responsible for respecting children as rights-holders by listening to children and taking their views into account.²¹³

The theories discussed underpin theories of development that are useful in explaining attitudes towards children in schools and how these affect the realisation of the rights of refugee children in education. Various theories of development have been couched as learning theories,²¹⁴ and these include progressivism, associated with philosophers such as John Dewey and Jean-Jacques Rousseau;²¹⁵ behaviourism²¹⁶ by John B Watson²¹⁷ and Burrhus Frederic Skinner²¹⁸, among others and constructivism associated with Jean Piaget and Lev Vygotsky.²¹⁹ They have influenced the provision of education in New Zealand.²²⁰ Theories of development can explain the educational experiences of children that may hinder the enjoyment of the right to education and inform how their experiences can be improved. It has been noted in earlier chapters that some of the issues affecting the enjoyment of the right to education for refugee children in schools in New Zealand include language and cultural barriers, discrimination, and social exclusion. It has also been observed that

²¹¹ John Wall “Human Rights in Light of Childhood” (2018) 16(4) *The International Journal of Children Rights* 523.

²¹² Huang, above n 160, at 102.

²¹³ Lotta Brantefors and Ann Quennerstedt “Teaching and Learning Children’s Human Rights: A Research Synthesis” (2016) 3(1) *Cogent Education* 1 at 2.

²¹⁴ These are based on broader educational theories discussed above.

²¹⁵ Influenced by Rousseau’s understanding that human beings have inherent goodness that is corrupted by society: See Nigel Blake *The Blackwell Guide to the Philosophy of Education* (Blackwell Pub, Oxford, 2003) at 289.

²¹⁶ Based on how people behave which depends on individual’s response to stimuli that is reward or punishment: Burrhus Frederic Skinner *The Behavior of Organisms: An Experimental Analysis* (Copley Pub Group, Acton Mass, 1991).

²¹⁷ John B Watson *Behaviorism* (Routledge, New York, 1998).

²¹⁸ Burrhus Frederic Skinner *Science and Human Behavior* (Macmillan, New York, 1953).

²¹⁹ This is the most dominant theory today and is based on the notion that students are responsible for constructing their own knowledge and are active participants in the learning process. The theory has three strands, the cognitive constructivism by Jean Piaget and socio-cultural constructivism by Lev Vygotsky and radical constructivism: See Lev S Vygotsky and others *Mind in Society: Development of Higher Psychological Processes* (Harvard University Press, Cumberland, 1978); and Jean Piaget *The Construction of Reality in the Child* (Routledge, London, 1999).

²²⁰ Historically, New Zealand adopted the behaviourist approach to learning in the 1800s and subsequently the constructivism approach which is reflected in the New Zealand education system today: See Annelie Kamp (ed) *Education Studies in Aotearoa* (NZCER Press, Wellington, 2019).

refugee students tend to be treated as a homogeneous group.²²¹ Therefore, in conducting this research, it is also important to consider whether education laws and policies take into consideration refugee children's heterogeneous nature and whether they provide additional targeted means owing to their migration status and their different ages, backgrounds, languages, and cultures.

3.4.1 Ecological System Theory

It has been noted that children's developmental needs translate to their rights, and they are entitled to standards of care and protection that guarantee their rights.²²² The ecology system and the sociocultural theories of development have been used to study the experiences of refugee children in education and what they need for their adequate resettlement. These theories are valuable as they can highlight potential infringements of rights in educational settings.

The ecological system theory is a developmental theory that has been used as a foundation for a human rights approach to the wellbeing of children.²²³ The ecology of human development is based on the notion that children are active participants influenced by the perception of others as well as their perception of events.²²⁴ This theory has also been used in various studies on refugee children and educational policies.²²⁵ It is based on the principle that children, adults and other elements of their environments shape each other, adapting and responding to changes over time.²²⁶ This ecological model comprises interlinked structures (the micro-, meso-, exo- and macro-systems) that influence development directly and indirectly, with the child being the central point of influence.²²⁷ James Garbarino and Robert Abramowitz note that the developing child's structures include family, friends, neighbourhood, school (microsystem) laws, social attitudes, and institutions that directly or indirectly affect the child.²²⁸ The ecological model is thus valuable for studying the various

²²¹ Jill Rutter *Refugee Children in the UK* (Open University Press, Maidenhead, 2006); and Jody L McBrien *Educational Needs and Barriers for Refugee Students in the United States: A Review of the Literature* (Review of Educational Research 75, No 3, 2005) at 329.

²²² McCallin, above n 64, at 157.

²²³ Edmund Bruyere and James Garbarino "The Ecological Perspective on the Human Rights of Children" in Sheila B Kamerman and others (eds) *From Child Welfare to Child Well-Being* (Springer, Dordrecht, 2010) at 137.

²²⁴ At 137.

²²⁵ Sara Amalie O'Toole Thommessen and Brenda Todd "How Do Refugee Children Experience their New Situation in England and Denmark? Implications for Educational Policy and Practice" (2018) 85 *Children and Youth Services Review* 228; and Richard Hamilton and others *Literature Review: Interventions for Refugee Children in New Zealand Schools: Models, Methods, and Best Practice* (Report Prepared for the Ministry of Education, 2000).

²²⁶ Urie Bronfenbrenner *The Ecology of Human Development: Experiments by Nature and Design* (Harvard University Press, Cambridge, 1979).

²²⁷ Bruyere and Garbarino, above n 216, at 136-137.

²²⁸ James Garbarino and Robert H Abramowitz "The Ecology of Human Development" in James Garbarino *Children and Families in the Social Environment* (Routledge, New York, 2017) at 12.

environments of childhood and how they affect their development.²²⁹ It has been used to highlight factors that may impact the transition of refugee children to a new country and factors affecting how they adapt to a new school.²³⁰

In this light, Bronfenbrenner's theory has served as a basis for considering refugee children's needs through the examination of the impacts of personal and environmental factors on the development of refugee children. It further allows for the consideration of the various divergent refugee groups through the same lens to understand how the different intersecting and interacting systems influence the refugee child's development.²³¹ Not only has the ecological view been used to identify and address issues relating to refugee children, but it has also been applied to obtain an understanding of how schools and teachers can facilitate refugee children and their families' involvement in schools.²³² It aligns with a children's rights perspective to the extent that the systems and environments affecting the development of children can be improved through the overarching principles of the UNCROC.²³³

Bronfenbrenner's theory is one of the theories that underpin the New Zealand early childhood education curriculum Te Whāriki, which challenges kaiako (educators) to recognise the rapidly changing children's worlds and how they are connected over time. Under the curriculum, the kaiako aim to uphold and protect children's rights, interests, and viewpoints from the earliest ages. They are "to recognise children as citizens and preserve their dignity while building their mana and supporting them to build the mana of others."²³⁴

This theory offers evaluative tools on how the implementation of the right to education can be measured or monitored. It allows a focus on the macro, meso and micro. This would mean examining the provision of education for refugees under international and domestic laws and policies and considering immigration processes. In addition to this, it can be assessed how organisations working with refugee children facilitate education in collaboration with schools, as well as the role of the

²²⁹ Barbara Bennett Woodhouse *The Ecology of Childhood: How Our Changing World Threatens Children's Rights* (New York University Press, New York, 2020) at 207.

²³⁰ Yusuf Alpaydin "An Analysis of Educational Policies for School-Aged Syrian Refugees in Turkey" (2017) 5(9) *Journal of Education and Training Studies* 36 at 38.

²³¹ Angelika Anderson and others "Education of Refugee Children" in Richard Hamilton and Dennis Moore (eds) *Educational Interventions for Refugee Children* (Routledge Falmer, London and New York, 2004) at 4.

²³² Richard Hamilton "Schools, Teachers and Education for Refugee Children" in Richard Hamilton and Dennis Moore (eds) *Educational Interventions for Refugee Children: Theoretical Perspectives and Implementing Best Practice* (Routledge Falmer, London, 2004) at 83.

²³³ Woodhouse, above n 229, at 220.

²³⁴ Ministry of Education *Te Whāriki He Whāriki Mātauranga Mō Ngā Mokopuna o Aotearoa Early Childhood Curriculum* (2017) at 61.

parents in ensuring the enjoyment of the right to education. This would indicate the extent to which the various duty bearers realise the right and inform what their obligations are.

3.4.2 Sociocultural Theory

Another development theory that can be useful in understanding and examining the experiences of refugee children and the extent to which their rights are realised is the sociocultural theory. It is based on Lev Vygotsky's theory of development, where he opposed the view that a child's mind contains future developments waiting for the right time to emerge. He believed that teaching was to precede development and be aimed at awakening functions as one matures.²³⁵ The sociocultural theory suggests that individual development stems from culture in the context of social interactions with others. According to the theory, development is a process arising from participating in the child's social and intellectual life.²³⁶ It suggests that children's achievements and failures result from culturally situated social interactions and their own strengths or discoveries.²³⁷ According to this theory, children perform better when their own experiences and knowledge are recognised as essential in the learning process.²³⁸

Several researchers are of the view that special safeguards and care required under the UNCROC should be interpreted contextually, taking into account the child's specific sociocultural environment and developmental experiences. They note that the experiences of refugee children should be given appropriate interpretation when considering their childhood experiences and circumstances.²³⁹ This theory can thus be applied to explain some of the barriers to the full enjoyment of the right to education and inform how laws and policies can be strengthened to protect the interests of refugee children within a child rights-based framework.

It has also been argued that this theory provides a theoretical framework that is particularly relevant to education.²⁴⁰ Smith further argues that sociocultural theories of development are more suited as a framework for child advocacy work and that they add a dimension to the discussion on children's

²³⁵ Lev S Vygotsky and others *Mind in Society: Development of Higher Psychological Processes* (Harvard University Press, Cumberland, 1978) at 57.

²³⁶ At 57; see also Peter Langford *Vygotsky's Developmental and Educational Psychology* (Psychology Press, Hove England, 2005).

²³⁷ Neil Mercer and Christine Howe "Explaining the Dialogic Processes of Teaching and Learning: The Value and Potential of Sociocultural Theory" (2012) 1(1) *Learning, Culture and Social Interaction* 12.

²³⁸ Clemence Due, Damien W Riggs and Martha Augoustinos "Diversity in Intensive English Language Centres in South Australia: Sociocultural Approaches to Education for Students with Migrant or Refugee Backgrounds" (2016) 20(12) *International Journal of Inclusive Education* 1286 at 1287.

²³⁹ Lawrence and others, above n 134, at 2.

²⁴⁰ Smith *Understanding Children and Childhood: A New Zealand Perspective*, above n 57, at 22.

rights.²⁴¹ She argues that for children to be able to formulate and express a view, they should receive appropriate support, thus establishing a link between rights thinking and sociocultural theory.²⁴² In the case of refugee children, they may, for instance, need additional language support and that their cultural needs be catered for. Smith uses a three-strand theory as a framework for understanding children and childhood, comprising of children rights, childhood studies and sociocultural theory.²⁴³ The sociocultural theory has been relied upon in the examination of early childhood education curriculum²⁴⁴ policy²⁴⁵ and to enhance the realisation of children's rights.²⁴⁶ Applying sociocultural theory is beneficial for migrant and refugee students, as the differences between home and school settings can be pronounced in new host countries, and a need for sharing knowledge in a culturally meaningful way is essential. Therefore, it is vital to consider the broader social context of schools and the learning experiences of students with migrant or refugee backgrounds.²⁴⁷ Applying this theory enhances the experiences of refugee children as it will determine the best way to facilitate their learning and examine the extent to which they are permitted to participate in the development of educational policy. This theory is thus useful in determining whether the laws, policies and practices relating to the provision of education facilitate their participation. The theory also supports the need for refugee children's social, cultural, and historical context to be reflected in the domestic legal framework and the education system.

Colette Daiute used sociocultural theory to inform the theoretical framework for analysing children's rights and child development theory within the UNCROC, with development being understood as an interaction between the individual and society.²⁴⁸ The sociocultural theory has also been applied in a study on children's rights to education, which focused on policy and the sociocultural context to show the barriers to free and equitable education. It highlighted that barriers tend to differ due to contextual factors based on cultural traditions and social constructions of childhood.²⁴⁹ Finding ways in which the interpretation and implementation of children's rights can be done in a culturally relevant manner

²⁴¹ Anne Smith "Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory" (2002) 10(1) *The International Journal of Children's Rights* 73 at 74.

²⁴² At 75.

²⁴³ Smith *Understanding Children and Childhood: A New Zealand Perspective*, above n 57, at 38.

²⁴⁴ Anne Smith "The Early Childhood Curriculum from a Socio-Cultural Perspective" (2006) 115(1) *Early Child Development and Care* 51.

²⁴⁵ Mitchell "Constructions of Childhood in Early Childhood Education Policy Debate in New Zealand", above n 117, at 328; where assumptions by government officials and various organisations about children and childhood were examined.

²⁴⁶ Smith "Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory", above n 241, at 73.

²⁴⁷ Due, Riggs and Augoustinos, above n 238, at 1287.

²⁴⁸ Colette Daiute "The Rights of Children, the Rights of Nations: Developmental Theory and the Politics of Children's Rights" (2008) 64(4) *Journal of Social Issues* 701 at 705.

²⁴⁹ Dawn Zinga and Sherri Young "Children's Right to Education: Contextualizing Its Expression in Developed and Developing Countries" in Tom O'Neill and Dawn Zinga (eds) *Children's Rights: Multidisciplinary Approaches to Participation and Protection* (University of Toronto Press, London, 2008) at 86.

and incorporated into policies and practices has been identified as a common challenge among countries, especially education policies that tend to be influenced by how children are perceived and their roles within society.²⁵⁰ It has been argued that Western conceptions of childhood, which are widely relied upon, do not take into account the various cultural needs that refugee children have. Sociocultural theory is useful as it provides additional analytical tools to adopt a broader view and interpretation of international standards regarding children's rights in education.

The sociocultural theory has been used primarily in research focusing on early childhood education in New Zealand. By adopting this approach to inform analysis of the right to education for refugee children at all levels of education or generally, the research provides a valuable contribution to the existing literature on the study of the rights of refugee children in New Zealand. While both the ecological and sociocultural theories of development may be useful for the research, the sociocultural theory underpins the aim of the study to critically analyse children's rights-based understandings and actions better. This is because it focuses mainly on the child and their unique experiences while considering the social, historical, and cultural contexts that influence the interpretation and implementation of children's rights.

3.5 *Conclusion*

In sum, the theoretical framework underpinning the research is the interest theory of rights, informed by the sociology of childhood and sociocultural theory. An underlying understanding of the interest theory of rights as a foundation for the right to education validates refugee children as rights-holders and places a duty on others to ensure that this right is realised. The conception of children as rights-holders by virtue of their interests can be better understood and applied if childhood is viewed as a social construct where children are social actors. Conceptualising refugee children as rights-holders also justifies the need to examine the obligations of those responsible for implementing the right to education. As refugee children are rights-holders with unique interests to be protected, the UNCROC can be relied upon to support a rights-based approach and examine refugee children's rights set out therein through an intersectionality perspective. This will allow the discussions to be centred on differences that refugee children have as individuals and as a group. The theoretical framework presented supports the notion that refugee children have different childhoods due to their culture and background. Therefore, when education is provided, their unique differences and cultures need to be reflected in laws, policies, and practices. The barriers to the realisation of the right to education for refugees will be explained in terms of the theoretical concepts discussed. While the research is based

²⁵⁰ At 85.

on a legal perspective, this interdisciplinary framework is constructed to facilitate a better understanding of wider factors that enhance or hinder refugee children's enjoyment of their right to education. It better informs the determination of the extent to which refugee children's rights can be realised and where improvements can be made.

The children's rights theoretical and analytical framework, together with sociological concepts of childhood informed by sociocultural perspective on education, provide an understanding of what is required to realise refugee children's education rights adequately. The above theories inform the analysis of education provision to refugee children in New Zealand and determine whether refugee children are recognised as heterogeneous rights-holders and active social actors. The theoretical framework is used to critically analyse how children are viewed in schools and other social institutions that facilitate education. The critical examination of laws and policies to assess the extent to which the realisation of the right to education impacts the resettlement and integration of refugee children in New Zealand will be guided by this framework

4. THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN UNDER INTERNATIONAL LAW

4.1 Introduction

The importance of education for refugee children to their resettlement and development has been emphasised in the previous chapters. It has also been pointed out that education is a right that refugee children as rights-holders have. Therefore, it is crucial to explore the right to education for refugees under international law. This chapter comprises a detailed examination of the normative content of the right to education and its meaning with regard to refugee children. The international legal obligations that New Zealand has regarding the rights to education of refugee children in New Zealand are highlighted. It serves as a basis for examining domestic law and policy, the extent to which the obligations are met, and whether refugee children are adequately recognised as rights-holders with rights to be protected. The meaning of the right to education is explored, and how the right is instrumental in addressing refugee children's educational needs will be discussed.

The right to education will be discussed in terms of international human rights, children's rights, and refugee rights instruments to determine the extent to which the right to education for refugee children is protected therein. The discussion on the right to education under international children's rights law examines the right to education for refugee children in general. It discusses how the Guiding Principles of the United Nations Convention on the Rights of the Child (UNCROC)¹ inform the content of the right. This will be followed by a child rights-based approach to refugees' right to education within the UNCROC using the 4A conceptual framework, which comprises of availability, adaptability, accessibility and acceptability as the key aspects of the right to education, which offers a practical guide for state parties.²

This chapter will demonstrate that additional measures are required for the adequate realisation of the right to education for refugee children. This chapter will further show how the interaction of a child rights-based approach and the 4A framework provides comprehensive guidelines and standards on how the right to education for refugee children should be realised for them to enjoy their rights fully.

¹ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

² Christian Courtis and John Tobin "Article 28 The Right to Education" in John Tobin (ed) *The UN Convention on the Rights of the Child* (Oxford University Press, Oxford, 2019) at 1067.

4.2 Nature of the Right to Education

The nature of education demonstrates how important it is as a right. A key characteristic of the right to education is that it is a multiplier right as it enables the realisation and enjoyment of other human rights.³ This has been emphasised by the Committee on Economic, Social and Cultural Rights (CESCR), which asserts that the right to education is an indispensable means of realising other human rights.⁴ It is seen as a fundamental human right and crucial for the enjoyment of all other human rights. Not only does the right to education promote the realisation of economic, social, and cultural rights, but civil and political rights as well. Some form of education and literacy is required for one to enjoy their civil and political rights, such as freedom of information, expression, assembly and association, and the right to vote.⁵ It has also been noted that several economic, social, and cultural rights require a minimum level of education for them to be enjoyed.⁶ As such, the right to education demonstrates the indivisible and interdependent nature of all human rights.⁷ As emphasised in the first chapter, when resettlement is considered the most durable solution for refugees, education equips refugee children to survive and succeed in a new environment.⁸ Even prior to and during the resettlement process, education plays a pivotal role in promoting understanding and peace to foster reconciliation and restoration of the social fabric in war-torn societies.⁹

There is no universal definition of what education means under international law. Although this is the case, the aims of education can inform how education is to be understood. The various international treaties that set out what the right to education entails outline the aims of education as well. They also provide a clearer understanding of the scope, contents, and limitations of the right to education.¹⁰ Katarina Tomasevski notes that the ends and means of education are defined through the rights and duties set out in international human rights law.¹¹ It has been reported that education is necessary for upholding one's dignity and should be understood as a right.¹² Christian Courtis and John Tobin also

³ Klaus Dieter Beiter *The Protection of the Right to Education by International Law* (Martinus Nijhoff, Leiden, 2006) at 29.

⁴ Committee on Economic, Social and Cultural Rights [CESCR] *General Comment No 13: The Right to Education (Art 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [1].

⁵ Manfred Nowak "The Right to Education" in Asbjorn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, London, 2001) at 245.

⁶ At 245.

⁷ CESCR *General Comment No 11: Plans of Action for Primary Education (Art 14 of the Covenant)* UN Doc E/1992/23 (10 May 1999) at [2].

⁸ James Hathaway *The Rights of Refugees under International Law* (Cambridge University Press, Cambridge, 2005) at 584.

⁹ Vienna Declaration and Programme of Action UN Doc A/CONF.157/24 (25 June 1993) at 20.

¹⁰ Manfred Nowak "The Right to Education - Its Meaning, Significance and Limitations" (1991) 9(4) *Netherlands Quarterly of Human Rights* 418 at 421.

¹¹ Katarina Tomasevski *Human Rights Obligations in Education: The 4-A Scheme* (Wolf Legal Publishers, Nijmegen, 2006) at 18.

¹² Dieter Beiter, above n 3, at 27.

emphasise that education is an interest and a right. They note that if education is understood as a right, education will thus not be provided on the basis of a state's discretion or benevolence.¹³ In terms of the interest theory, the child's right to education, therefore, imposes a corresponding legal duty on a state party to secure the realisation of that right. As highlighted in the previous chapter, refugee children are rights-holders with unique interests, giving rise to their right to education in terms of the interest theory of rights. Therefore, it is essential to examine the legal obligations state parties have in realising their right to education.

One of the interests that refugee children have is development, which tends to be interrupted by forced migration. Development has been recognised as is an intrinsic part of children's rights and appears several times in the UNCROC; so, it is an interest and a right. One of the key aims of education is to support the development of children, which as noted, can often be interrupted by forced migration.¹⁴ Some of the development benefits of the right to education are that it helps individuals reach their full potential and ability to claim their other rights.¹⁵ It makes one aware of their cultural and spiritual values.¹⁶ The Special Rapporteur on the right to education has noted that all individuals, including refugees, have a right to education and for education to contribute to the realisation of individual capabilities.¹⁷ With regard to the right to education for refugees, in particular, the Special Rapporteur was of the view that their human right to education should not be contentious. Although this is the case, it has been observed that contentions exist regarding the nature of the right itself.¹⁸ This research, therefore, explores how the right to education for refugee children should be understood to ensure adequate realisation.

As an economic, social, and cultural right, one of the key features of the right to education is that it should be progressively realised¹⁹ which can make implementation challenging. Courtis and Tobin note that this concept requires that states take immediate action to outline how the right to education will be realised and demonstrate efforts made to secure the right.²⁰ Discussing and clarifying the normative content in more detail and specifying the nature and content of state obligations is thus required to strengthen the implementation of economic, social, and cultural rights. This approach will

¹³ Courtis and Tobin, above n 2, at 1057.

¹⁴ Ziba Vaghri and others "Refugee and Asylum-Seeking Children: Interrupted Child Development and Unfulfilled Child Rights" (2019) 6(11) Children 120 at 125.

¹⁵ Allison Anderson, Peter Hyll-Larsen and Jennifer Hofmann "The Right to Education for Children in Emergencies" (2011) 2(1) Journal of International Humanitarian Legal Studies 84 at 86.

¹⁶ Dieter Beiter, above n 3, at 18.

¹⁷ *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education* UN Doc A/HRC/14/25 (16 April 2010) at [17].

¹⁸ At [73].

¹⁹ See Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 20.

²⁰ See Courtis and Tobin, above n 2, at 1073.

be beneficial in identifying the gaps in international protection of the right to education for refugee children and how they can be addressed.

4.3 *The Right to Education for Refugees under International Law*

The right to education for refugee children is provided by a wide range of international instruments under international human rights law, international children's rights law and international refugee law.

4.3.1 International Human Rights Law

It was not until after the Second World War that the right to education was explicitly recognised under international human rights law under the auspices of the United Nations.²¹ The importance of education was emphasised in the UN Charter, which was drafted and concluded as a result of the outbreak of the war and its aftermath. It was aimed at ensuring the respect of fundamental human rights, dignity and worth of the human person, as well as maintaining international peace and security.²² This aim was particularly relevant for refugees who had to flee conflict and thus undergo disruptions in their lives. Consequently, the UN Charter provided for the establishment of the General Assembly, which was responsible for “the promotion of international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”²³ Furthermore, consistent with the aim of creating conditions of stability and well-being required for peaceful and friendly relations among nations, the United Nations was created to promote “international cultural and educational cooperation.”²⁴

The UDHR²⁵ is a common standard of achievement to which all peoples and all states strive for in respecting rights and freedoms²⁶ and recognise education as a right.²⁷ Though not exclusive to refugees, the UDHR sets out the rights and freedoms that protect refugees without distinction on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, as noted in the Chapter One.²⁸ Article 26 provides that everyone has the right to education and

²¹ Douglas Hodgson “The International Human Right to Education and Education Concerning Human Rights” (1996) 4(3) *The International Journal of Children's Rights* 237 at 239; and Nowak, above n 5, at 248.

²² Charter of the United Nations 1 UNTS XVI (24 October 1945) [UN Charter] at preamble.

²³ At art 13(1)(b).

²⁴ At art 55(b).

²⁵ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR].

²⁶ At preamble.

²⁷ Ben Saul, David Kinley and Jacqueline Mowbray *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases and Materials* (Oxford University Press, Oxford, 2014) at 1087.

²⁸ UDHR, above n 25, at art 2.

that it is to be free in the elementary (primary) and fundamental stages.²⁹ It also sets out the aims and objectives of education. Article 26 explicitly recognises that education is to be directed at the full development of the human personality, respect for human rights and fundamental freedoms, and maintaining peace.³⁰ These aims were particularly relevant for refugees as education was considered necessary post-Second World War during the drafting of the UDHR. It was proposed that education be explicitly directed to the objectives of the United Nations relating to the maintenance of peace.³¹ This emphasis on education as a basis for peace is particularly relevant to refugee children, whose right to education not only realises a human right but also serves as a way to foster stability following displacement.

The ICESCR³² has been described as the most extensive article on the right to education. Article 13(1) provides for the right to education for everyone. The article also sets out the aims of education, which include the full development of the human personality and dignity, and that it should be directed at strengthening respect for human rights and fundamental freedoms. Education should enable all persons to participate effectively in a free society, promote understanding, tolerance, and friendship among all nations and all racial, ethnic or religious groups, and aim to maintain peace.³³ “Everyone” has the right to education as set out in the ICESCR. Therefore, it applies to refugee children as well. Article 2(2) provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The ICESCR further sets out the minimum standards for realising the right to education at the different levels of education. It is noteworthy that under the ICESCR, different obligations are imposed depending on the level of education. State parties are required to provide free and compulsory primary education to everyone.³⁴ Primary education is of great importance under the Covenant. This is evident in the obligation set out in art 14 that a detailed plan of action for progressive implementation should be adopted within two years with regard to compulsory education.

²⁹ At art 26(1).

³⁰ At art 26(2).

³¹ *Hundred and Forty-Seventh Meeting, Held at Palais de Chaillot, Paris, on Friday, 19 November 1948: [3rd Committee, General Assembly, 3rd Session]* UN Doc A/C.3/SR.147-EN (19 November 1948) at 594.

³² International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 03 January 1976) [ICESCR].

³³ At art 13(1).

³⁴ At art 13(2)(a).

Secondary education is to be made generally available and accessible to everyone through the progressive introduction of free education,³⁵ and higher education is to be made equally accessible to all on the basis of capacity through the progressive introduction of free education.³⁶ State parties are to take steps to the maximum of their available resources to progressively realise the rights set out in the Covenant.³⁷ The provisions of the ICESCR discussed demonstrate that the content of the right to education varies with the level of education being considered, and therefore the states' obligations stemming from the right to education will also vary.³⁸

The right to education entails a corresponding set of three obligations. The CESCR expands on the provisions of the Covenant and obligations therein. The CESCR has highlighted that the Covenant imposes on states parties the obligation to respect, protect and fulfil, which includes facilitating and providing.³⁹ In line with the obligation to respect, state parties are to avoid measures that hinder the enjoyment of the right to education. To meet the obligation to protect the right to education, states are to prevent third parties from interfering with the enjoyment of the right to education. The CESCR has underscored the need for states to take active steps to enable and assist individuals and communities in enjoying the right to education when meeting the obligation to fulfil.⁴⁰ The obligation to fulfil the right to education places a duty on states to "provide".⁴¹ This applies to instances when one person or a particular class of people are unable to realise their right.⁴² Another key obligation under the right to education is for states to establish and maintain a transparent and effective monitoring system on the extent to which education meets the objectives set out in art 13(1).⁴³

Although the ICESCR includes refugees, there is no specific reference to refugees therein. While it can be argued that this suggests a lack of clear specific obligations and standards of the right to education for refugee children, the CESCR has made comments on the rights of refugees. It has underlined that the rights set out in the ICESCR apply to everyone, including non-nationals, such as refugees, asylum-seekers and other groups.⁴⁴ The CESCR also recognises that access to education is

³⁵ At art 13(2)(b).

³⁶ At art 13(2)(c).

³⁷ At art 2(1).

³⁸ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [48].

³⁹ At [46].

⁴⁰ At [49].

⁴¹ At [47].

⁴² At [47].

⁴³ At [49].

⁴⁴ CESCR *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights (Art 2, Para 2, of the International Covenant on Economic, Social and Cultural Rights)* UN Doc E/C.12/GC/20 (2 July 2009) at [30].

one of the key ways refugees can be integrated into the host country.⁴⁵ The former UN Special Rapporteur on the right to education has also highlighted that refugees have the right to education.⁴⁶ There has also been an emphasis on the need for states to address the specific and practical barriers that may interfere with particular groups enjoying their rights under the ICESCR. The CESCR has, in this regard, highlighted that due to their precarious circumstances, asylum seekers and undocumented migrants are at risk of discrimination.⁴⁷ Interestingly, refugees are not explicitly included in this provision. Data collection has been considered crucial in determining the extent to which refugees enjoy the rights set out in the ICESCR. The CESCR has noted that in some circumstances, insufficient data on the realisation of the rights of refugees, asylum seekers and undocumented migrants is provided. As such, states are urged to collect data as it has the potential to greatly influence the adoption and implementation of policies that ensure access to education, employment and healthcare.⁴⁸ During data collection it is important that privacy and confidentiality protections be taken into account.⁴⁹

Other international human rights instruments set out rights in education though not expressly on education itself.⁵⁰ The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁵¹ requires states to prohibit and eliminate racial discrimination and to guarantee the right of everyone to equality before the law and the enjoyment of the right to education.⁵² Other international human rights treaties have also provided elements of the right to education regarding discrimination of certain groups of people to which refugees may also belong. These include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),⁵³ which requires states to take all appropriate measures to eliminate discrimination against women in order to ensure that they have equal rights with men in education.⁵⁴ It further provides that the equality required should be ensured at all stages of education, that is, pre-school, general, technical, professional and higher technical education.⁵⁵ The Convention on the

⁴⁵ CESCR *Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C.12/2017/1 (13 March 2017) at [6].

⁴⁶ See generally *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17.

⁴⁷ CESCR *Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights*, above n 45, at [7].

⁴⁸ At [17].

⁴⁹ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR], at art 17; see also UNCROC, above n 1, at art 16.

⁵⁰ ICCPR, above n 49, at art 2(1).

⁵¹ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 04 January 1969) [ICERD].

⁵² At arts 5 and 7.

⁵³ Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW], at art 10.

⁵⁴ At art 10.

⁵⁵ At art 10.

Rights of Persons with Disabilities (CRPD)⁵⁶ obligates states to promote, protect and ensure the full enjoyment of human rights by persons with disabilities and ensure that they enjoy full equality under the law, including the right to education.⁵⁷

In line with the objectives of the United Nations, the United Nations Educational, Scientific and Cultural Organization (UNESCO) was set up to advance, through the educational, scientific and cultural relations of the peoples of the world, the objectives of international peace and the common welfare of humankind.⁵⁸ It was set up to ensure that states work collaboratively to advance the universal respect for human rights and equality of educational opportunity.⁵⁹ The UNESCO Constitution emphasises the importance of education in fostering peace and security. Education was recognised for its contribution to the universal respect for justice, the rule of law, human rights, and fundamental freedoms without distinction of race, sex, language, or religion.⁶⁰

The UNESCO Convention against Discrimination in Education (CADE) covers the right to education extensively and has a binding force in international law. It asserts that every person has the right to education⁶¹ and recognises that the principles of non-discrimination and equality of educational opportunities are central to the adequate realisation of the right to education.⁶² Therefore, states are required to take steps to achieve equality of opportunity and treatment for all in education.⁶³ The Convention explicitly prohibits any discrimination based, inter alia, on national or social origin, economic condition or birth so that educational opportunities are truly accessible to all, including refugees.⁶⁴ Article 2 of CADE sets out actions that should not be considered discriminatory even though they amount to differential treatment. The Convention obligates states to formulate, develop and apply a national policy by “methods appropriate to the circumstances” to promote equality of opportunity and treatment in education.⁶⁵ This is to be achieved by making primary education free and compulsory, making secondary education generally available and accessible to all, and making higher education equally accessible to all based on individual capacity.⁶⁶ Another important obligation imposed by the Convention is that the quality and standard of education should be the same

⁵⁶ Convention on the Rights of Persons with Disabilities UN Doc A/RES/6/106 (24 January 2007) [CPRD].

⁵⁷ At art 24.

⁵⁸ Constitution of the United Nations Educational, Scientific and Cultural Organisation 4 UNTS 275 (opened for signature 16 November 1945, entered into force 4 November 1946) [UNESCO Constitution], at preamble.

⁵⁹ Convention Against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962) [CADE], at preamble.

⁶⁰ UNESCO Constitution, above n 58, at art 1.

⁶¹ CADE, above n 59, at preamble.

⁶² At preamble.

⁶³ Mialaret Gaston (ed) *The Child's Right to Education* (UNESCO, Paris, 1979) at 27.

⁶⁴ CADE, above n 59, at art 1(1).

⁶⁵ At art 4.

⁶⁶ At art 4(a).

in all public educational institutions.⁶⁷ States are also to “encourage and intensify by appropriate methods the education of persons who have not received any primary education or who have not completed the entire primary education course and the continuation of their education on the basis of individual capacity.”⁶⁸ This is especially relevant for refugees whose education is often disrupted by forced migration. Some of the common barriers to education for refugees identified by UNESCO include the treatment of refugees in schools, interruption of schooling, the quality and cost of education, language, bullying and discrimination.⁶⁹ It has been underscored that UNESCO instruments that set standards in the field of education protect the right to education for refugees as well.⁷⁰ UNESCO has issued recommendations that address the right to education for refugees, although most relate to higher education.⁷¹

The New York Declaration for Refugees and Migrants⁷² also recognises education as crucial for the response to the refugee crisis. This is demonstrated in the provisions that state parties have committed to therein. These include the commitment to provide quality primary and secondary education to all refugee children,⁷³ to support and promote early childhood education,⁷⁴ as well as tertiary education and vocational training.⁷⁵ The Declaration further recognises the importance of access to quality education in the fundamental protection of children and young people in displacement contexts, particularly in conflict and crisis situations.⁷⁶

It has been noted in Chapter One that it is important to distinguish between migrants and refugees owing to their differences.⁷⁷ This is crucial because if such a distinction is not made, there may be serious consequences for those requiring international protection.⁷⁸ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) excludes refugees from its scope unless such application is provided for in each state’s relevant

⁶⁷ At art 4(b).

⁶⁸ At art 4(c).

⁶⁹ UNESCO *Protecting the Right to Education for Refugees* (Working Papers on Education Policy No 4, 2017) at 8.

⁷⁰ At 15.

⁷¹ UNESCO *Recommendation Concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms* (adopted 19 November 1974); UNESCO *Recommendation Concerning Technical and Vocational Education and Training (TVET) 2015* (2016); UNESCO *Recommendation on Adult Learning and Education, 2015*; and UNESCO *Recommendation Concerning the Status of Higher-Education Teaching Personnel* (adopted 11 November 1997).

⁷² New York Declaration for Refugees and Migrants UN Doc A/RES/71/1 (3 October 2016).

⁷³ At [81].

⁷⁴ At [82].

⁷⁵ At [82].

⁷⁶ At [81].

⁷⁷ Maria Hayward “Teaching as a Primary Therapeutic Intervention for Learners from Refugee Backgrounds” (2017) 28(2) *Intercultural Education* 165 at 166.

⁷⁸ Shabia Mantoo ““Refugees” or “Migrants”? How Word Choices Affect Rights and Lives” (20 December 2023) <www.unhcr.org>.

national legislation or international instruments in force.⁷⁹ Although this is the case, the Joint General Comment by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and the Committee on the Rights of the Child (CRC) can be applied to refugee children as the UNCROC applies to all children including refugee children while the ICRMW addresses specific measures relating to migration. The CMW and the CRC have also commented on how the rights of all children are to be fulfilled in the context of international migration. The policies and practices implemented in this regard should be comprehensive, involving different key institutions and bodies, including social protection, health, education, justice, migration and gender, and between governments.⁸⁰ Furthermore, the policies and programmes should be adequately resourced and financed for effective implementation. The need for continuous and periodic training of officials on the rights of refugee children, including intersectional discrimination, has been encouraged.⁸¹ It has been noted that realising the right to education for refugees requires that they be afforded the means to rebuild their lives and empowered to exercise other human rights and foster their individual freedom.⁸² This is because refugee children tend to have their education disrupted and, in some instances, have no prior education upon arrival in new host countries.⁸³

As highlighted above, the right to education is extensively provided for under international human rights treaties, and they apply to refugee children. It is worth noting that the aims and objectives of education, as set out in international human rights law, are directed toward enabling one to freely develop their personality and dignity, participate in a free society, and respect human rights.⁸⁴ Even though some international human rights instruments provide obligations for states, as well as indicators for realisation, some scholars are of the view that the ICESCR and other treaties protecting the right to education do not identify any indicators necessary to monitor the fulfilment of the right.⁸⁵ Nina Maadad also argues that refugee children and youth are disadvantaged as national monitoring

⁷⁹ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (adopted 18 December 1990, entry into force 1 July 2003) [ICMW], at art 3(d).

⁸⁰ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child 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 2017) at [18].

⁸¹ At [18].

⁸² UNESCO *Protecting the Right to Education for Refugees*, above n 69, at 16.

⁸³ Nina Maadad *Syrian Refugee Children in Australia and Sweden Education and Survival Among the Displaced, Dispossessed and Disrupted* (Routledge, Milton, 2019) at 7.

⁸⁴ Nowak, "The Right to Education", above n 5, at 249.

⁸⁵ Sital Kalantry, Jocelyn E Getgen and Steven Arrigg Koh "Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR" (2010) 32(2) *Human Rights Quarterly* 253 at 260.

systems do not usually track refugees' educational access and attainment. As such, their educational needs and achievements are invisible.⁸⁶

The above discussion on the different international instruments outlines provisions that set out the obligations New Zealand as a signatory has with regard to the realisation of the right to education for refugee children. Positive measures are to be taken to provide assistance to individuals, in this case, refugee children, to enjoy the right to education.⁸⁷ The CESCR sets out the general rule that state parties are under an obligation to fulfil (provide) a right if one individual or a group cannot realise the right themselves.⁸⁸ This is particularly relevant for refugee children, owing to their migratory experiences and needs, which require additional assistance and protection, as emphasised in the Chapter One. Regarding the obligation to respect, state parties should avoid measures that hinder the enjoyment of the right to education. In contrast, the obligation to protect requires state parties to prohibit others from interfering with the enjoyment of the right.⁸⁹ The existing international human rights instruments provide for the right to education for refugee children. It is evident that the obligations states have are spread across the different instruments that provide different obligations relating to the right to education and various standards. Notably, none of the treaties explicitly require the unique needs of refugee children to be taken into account. This may result in the needs and interests of refugee children being overlooked in the implementation of their rights. This gap highlights a key challenge that appears to be common among various states, which this thesis aims to address. Subsequent chapters will therefore explore ways to ensure that the right to education for refugee children receives focused attention.

4.3.2 International Refugee Law

While the various international norms and instruments outlined above afford protection of the right to education for all, they do not adequately address the unique circumstances relating to the educational rights of migrants, refugees and asylum-seekers.⁹⁰ Unlike international human and children's rights instruments, art 22 of the Convention Relating to the Status of Refugees (Refugee Convention)⁹¹ provides specifically for the right to education for refugees. State parties are to afford refugees the same treatment as is accorded to nationals with respect to primary education. With

⁸⁶ Maadad, above n 83, at 2.

⁸⁷ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [47].

⁸⁸ At [47].

⁸⁹ At [47].

⁹⁰ *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [26].

⁹¹ UN General Assembly Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

regards to education other than primary, states parties have a duty to accord refugees treatment as favourable as possible and not less favourable than that accorded to aliens generally in the same circumstances. Even though international refugee law provides explicitly for refugee children's right to education, Joseph O'Rourke is of the view that when comparing the Refugee Convention with other international treaties, other binding international instruments express a right to education as more than just equal access.⁹² Andreas Zimmermann also argues that art 22 does not set out any material obligations regarding the substance and the extent to which the right to education must be realised specifically for refugees. He argues that the provision in the Refugee Convention does not require any more access to elementary (primary) education than nationals of the state.⁹³ Therefore, the Refugee Convention does not adequately take into account the interests and needs of refugee children in education. Although there is a need for additional support and measures to meet their unique circumstances, art 22 does not set out any further obligations for this to be taken into account. The subsequent chapters will explore whether New Zealand's law and policy effectively embodies this aspect.

While the Refugee Convention does not provide sufficient standards and measures for the realisation of the right to education, state parties are under an obligation to work with the UNHCR in its functions to facilitate and supervise the application of the provisions of this Convention.⁹⁴ The UNHCR⁹⁵ has addressed the right to education for refugees on several occasions.⁹⁶ It has been recognised that education is one of the areas in which refugee children need special assistance.⁹⁷ The Executive Committee on the International Protection of Refugees reaffirmed the importance of the right of refugee children to education. It urged states to intensify their efforts to ensure that all refugee children benefit from a satisfactory quality primary education that considers their cultural identity

⁹² Joseph O'Rourke "Education for Syrian Refugees: The Failure of Second-Generation Human Rights During Extraordinary Crises" (2015) 78(2) Albany Law Review 711 at 726.

⁹³ Andreas Zimmermann *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol* (Oxford University Press, New York, 2011) at 1032.

⁹⁴ Refugee Convention, above n 91, at art 35.

⁹⁵ Which was established to ensure the international protection of refugees, seeking permanent solutions for the problem of refugees, assist Governments and private organisations in facilitating the voluntary repatriation or assimilation of refugees.

⁹⁶ UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 47 (XXXVIII) Refugee Children* (1987); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 59 (XL) Refugee Children* (1989); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 77 (XLVI) General* (1995); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 84 (XLVIII) Refugee Children and Adolescents* (1997); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 100 (LV) International Cooperation and Burden and Responsibility Sharing in Mass-Influx Situations* (2004); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 104 (LVI) Local Integration* (2005); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 107 (LVIII) Children at Risk* (2007); UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 109 (LX) Protracted Refugee Situations* (2009); and UNHCR *Note on Refugee Children* UN Doc EC/SCP/46 (9 July 1987).

⁹⁷ UNHCR *Note on Refugee Children*, above n 96, at [10].

and adapted to understanding the host country.⁹⁸ The Executive Committee further underscored that refugee children should be afforded further education and, consequently, there should be assistance in post-primary education in assistance programmes by the UNHCR.⁹⁹

Educational assistance should be afforded to refugee children based on the child's needs, and such needs are to be assessed throughout the migration process. Some of the factors to be taken into account include access to a satisfactory level of education, their cultural identity, an understanding of the host country, and knowledge concerning the development of the economic life of their own communities.¹⁰⁰ As such, there is a need for states to facilitate the resettlement or integration of refugee children into their education systems. The Executive Committee has urged for targeted support to be provided to refugee children, especially adolescents, in schools through language support, education on the host country's culture and social structures, and targeted support addressing their specific needs.¹⁰¹

Although the UNHCR provides commentary on the right to education of refugee children, the Refugee Convention does not adequately protect the interests of refugee children in education, as noted above. As noted in Chapter One, there is great benefit in applying and interpreting the Refugee Convention in light of international human rights treaties, as it provides comprehensive interpretation and protection of rights, such as education. Conversely, the protection afforded by the Refugee Convention can reinforce reporting mechanisms of international human rights law on refugees.¹⁰² There are different views on the categorisation of international children's rights law as discussed in Chapter One. While it relates to specific rights for children as a special group,¹⁰³ it has also been viewed as a human rights tailored for children.¹⁰⁴ As such, children's rights would fall under the broader category of human rights law.¹⁰⁵ Therefore, international refugee law should be read in conjunction with and complemented by international human rights law and children's law to ensure that the unique needs and interests of refugee children are taken into account. As also discussed in

⁹⁸ UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 47 (XXXVIII) Refugee Children*, above n 96 at [o].

⁹⁹ At [p].

¹⁰⁰ UNHCR *Note on Refugee Children*, above n 96, at [47].

¹⁰¹ UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 107 (LVIII) Children at Risk*, above n 96, at [h(xvii)].

¹⁰² Tom Clark and François Crépeau "Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law" (1999) 17(4) *Netherlands Quarterly of Human Rights* 389 at 408.

¹⁰³ Lucinda Ferguson "Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights" (2013) 21 *The International Journal of Children's Rights* 177 at 181.

¹⁰⁴ Nigel Cantwell "Are Children's Rights Still Human?" in Antonella Invernizzi and Jane Williams (eds) *The Human Rights of Children: From Vision to Implementation* (Routledge, Oxford, 2011) 37 at 41.

¹⁰⁵ Ferguson, above n 103, at 178.

Chapter One, art 30 of the Vienna Convention on the Law of Treaties¹⁰⁶ requires that the overlapping treaty obligations outlined in international refugee law, human rights law, and children’s rights law be harmonised to ensure that the provisions are interpreted consistently and in a coherent manner.¹⁰⁷

4.3.3 International Children’s Rights Law

While the international human rights and refugee legal instruments include children, the specific rights of children are protected under international children’s rights law. As noted in Chapter Two, the origins and development of children’s rights stemmed from issues affecting children during and after World War I.¹⁰⁸ The Declaration of Geneva 1924¹⁰⁹ was the first international document that identified children’s rights and recognised the right to education.¹¹⁰ Although there was no explicit mention of a right to education, the Declaration stated principles that indirectly related to the right to education. It provided for the child to be afforded the means for normal development, that the “backward” child is assisted, and that the child is placed in a position to earn a livelihood.¹¹¹ The importance of education in the child’s overall development was thus dominant even before it was recognised as a right under international child law. The Declaration of the Rights of the Child 1959¹¹² expanded on the principles set out in the Declaration of Geneva. It expressly provided that the child has the right to recreational activities and free education.¹¹³ The Declaration of the Rights of the Child also recognised the need for education to be tailored to suit the needs of each child. Thus, it provided the right to special education for physically and mentally disabled children.¹¹⁴

The UNCROC¹¹⁵ provides a complete set of children’s rights, including the right to education. It explicitly recognises that all children have a right to education, and it should be realised progressively and based on equal opportunity.¹¹⁶ State parties have a duty to “make primary education compulsory and available free to all.”¹¹⁷ Similar to the ICESCR and the Refugee Convention, the obligations to respect, protect, and fulfil remain the same but what states must do to discharge those obligations

¹⁰⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 [VCLT].

¹⁰⁷ Chapter One footnotes 48 – 51 and accompanying text.

¹⁰⁸ Jason M Pobjoy “A Child Rights Framework for Assessing the Status of Refugee Children” in Satvinder Singh Juss and Colin Harvey (eds) *Contemporary Issues in Refugee Law* (Edward Elgar Publishing, Gloucestershire, 2013) at 91.

¹⁰⁹ Geneva Declaration of the Rights of the Child (adopted 26 September 1924).

¹¹⁰ Douglas Hodgson “The International Human Right to Education and Education Concerning Human Rights” (1996) 4(3) *The International Journal of Children’s Rights* 237 at 239.

¹¹¹ Geneva Declaration of the Rights of the Child, above n 109.

¹¹² Declaration of the Rights of the Child UN Doc A/RES/1386(XIV) (20 November 1959).

¹¹³ At principle 7.

¹¹⁴ At principle 5.

¹¹⁵ UNCROC, above n 1.

¹¹⁶ At art 28(1).

¹¹⁷ At art 28(1)(a).

differs in relation to the different levels of education. With regard to secondary education, states are to develop different forms of education, ensuring they are available and accessible to every child through measures such as the introduction of free education and financial assistance.¹¹⁸ Higher education is to be made accessible to all based on capacity.¹¹⁹

Article 22 of the UNCROC is unique, as it has been identified as the only explicit refugee-related provision in any of the international human rights instruments.¹²⁰ Article 22 requires state parties to take measures to ensure that a refugee child receives appropriate protection and assistance in the enjoyment of applicable rights in the UNCROC, including the right to education.¹²¹ In taking into account art 2, a prohibition on discrimination and commentary by the CRC on refugee children's education, Mieke Verheyde argues that the promotion of education for refugees under UNCROC is a core element of the right to education.¹²²

An intersectional approach to the rights to education of refugee children requires considering the different characteristics that refugee children have as a group and as individuals, and this can contribute to a better understanding of the right. It has been pointed out in the previous chapter that the different needs of refugee children should be taken into account for their rights to be adequately protected. Children differ in age, and therefore, their various ages should be taken into account. The CRC acknowledges this, and this is evident in the General Comments on early childhood¹²³ and the rights of adolescents.¹²⁴ It is also worth reiterating that different obligations are imposed on states depending on the level of education. Therefore, different approaches need to be taken by states in realising the refugee child's right to education, depending on the level of education being addressed.

Early childhood education is not explicitly referred to in the right to education under international law.¹²⁵ However, during the drafting of the UNCROC, the inclusion of early childhood in the Convention was considered. Although not accepted, UNESCO made a proposal for the article on the right to education to impose an obligation on states to "facilitate the provision of early childhood care

¹¹⁸ At art 28(1)(b).

¹¹⁹ At art 28(1)(c).

¹²⁰ Christoph Bierwirth "The Protection of Refugee and Asylum Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child" (2005) 24(2) *Refugee Survey Quarterly* 98 at 103.

¹²¹ Mano Candappa "The Right to Education and an Adequate Standard of Living: Refugee Children in the UK" (2000) 8(3) *The International Journal of Children's Rights* 261 at 266.

¹²² Mieke Verheyde *Article 28 The Right to Education* (Martinus Nijhoff Publishers, Leiden, 2006) at 55.

¹²³ *CRC General Comment No 7 (2005): Implementing Child Rights in Early Childhood* UN Doc CRC/C/GC/7/Rev.1 (20 September 2006).

¹²⁴ *CRC General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence* UN Doc CRC/C/GC/20 (6 December 2016).

¹²⁵ Geraldine Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff, Boston, 1995) at 234; and Dieter Beiter, above n 3, at 19.

and education, using all possible means, in particular for the disadvantaged child, in order to contribute to the young child's growth, development and to enhance his or her later success at other levels of education."¹²⁶ While the UNCROC does not specifically provide for early childhood education, the CRC, when taking into account the aims set out in art 29, recognises the right to education during early childhood.¹²⁷ The CRC has also commented on the implementation of the right to education in early childhood, noting that it begins at birth and that the right to education is closely connected to young children's right to maximum development.¹²⁸ The CRC has expressed the need for states to invest in improving education at all levels, including early childhood, particularly for children from refugee and migrant backgrounds, among other groups.¹²⁹

Young refugee children have been identified by the CRC as a group that requires particular attention¹³⁰ and adequate protection for them to enjoy their rights owing to the different risks they face.¹³¹ As such, there must be quality early education programmes as they are necessary for refugee children to progress and transition to primary education and are instrumental in their long term integration into society.¹³² More importantly, the CRC has encouraged states to recognise young children as holders of all rights in the UNCROC, highlighting early childhood as a critical period for realising children's rights.¹³³ A key comment made by the CRC, which is particularly relevant to refugee children, is that the starting point when realising the rights of young children is to respect the unique interests, experiences and challenges that they face.¹³⁴ As young refugee children are prone to be disoriented and unfamiliar with new surroundings and relationships, they are entitled to equal access to education, health care, and other services.¹³⁵

Adolescents¹³⁶ are also rights-holders and can exercise their rights according to their evolving capacities, and they are entitled to special protection measures. States are urged to take into account the development of adolescents and their evolving capacities in the implementation of their rights. As such, measures adopted to realise the rights of adolescents should differ from those adopted for

¹²⁶ Sharon Detrick *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires"* (Martinus Nijhoff, Netherlands, 1992) at 391.

¹²⁷ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [28].

¹²⁸ At [28].

¹²⁹ CRC *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia* UN Doc CRC/C/AUS/CO/5-6 at [43(b)].

¹³⁰ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [24].

¹³¹ At [36].

¹³² UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective* (Working Paper on Education Policy No 8, 2019) at 34.

¹³³ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [1].

¹³⁴ At [7].

¹³⁵ At [36(c)].

¹³⁶ Adolescents are considered children from the age of 10 to 18 years. CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 124, at [5].

younger children.¹³⁷ Concerning education, the CRC has emphasised that settings for learning, development and socialisation are important for adolescents, and therefore, schools should provide such settings.¹³⁸ It has been observed that the potential of adolescents is widely compromised because states parties do not recognise or invest in the measures needed for them to enjoy their rights. Data disaggregated by age, sex and disability is not available in most countries to inform policy, to identify gaps and support the allocation of appropriate resources for adolescents. Generic policies designed for children or young people often fail to address adolescents in all their diversity and are inadequate to guarantee the realisation of their rights.¹³⁹ The UNHCR Executive Committee has recognised the rights of adolescent refugees and has urged states to realise their rights, noting that the right of children and adolescents to education is one of the rights relevant to the protection of refugees.¹⁴⁰

Education has a fundamental role in childhood, as demonstrated in the previous chapter, and it is a very important right, with the first general comment of the CRC being on the aims of education.¹⁴¹ Article 29 sets out detailed provisions on the aims, relevance and standards of the right to education in international law.¹⁴² These aims contribute to the understanding and realisation of the right to education. They are useful in determining or assessing the extent to which state parties meet their obligations. The CRC has noted that art 29(1) demonstrates the individualistic and subjective nature of the right to education. One of the main aims in art 29 is that education should be aimed at the realisation of the child's human dignity and rights, taking into account the child's special developmental needs and diverse evolving capacities,¹⁴³ and all other aims are centred around it. The CRC has further underscored the need for child-centred education. Taking into account that each child has unique attributes, interests, abilities and needs, the goal of education should be the development of each child's personality, talents, and abilities.¹⁴⁴

In reconciling the obligations and aims of the right to education, art 29(1) requires that education be approached holistically to ensure that the physical, mental, spiritual and emotional aspects are taken into account. The educational opportunities should also reflect a balance between promoting the intellectual, social and practical needs, and aspects of childhood.¹⁴⁵ Education should be designed to

¹³⁷ At [1].

¹³⁸ *CRC 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) at [13].

¹³⁹ *CRC General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 124, at [3].

¹⁴⁰ *UNHCR Conclusions adopted by the Executive Committee on the International Protection of Refugees: No 84 (XLVIII) Conclusion on Refugee Children and Adolescents (1997)* at [a(iii)].

¹⁴¹ *CRC General Comment No 1 (2001): The Aims of Education* UN Doc CRC/GC/2001/1 (17 April 2001).

¹⁴² Nowak, above n 5, at 251.

¹⁴³ *CRC General Comment No 1 (2001): The Aims of Education*, above n 141, at [1].

¹⁴⁴ At [9].

¹⁴⁵ At [12].

provide the child with life skills, strengthen the child's capacity to enjoy the full range of human rights and promote cultures infused with appropriate human rights values. The goal is to empower the child by developing their skills, learning, and other capacities, as well as human dignity, self-esteem, and self-confidence.¹⁴⁶ To ensure the right to education for children is realised, and the obligations imposed under art 28 are carried out in light of the aims set out in art 29, the CRC has cautioned against states not incorporating the aims and values in legislation and policy.¹⁴⁷ State parties have thus been urged to incorporate them formally into domestic education policies and legislation at all levels.¹⁴⁸ The lack of such may result in the relevant principles not informing educational policies.¹⁴⁹ This will be considered in subsequent chapters.

The obligations set out in arts 28 and 29 of the UNCROC apply to refugee children. The UNHCR notes that:¹⁵⁰

The Convention on the Rights of the Child provides a comprehensive framework for the responsibilities of its States Parties to all children within their borders, including those who are of concern to UNHCR. Moreover, as a United Nations convention, it constitutes a normative frame of reference for UNHCR's action."

Valentina Migliarini argues that the UNCROC provides comprehensive standards for refugee children, resulting in the right to education being applied as a human right and not a humanitarian intervention.¹⁵¹ Samantha Arnold argues that most of the comments, recommendations and guidance by the CRC on child refugees and asylum seekers relate to procedural rights, safeguards and care.¹⁵² Even though this is the case, it will be demonstrated that a child rights approach based on the UNCROC, when applied to address refugee children, can result in the adequate realisation of their substantive rights, specifically education.

¹⁴⁶ At [2].

¹⁴⁷ At [17].

¹⁴⁸ At [17].

¹⁴⁹ At [17].

¹⁵⁰ UNHCR *Policy on Refugee Children* UN Doc EC/SCP/82 (06 August 1993) at [17].

¹⁵¹ Valentina Migliarini "The Education of Refugee Children" in Lori Diane Hall and Felice J Levine (eds) *Global Perspectives on Education Research* (Routledge, New York, 2018) at 53.

¹⁵² Samantha Arnold *Children's Rights and Refugee Law: Conceptualising Children Within the Refugee Convention* (Routledge, London, 2017) at 110.

4.4 *An UNCROC Child Rights-Based Approach to the Right to Education for Refugees*

Several writers have deemed the UNCROC the most interesting legal instrument, as it addresses a spectrum of issues, including displacement, conflict,¹⁵³ protection,¹⁵⁴ refugees,¹⁵⁵ and other human rights.¹⁵⁶ As highlighted, the Refugee Convention does not adequately provide for and take into account the interests and needs of refugee children in education. The UNCROC has thus been considered relevant and instrumental to refugee law and the development of law and policies.¹⁵⁷ It has also been argued that the UNCROC elaborates more on the manner in which children, including refugee children, are to be treated.¹⁵⁸ The UNCROC is also unique as it provides Guiding Principles¹⁵⁹ on how children's rights are to be understood and implemented, including rights relating to the protection of refugee children.¹⁶⁰ It specifically provides for the protection of refugee children, as noted earlier.¹⁶¹ Although there is no specific right to education for refugee children in the Convention, it is worth noting that reference was made to education during the drafting of art 22, which relates to the protection of refugee children in general. UNESCO proposed that the provision include the obligation for the refugee child to receive effective access and education training.¹⁶² The proposal was withdrawn, and one of the grounds for the opposition was that education was protected under separate articles in the Convention.¹⁶³ As such, the provisions under art 28 and 29 equally apply to refugee children as well.

The CRC has recognised the need for special consideration of the right to education for refugee children and how their particular circumstances interfere with the enjoyment of the right to education. In state parties taking action to protect the rights of children in the context of international migration, they are to be treated first and foremost as children.¹⁶⁴ Some UN Committees have noted that owing to the importance of children's rights to international migration, incidental frameworks, policies and

¹⁵³ See UNCROC, above n 1, at art 38.

¹⁵⁴ At arts 8, 16, 20.

¹⁵⁵ At art 22.

¹⁵⁶ Anderson, Hyll-Larsen, and Hofmann, above n 15, at 95.

¹⁵⁷ Arnold, above n 152, at 106.

¹⁵⁸ Bierwirth, above n 120, at 101.

¹⁵⁹ The right to non-discrimination, the requirement that the best interests of the child be upheld, the right to life, survival and development, and the child's right to be heard. These principles will be further considered and applied in the following chapters in examining the extent to which the New Zealand legal framework realises refugee children's right to education.

¹⁶⁰ Thoko Kaime "The Protection of Refugee Children Under the African Human Rights System" in Julia Sloth-Nielsen (ed) *Children's Rights in Africa: A Legal Perspective* (Routledge, New York, 2008) at 185.

¹⁶¹ UNCROC, above n 1, at art 22.

¹⁶² *Report of the Working Group on a Draft Convention on the Rights of the Child* UN Doc E/CN.4/1989/48 (2 March 1989) at [379].

¹⁶³ At [381].

¹⁶⁴ CMW *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child on the General Principles regarding the Human Rights of Children in the Context of International Migration*, above n 80, at [11].

practices should incorporate the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, as well as the UNCROC.¹⁶⁵ Four Guiding Principles underpin all the interrelated rights of the UNCROC and inform how individual rights in the Convention are to be understood and realised. They are to be applied when establishing and determining how refugee children are to be treated.¹⁶⁶ All four Guiding Principles are relevant to refugee children and their education. One of the goals of art 29 is respect for human rights,¹⁶⁷ and the Guiding Principles of the UNCROC are instrumental in ensuring that the human rights of children are adequately respected. As noted earlier, the principles inform a children's rights perspective necessary for effective implementation of the whole Convention.¹⁶⁸ When applied, the Guiding Principles demonstrate how the right to education enables the realisation of other refugee children's rights and vice versa. The CRC emphasises that it is crucial for all relevant "sectoral" laws in areas such as education to reflect the principles and standards of the Convention consistently.¹⁶⁹ These principles will be discussed and applied to the right to education, and implications arising concerning refugee children, in particular, will be considered. They will also be the basis of Chapter Seven, which aims to determine the extent to which New Zealand laws and policies respect, protect, and fulfil refugee children's rights to education.

4.4.1 The Best Interests of the Child as a Primary Consideration in All Actions Concerning Children

To ensure that children's rights are adequately realised and enjoyed, the child's best interests should be taken into account.¹⁷⁰ Article 3(1) states that the best interest of the child shall be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. The best interest of the child principle has been described as a substantive right¹⁷¹ and a fundamental¹⁷² interpretative legal principle and rule of procedure.¹⁷³ When determining the best interests of the child, all children's rights are to be taken into account, as the provisions of the UNCROC are indivisible and

¹⁶⁵ At [13].

¹⁶⁶ Bierwirth, above n 120, at 101.

¹⁶⁷ UNCROC, above n 1, at art 29(1)(b).

¹⁶⁸ *CRC General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12].

¹⁶⁹ At [22].

¹⁷⁰ *CRC General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [4].

¹⁷¹ In this regard, the child has a right for their best interest to be a primary consideration when there are different interests to be considered for a decision to be made: at [6(a)].

¹⁷² Meaning that where a legal provision has different interpretations, there is an obligation for the interpretation that adequately serves the best interest of the child to be chosen: at [6(b)].

¹⁷³ At [6(c)].

interdependent.¹⁷⁴ The application of the best interest of the child should particularly be in light of other principles, such as the child's wishes or feelings and the resources required for the child's survival, development, and participation.¹⁷⁵

The best interests principle is all-encompassing and informs all children's rights since it covers "all actions concerning children."¹⁷⁶ States have an obligation in all legislative, administrative and judicial measures to apply the best interest principle by considering each child's rights and interests and how they will be affected by their decisions and actions.¹⁷⁷ The CRC urges states to ensure that art 3(1) is complied with in a manner that promotes the integration of children in policy-making and takes into account their rights.¹⁷⁸ The best interest of the child has been identified as a starting point when determining the protection to be afforded to children because the child's background, unique vulnerabilities and needs are to be assessed under this principle.¹⁷⁹ Each child's unique circumstances should be taken into account when determining what is in the best interest of the child.¹⁸⁰

The importance of applying the best interest principle in education matters has been noted by the CRC. In expanding on art 3(1), the CRC notes that decisions made by administrative authorities include those relating to education and such decisions should be assessed and guided by the best interests of the child.¹⁸¹ The CRC has highlighted the importance of children being recognised as rights-holders, and this understanding is key to the application of the best interest of the child.¹⁸² This principle is mainly aimed at promoting the full respect of children as rights-holders.¹⁸³ As such, it is to be defined and assessed on an individual basis, according to each child or group of children's specific situation, taking into consideration their personal situation and needs.¹⁸⁴ The UNHCR has included the best interest of the child principle in its policy on refugee children. One of the central principles of the policy is that "in all actions taken concerning refugee children, the human rights of the child, in particular his or her best interests, are to be given primary consideration."¹⁸⁵

¹⁷⁴ United Nations High Commissioner for Refugees (UNHCR) *UNHCR Guidelines on the Formal Determination of the Best Interests of the Child* (May 2006) at 31.

¹⁷⁵ Urban Jonsson "Human Rights Approach to Development Programming" (UNICEF, 2013) at 17.

¹⁷⁶ Arnold, above n 152, at 56.

¹⁷⁷ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 168, at [12]; and CRC *General Comment No 12 (2009): The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (20 July 2009) at [14(a)].

¹⁷⁸ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 168, at [47].

¹⁷⁹ Bierwirth, above n 120, at 101.

¹⁸⁰ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration, (Art 3, Para 1)*, above n 170, at [48].

¹⁸¹ At [30].

¹⁸² At [16(b)].

¹⁸³ At [12].

¹⁸⁴ At [32].

¹⁸⁵ UNHCR *Policy on Refugee Children*, above n 150, at [26(a)].

With regard to education, all decisions on measures and actions concerning a specific child or a group of children must respect the best interests of the child or children.¹⁸⁶ Access to free quality education at all levels of learning, including early childhood education, is considered to be in the best interests of the child. Therefore, states have an obligation to provide quality education, and the CRC states some of the ways good quality education for children can be achieved. There should be well-trained teachers and other professionals in education-related settings. The environment should be child-friendly, with appropriate teaching and learning methods.¹⁸⁷ It is also in the best interest of children to have their responsibilities developed to overcome the limitations of their vulnerability of any kind.¹⁸⁸ These factors are important as it has been noted that the right and need for quality education for refugee children and youth increases due to emergencies and displacements.¹⁸⁹ As such, Geraldine Van Bueren points out that it is in the best interest of refugee children to establish durable solutions as soon as possible.¹⁹⁰ In line with the theoretical framework of this research, the child's identity, including their nationality, upbringing, ethnic, cultural and linguistic particulars and vulnerabilities, should be assessed to determine durable solutions.¹⁹¹ States thus have an obligation to normalise the child's circumstances as soon as possible.¹⁹² This will be explored in Chapter Seven to determine how effectively New Zealand fulfils its obligation to ensure the stability of refugee children's circumstances.

4.4.2 The Right to Non-Discrimination

State parties have an obligation under art 2 to respect and ensure the rights in the UNCROC to each child without any discrimination irrespective of the child's or their parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. One of the UN Sustainable Development Goals targets is for equal opportunity to be guaranteed and inequalities of outcome to be reduced through the elimination of discriminatory laws, policies, and practices.¹⁹³ The CRC has underscored that one of the ways discrimination can occur is through limited opportunities for play, learning and education. It further emphasised that the prohibition of discrimination also applies to particular groups of young

¹⁸⁶ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 170, at [79].

¹⁸⁷ At [79].

¹⁸⁸ At [79].

¹⁸⁹ Global Refugee Forum Education Co-Sponsorship Alliance *Global Framework for Refugee Education* (UNHCR, November 2019) at 7.

¹⁹⁰ Van Bueren, above n 125, at 365.

¹⁹¹ Guy S Goodwin-Gill *The Refugee in International Law* (Clarendon Press, Oxford, 1996).

¹⁹² Kaime, above n 160, at 186.

¹⁹³ *Transforming Our World: The 2030 Agenda for Sustainable Development* UN Doc A/RES/70/1 (21 October 2015) at target 10.3.

children,¹⁹⁴ including adolescents.¹⁹⁵

The provision for non-discrimination and equality is a means of guaranteeing the right to education.¹⁹⁶ On several occasions, the CRC has emphasised that access to education should be afforded in a non-discriminatory manner, and effective measures are to be taken for equal access to education.¹⁹⁷ The principle of non-discrimination is also crucial to the enjoyment of the rights of refugee children as it prohibits any discrimination based on the child being a refugee.¹⁹⁸ It is particularly relevant for refugee children because many refugees experience discrimination and marginalisation globally.¹⁹⁹ There has also been an emphasis on the fact that inclusion and equity in, and through, education are essential and should be considered for education in emergency contexts.

Discrimination against refugee children, in particular, has been a cause of concern for the CRC.²⁰⁰ It is a key facet of a child's rights-based approach and can hinder the adequate realisation of the right to education. The CRC has also noted that refugee children continue to face discrimination in accessing services such as education.²⁰¹ States are, therefore, urged to take further measures to prevent and combat discrimination against refugees.²⁰² State parties, thus, have an obligation to monitor and combat any form of discrimination wherever it occurs, including in schools, communities or other institutions.²⁰³ One of the issues in which the CRC has raised concerns regarding discrimination in accessing quality services for young children is that education is not universally available.²⁰⁴ It has emphasised that the provision of the right to access education for refugees on a non-discriminatory basis is a core part of the right to education for refugees.²⁰⁵ Therefore, education systems should be inclusive, responsive, and flexible to cater to children's needs, including refugees.²⁰⁶ To achieve this, the CRC highlights that states are to actively identify individual children

¹⁹⁴ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [11(b)].

¹⁹⁵ CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 124, at [4].

¹⁹⁶ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 26.

¹⁹⁷ CRC *Concluding Observations: Croatia* UN Doc CRC/C/15/Add.243 (3 November 2004) at [62]; CRC *Concluding Observations of the Committee on the Rights of the Child: Finland* UN Doc CRC/15/Add.132 (16 October 2000) at [52].

¹⁹⁸ Bierwirth, above n 120, at 102.

¹⁹⁹ *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* UN Doc A/70/59 (21 April 2016) at [60].

²⁰⁰ CRC *Concluding Observations of the Committee on the Rights of the Child: Belgium* UN Doc CRC/BGD/CO/4 (26 June 2009) at [32]; CRC *Concluding Observations: Netherlands* UN Doc CRC/C/NLD/CO/3 (27 March 2009) at [27]; and CRC *Concluding Observations: Kenya* UN Doc CRC/C/KEN/CO/2 (19 June 2007) at [24].

²⁰¹ CRC *Concluding Observations of the Fifth Periodic Report of Great Britain and Northern Ireland* UN Doc CRC/C/GBR/CO.5 (12 July 2016) at [21(c)] and [76(f)].

²⁰² CRC *Concluding Observations: Denmark* UN Doc CRC/C/15/Add.33 (15 February 1995) at [25]; and CRC *Concluding Observations: Kenya* UN Doc CRC/C/KEN/CO/2 (19 June 2007) at [60(e)].

²⁰³ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [12].

²⁰⁴ At [12].

²⁰⁵ UNESCO *Protecting the Right to Education for Refugees*, above n 69, at 15.

²⁰⁶ *The Incheon Declaration: Education 2030: Towards Inclusive and Equitable Quality Education and Lifelong Learning for All* ED/WEF2015/MD/3 (21 May 2015) at 34.

and groups of children whose rights may require special measures to be adequately realised.²⁰⁷ As such, there is a need for data collection to be disaggregated to enable discrimination or potential discrimination to be identified.²⁰⁸ The principles of non-discrimination and equality are key to the realisation of refugee rights. Incorporating these principles into domestic legislation is a way to ensure that the right to education for refugees can be guaranteed.²⁰⁹

4.4.3 The Right of the Child to Express Their Opinion and Have Those Opinions Heard in All Matters Affecting Them

As argued in the previous chapter, refugee children are rights-holders and social actors. Therefore, like any other child, they have the right to form their own views freely in all matters affecting them, and such views are given due weight in accordance with their age and maturity.²¹⁰ The child is to be afforded the opportunity to be heard in judicial and administrative proceedings affecting them.²¹¹ Article 12 is twofold in that it places an obligation on states to actively assure the child's right to express his or her views and that "due weight" is given to the expressed views.²¹² It is worth noting that art 12 forms part of a group of participation rights.²¹³ Participation is commonly applied and afforded to children in asylum procedures.²¹⁴ Their participation is also essential with regard to their education. The administrative proceedings in art 12(2) include decisions relating to children's education.²¹⁵ The CRC has acknowledged that the child is an active participant and has a role in promoting, protecting, and monitoring all rights and obligations set out in the UNCROC.²¹⁶ The right cannot be fully implemented if the child is not recognised as a subject with her or his own views on their rights and their implementation.²¹⁷

²⁰⁷ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 168, at [12].

²⁰⁸ At [12].

²⁰⁹ UNESCO *Protecting the Right to Education for Refugees*, above n 69, at 26.

²¹⁰ UNCROC, above n 1, at art 12(1).

²¹¹ At art 12(2).

²¹² Laura Lundy, John Tobin and Aisling Parkes "Article 12 The Right to Respect for the Views of the Child" in John Tobin (ed) *The UN Convention on the Rights of The Child A Commentary* (Oxford University Press, Oxford, 2019) at 401.

²¹³ At 401.

²¹⁴ Bierwirth, above n 120, at 102.

²¹⁵ CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [32].

²¹⁶ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 168, at [12].

²¹⁷ CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above 177, at [68].

Article 12 interrelates with other general principles of the UNCROC²¹⁸ and all other articles of the Convention.²¹⁹ The child's right to express their views and the realisation of the right to education are closely connected. A key aspect of the realisation of the right to education is upholding the child's right to be heard within education.²²⁰ It has been emphasised that education for refugees should enable them to participate fully in the new host country.²²¹ The CRC also notes that if the right to education is not realised, the child's capacity to participate fully in society can be impaired or undermined.²²² The child's participation should thus be supported in all educational goals, settings and practices. The provision of education should not interfere with the child's inherent dignity, and the child should be enabled to express their views freely and participate in school life.²²³ It has been noted that the way children are perceived and treated within the context of the obligation to respect their views requires a shift from them being "passive objects in need of adult protection" to active participants in decision-making processes affecting them.²²⁴

The CRC has also noted the need for conducive schooling environments for children to be able to express their views and for their views to be taken into consideration. While this is the case, it has highlighted discrimination, authoritarianism, disrespect and violence as some characteristics of some schools and learning environments.²²⁵ Considering the views of children is important in eliminating discrimination, preventing bullying and in disciplinary processes.²²⁶ This is particularly critical for refugee children, who tend to face discrimination. The CRC pointed out that refugee children tend to be in vulnerable situations, and their right to express their views in immigration and asylum proceedings is especially crucial. Within a migration context, the child is to be afforded the opportunity to be heard on several issues, one of them being his or her educational expectations to ensure they integrate into school.²²⁷ As children have the ability to make a difference in emergencies, including post-conflict resolution and reconstruction processes arising from emergencies, the CRC has recommended that they should be encouraged and enabled to participate in assessing their current situation and their future.²²⁸ State parties should also consult children regarding all aspects of

²¹⁸ Article 2 (the right to non-discrimination), art 6 (the right to life, survival and development) and, art 3 (primary consideration of the best interests of the child), the child's view should inform the discussion of what is in their best interests.

²¹⁹ CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [68].

²²⁰ At [105].

²²¹ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 49.

²²² CRC *General Comment No 1 (2001): The Aims of Education*, above n 141, at [14].

²²³ At [8]; see also UNCROC, above n 1, at art 12(1).

²²⁴ Lundy, Tobin and Parkes, above n 212, at 398.

²²⁵ CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [105].

²²⁶ At [109].

²²⁷ At [123].

²²⁸ At [125].

education policy.²²⁹ When planning the curriculum and school programmes, education authorities should include children's views.²³⁰

Although ensuring educational opportunities are available to children is central to the right to education, it is important to highlight that the manner in which the right to education is realised is crucial. The right to education includes the educational processes, teaching methods and the learning environment. Therefore, children should be enabled to express their views freely and participate in school life.²³¹ Such participation can be achieved by engaging children in decision-making processes and the development and implementation of school policies and codes of behaviour through class councils, student councils, and representation on school boards and committees.²³² In the case of refugee children, participation can be enhanced by removing the language barrier that many refugees face.²³³ The CRC has noted that the rights should be incorporated into domestic legislation and not based on the discretion of authorities, schools and headteachers for their implementation.²³⁴

As emphasised in this chapter thus far, all the Guiding Principles of the UNCROC are interrelated, and Arnold argues that children should have the opportunity to have a say in the direction of their education in accordance with their age and maturity when the right to education is read with the child's right to be heard, and the best interests principle is taken into account.²³⁵ In line with art 6 and art 29, it has also been underscored that child participation stimulates the full development of the child's personality and evolving capacities.²³⁶

4.4.4 The Child's Right to Life, Survival and Development

The main aim of education, as set out under art 29, is development, and this aim is consistent with one of the Guiding Principles of the UNCROC. Article 6(2) requires states to ensure the survival and development of the child to the maximum extent possible. The right to development is an important element of childhood, and the relation between development and refugee childhood has been explored in the previous chapter.²³⁷ Therefore, in realising the right to education, implementation measures by states should result in the optimal development of all children. The CRC has noted that states should

²²⁹ At [111].

²³⁰ At [107].

²³¹ *CRC General Comment No 1 (2001), Article 29(1): The Aims of Education*, above n 141, at [8]; see also UNCROC, above n 1, at art 12(1).

²³² *CRC General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [110].

²³³ *UNESCO Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 51.

²³⁴ *CRC General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [110].

²³⁵ Arnold, above n 152, at 47.

²³⁶ *CRC General Comment No 12 (2009): The Right of the Child to be Heard*, above n 177, at [79].

²³⁷ Arnold, above n 152, at 101.

take into account the different stages of development to guarantee the optimum development of every child.²³⁸ To ensure the survival and development of each child, the evolving capacities of the child should be taken into account. The CRC defines evolving capacity as the “process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights.”²³⁹ This Guiding Principle enables the realisation of the child’s right to express their opinion and have those opinions heard in all matters affecting them.

Development is to be understood and interpreted broadly to include the child’s physical, mental, spiritual, moral, psychological and social development.²⁴⁰ Access to education is considered one of the main factors that should be taken into account when determining the child’s developmental needs.²⁴¹ The UNHCR notes that education, health care, and nutrition are necessary for children to grow and develop physically and intellectually. Age-specific requirements should thus be met.²⁴² The CRC has noted the lack of or limited data regarding refugee children²⁴³ and data concerning their access to education.²⁴⁴ Through systematic data collection, disaggregated in terms of significant variables related to children’s circumstances and background, states are urged to monitor the availability and access to quality services that contribute to young children’s survival and development.²⁴⁵

It has been further highlighted that the learning opportunities and the nurturing and encouragement children receive as they grow determine their psychosocial development.²⁴⁶ Therefore, appropriate educational opportunities should be available to refugee children so that they can develop and integrate into a new community. Educational programmes are to be expanded and improved upon. Efforts must be made to ensure that all refugee children have access to primary education.²⁴⁷ The CRC has highlighted that the best way states can ensure the immediate and long-term development of adolescents is by guaranteeing the right to universal, quality and inclusive education and

²³⁸ The CRC recognises adolescence as a developmental stage of childhood. See *CRC General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 124, at [1].

²³⁹ At [18].

²⁴⁰ *CRC General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 168, at [12].

²⁴¹ *UNHCR Guidelines on Formal Determination of the Best Interests of the Child Provisional Release* (May 2006) at 36.

²⁴² *UNHCR Policy on Refugee Children*, above n 150, at 15.

²⁴³ *CRC Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia* UN Doc CRC/C/AUS/CO/5-6 (1 November 2019) at [11(a)].

²⁴⁴ At [44(f)].

²⁴⁵ *CRC General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [12].

²⁴⁶ *UNHCR Policy on Refugee Children*, above n 185, at 15.

²⁴⁷ *UNHCR Note on Refugee Children*, above n 96, at [51].

training.²⁴⁸ Secondary education, in particular, has been proven to impact their development positively. As such, states are urged to avail secondary education urgently and make higher education accessible to all based on capacity.²⁴⁹ To realise the development of children in vulnerable situations, it has been noted that states are to adopt targeted measures.²⁵⁰ This can be achieved by seeking durable solutions as they contribute positively to the refugee child’s survival, protection, and development.²⁵¹ This research is focused on resettlement, which tends to be the preferred durable solution²⁵² owing to the potential of improved socioeconomic opportunities for refugees.²⁵³

Some of the observations and recommendations made by the CRC to New Zealand regarding refugee children relate to strengthening measures to combat and prevent discrimination against those in vulnerable situations like refugees.²⁵⁴ New Zealand has also been urged to collect disaggregated data to analyse situations affecting children, particularly refugees, asylum seekers and migrants.²⁵⁵ Efforts to promote the integration of, and access to, services by asylum-seeking and refugee children are to be strengthened.²⁵⁶ These are examined and considered in the following chapters to assess New Zealand’s performance in implementing the right to education for refugee children.

Although the UNCROC does not explicitly set out obligations for states regarding the right to education for refugees, in particular, the Guiding Principles of the UNCROC inform how the right can be guaranteed for refugee children. They outline the appropriate measures required for the enjoyment of their right to education in terms of art 22. The Guiding Principles will be considered in more detail in terms of how they enhance the enjoyment of the right to education for refugee children in the New Zealand context.

²⁴⁸ CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 124, at [68].

²⁴⁹ At [68].

²⁵⁰ Olga Byrne “Promoting A Child Rights’ Based Approach to Immigration in the United States” (2018) 32 *Georgetown Immigration Law Journal* 59 at 91.

²⁵¹ Guy S Goodwin-Gill *The Refugee in International Law* (Clarendon Press, Oxford, 1996) at 100.

²⁵² The other durable solutions are local integration and voluntary repatriation: UNHCR *Framework for Durable Solutions for Refugees and Persons of Concern* (May 2003) at 5.

²⁵³ Samuel Opono and Frank Ahimbisibwe “Protracted Refugee Situations and the Shrinking Durable Solutions: Could There Be a Ray of Hope in Local Solutions?” (2024) 10(1) *African Studies and Asian Studies* 1.

²⁵⁴ CRC *Concluding Observations on the Fifth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016) at [15(b)].

²⁵⁵ At [10(a)].

²⁵⁶ At [40].

4.5 Analysis of the Right to Education Using the 4A Framework

UNESCO has emphasised that it is vital for states to seek lasting and sustainable ways of realising the right to education at all phases of the migration context.²⁵⁷ This can be achieved by guaranteeing the right to education by adopting education policies and legal frameworks enforcing the right to education of refugees.²⁵⁸ The obligations arising from the right to education for refugees should thus be included in legal frameworks, policies and education systems. To clearly outline states' obligations, the Special Rapporteur on the right to education, Katarina Tomasevski, conceptualised the 4-A scheme. As outlined earlier, it entails availability, adaptability, accessibility and acceptability as the key aspects of the right to education applicable to all stages of education.²⁵⁹ These were recognised by the CESCR,²⁶⁰ and education at all levels of schooling should be available, accessible, acceptable and adaptable.²⁶¹ The 4As are a useful framework for examining the content of the right to education and its intersection with cultural and language differences.²⁶²

A combination and understanding of the various international frameworks provide a premise on which the realisation of the right to education can be examined. In addition to the general obligations that states have, that is, to ensure young children have access to early childhood education, to provide to all children free and compulsory primary education, to make secondary education generally available and higher education equally accessible to all on the basis of capacity and progressively introducing free education for both levels, states have an obligation to ensure that there are durable solutions as noted earlier for the adequate realisation of the right to education for refugees when adopting education policies and legal frameworks.²⁶³ There should be additional and special measures to ensure that refugee children adequately enjoy the right to education. It has been rightly pointed out that international human and children's rights standards do not require less adequate education in emergencies, camps and for refugees.²⁶⁴ While there is recognition that refugee children have additional special interests to be protected in education, there are different obligations and standards for providing education in general and for refugees. This may influence how the right to education for refugees is understood and implemented, as states are required to take all appropriate measures,

²⁵⁷ UNESCO *Protecting the Right to Education for Refugees*, above n 69, at 21.

²⁵⁸ At 22.

²⁵⁹ *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski submitted in accordance with Commission on Human Rights Resolution 1998/33 UN Doc E/CN.4/1999/49* (13 January 1999) at [42]-[74].

²⁶⁰ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6].

²⁶¹ At [8] and [11].

²⁶² Jay Marlowe and others "The New Zealand Refugee Resettlement Strategy: Implications for Identity, Acculturation and Civic Participation" (2014) 9(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 60 at 67.

²⁶³ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 24.

²⁶⁴ Anderson, Hyll-Larsen, and Hofmann, above n 15, at 97-98.

using the maximum of their available resources, and to progressively realise the right to education for all children, including refugees.²⁶⁵

To obtain a comprehensive understanding of state obligations, the 4A framework provides interpretative tools for examining legislation and policy. In addition, the 4As are useful in facilitating an interpretation of art 28 in a practical way that can guide action by states.²⁶⁶ UNESCO has also promoted the 4A framework as useful in the realisation of the right to education for refugees and informing how states are to protect refugee rights and understand obligations arising from their right to education.²⁶⁷ As highlighted in the previous chapters, due to the migratory experiences and different needs of refugee children, their education should be tailored to meet their needs and cultural differences. The four main features of the right to education are discussed from a child rights-based approach, as they require an application of one or more of the UNCROC Guiding Principles to determine New Zealand's obligations and how the right to education should be implemented to meet the needs of refugee children.

4.5.1 Availability

One of the main elements of the right to education is the state's obligation to make education available to children.²⁶⁸ Availability is explicitly required by the ICESCR, as well as the UNCROC. However, the manner in which it is to be made available is different at the various levels of education. Primary education should be freely available to all,²⁶⁹ and secondary education should be generally available,²⁷⁰ while tertiary education should be accessible equally to everyone based on capacity through appropriate means.²⁷¹ As noted earlier, the international treaties do not define standards for the provision of early childhood education. However, the CRC has recognised that the right to education begins during early childhood, which is at birth.²⁷² For the right to education to be adequately realised, subject to the availability of resources, state parties have a duty to provide the necessary and well-maintained educational infrastructure for all levels,²⁷³ provide good teaching resources and equipment,²⁷⁴ and ensure that trained teachers are available,²⁷⁵ as well as sufficient

²⁶⁵ See ICESCR, above n 32, at art 2; and UNCROC, above n 1, at art 4.

²⁶⁶ Courtis and Tobin, above n 2, at 1067.

²⁶⁷ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 24.

²⁶⁸ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 20.

²⁶⁹ ICESCR, above n 32, at art 13(2)(a); and UNCROC, above n 1, at art 28(1)(a).

²⁷⁰ At art 13(2)(b); and at art 28(1)(b).

²⁷¹ At art 13(2)(c); and at art 28(1)(c).

²⁷² CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [28].

²⁷³ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(a)].

²⁷⁴ ICESCR, above n 32, at art 13(2)(e); and CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(a)].

²⁷⁵ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(a)].

budgetary, material resources, necessary facilities for the enjoyment of the right to education.²⁷⁶ The availability of resources is an important aspect of the realisation of the rights, particularly those of young children, and there should be more human and financial resources for early childhood services.²⁷⁷

Refugee children usually face particular challenges and barriers that hinder their access to or completion of school in new host countries. It has been observed that these barriers tend to be worsened by a lack of resources in schools.²⁷⁸ From a child rights perspective, the right to education should be subject to the principle of non-discrimination. As such, the lack of resources should not be grounds for discrimination.²⁷⁹ Although financing adequate education is required for all children, it has been argued that it does not always result in equal educational opportunity, which is the aim of the right to education.²⁸⁰ Tomasevski is of the view that when education is understood as a human right and thus obligatory and not discretionary, then human rights obligations in education can be incorporated into domestic budget allocations.²⁸¹ She argues that education is usually not adequately funded to ensure adequate quality education, and she attributes this to the discretionary nature of educational allocations. She recommends that fiscal allocations should be guaranteed in the domestic laws for the right to education.²⁸² Iris BenDavid-Hadar contends that if refugee children are provided with just the sufficient minimum required from the state, they may be disadvantaged. This is in comparison with other children who have access to more support from parents or local authorities and do not need to learn a new language or integrate into a new culture. She suggests that an equitable education finance policy for refugee children is necessary.²⁸³ It is, however, important to note that the right to education is subject to progressive realisation and the availability of resources. The obligations relating to economic and social rights are defined in terms of progressive realisation, which mainly considers the differences in the stage of development and financial limitations.²⁸⁴ Both the UNCROC and the ICESCR require states to avail the maximum extent of available resources. If the obligation is not realised, there is an obligation to justify it by providing legitimate reasons.

²⁷⁶ At [6(a)].

²⁷⁷ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [38].

²⁷⁸ Global Refugee Forum Education Co-Sponsorship Alliance *Global Framework for Refugee Education* (UNHCR, November 2019) at 8. Some of the barriers identified include missed periods of schooling due to crisis and displacement, being overage for their grade, the need to learn new languages of instruction and examination, unfamiliar enrolment procedures, protection issues, transportation limitations, trauma and the need for access to psychosocial support, and stigmatisation.

²⁷⁹ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 69, at 22.

²⁸⁰ Iris BenDavid-Hadar "Human Rights Education: Refugees and Asylum Seekers' Right to Education" in Zajda Joseph and Sev Ozdowski (eds) *Globalisation, Human Rights Education and Reforms* (Springer Netherlands, Dordrecht, 2016) 221 at 223.

²⁸¹ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 24.

²⁸² At 24.

²⁸³ BenDavid-Hadar, above n 280, at 223.

²⁸⁴ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 37.

Another way the quality of education can be improved is through teacher training. The CRC has recommended that efforts to improve the quality of education through teacher training be strengthened.²⁸⁵ Teachers and other personnel working with migrants, refugees, and asylum-seekers are to be supported, and such support should not be limited to the teacher or school level. However, an integrated system should be implemented from a broader community level. In refugee contexts, training should be aimed at equipping teachers to deal with traumatised learners and providing psychosocial support and expert counselling for teachers as well as refugees is crucial.²⁸⁶

Article 13(2)(e) of the ICESCR also requires that a system of schools at all levels be developed and actively pursued. The CESCR has, in this regard, highlighted the need for state parties to develop an overall developmental strategy for the school system.²⁸⁷ This obligation is particularly relevant for refugees, and it has been acknowledged that quality education for refugees can be achieved if they are included in national education systems.²⁸⁸

4.5.2 Accessibility

Courtis and Tobin define this component of the right to education as education being open to all, especially those viewed as vulnerable and the most marginalised groups.²⁸⁹ Accessibility relates to the obligation to protect and eliminate barriers to the enjoyment of the right. This element also relates to the Guiding Principle of non-discrimination, as stated in art 2 of the UNCROC. Accessibility is particularly relevant to refugee children who, as shown in the first chapter, have many barriers to the enjoyment of their rights. Similar to other elements of the right to education, international human rights and children's rights impose different standards of accessibility depending on the level of education. As highlighted, state parties are obliged to secure access for all children to free and compulsory primary education. Education at secondary and tertiary levels, is not compulsory but should be made generally accessible to all. The UNHCR has emphasised that more efforts are required for refugee children to have access to satisfactory and quality primary education in a manner that will accommodate their cultural identity and ensure they understand the host country.²⁹⁰

²⁸⁵ CRC *Concluding Observations: China (including Hong Kong and Macau Special Administrative Regions)* UN Doc CRC/C/CHN/CO/2 (24 November 2005) at [77(e)]; and CRC *Concluding Observations: Russian Federation* UN Doc CRC/C/RUS/CO/3 (23 November 2005) at [65(d)].

²⁸⁶ *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [84].

²⁸⁷ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [25].

²⁸⁸ UNHCR *No More Excuses: Provide Education to all Forcibly Displaced People* (Policy Paper, 26 May 2016) at 2.

²⁸⁹ Courtis and Tobin, above n 2, at 1068.

²⁹⁰ UNHCR *Note on Refugee Children*, above n 96, at [61].

In addressing the element of accessibility, indicators on whether education is accessible are outlined by the CESCR, and include non-discrimination, physical accessibility and economic accessibility.²⁹¹ Non-discrimination is prohibited by the various international instruments discussed earlier.²⁹² Although economic, social and cultural rights are subject to progressive realisation, non-discrimination must be secured immediately and fully.²⁹³ With regards to the right to education, in particular, education must be accessible to everyone, especially those deemed most vulnerable, without discrimination on any prohibited grounds.²⁹⁴ Even though this is the case, various groups of children can be excluded from education, and this has been highlighted by the lack of comparative data in educational statistics.²⁹⁵ Discrimination on the basis of race, colour, sex, language, religion, political or other opinions, national, ethnic or social origin, property, disability, birth or other status, activities, or beliefs of the child's parents, legal guardians, or family members interferes with the child's human dignity. It can undermine or destroy the child's capacity to benefit from educational opportunities.²⁹⁶

States parties thus have specific obligations regarding the right to education to guarantee that it will be exercised without discrimination of any kind and that steps will be taken to realise the right to education. The CESCR has noted that the steps to be taken should be "deliberate, concrete and targeted" towards the full realization of the right to education.²⁹⁷ Although discrimination is a key part of the right to education being realised, it has been recognised that there are challenges with measuring or proving that discrimination exists if there is no quantitative data.²⁹⁸ Tomasevski observes that some states do not collect data that would show or reflect discrimination against minorities, citing privacy and confidentiality as justifications. She suggests that education strategies and quantitative data should incorporate human rights protections that take into account diversity among groups and ensure that those considered different are protected from discrimination.²⁹⁹ When addressing the right to education for refugees, migrants and asylum seekers, the Special Rapporteur identified them as a group at risk of marginalisation and, specifically, discrimination in the provision of education.³⁰⁰

²⁹¹ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(b)].

²⁹² UN Charter, above n 22, at art 1(3); UDHR, above n 25, at art 2; ICESCR, above n 32, at art 2(2); CADE, above n 59, at art 1(1); and UNCROC, above n 1, at art 2(1).

²⁹³ *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski submitted in accordance with Commission on Human Rights resolution 1998/33*, above n 259, at 21.

²⁹⁴ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(b)].

²⁹⁵ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 43.

²⁹⁶ CRC *General Comment No 1 (2001), Article 29(1): The Aims of Education*, above n 141, at [10].

²⁹⁷ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [43].

²⁹⁸ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 46.

²⁹⁹ At 46.

³⁰⁰ *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [2].

Refugee children tend to face barriers in accessing educational opportunities regardless of their location, and these include language, immigration status barriers, poverty, child labour, early marriage as well as gender-based issues.³⁰¹ The principle of non-discrimination goes hand in hand with the ability of refugees to integrate into a new society. Muñoz suggests that imposing the normative restrictions of the right to education on all forms and levels of education can result in the elimination of discrimination and the successful integration of refugees.³⁰² It has also been highlighted that educational exclusion can be dealt with by enhancing the “integrability” of those being excluded.³⁰³ Therefore, host countries have an obligation to prevent discriminatory practices toward refugees and facilitate their access to educational settings.³⁰⁴ While planning for the inclusion of refugees in national education systems should begin as early as possible in the emergency phase, educational planning has to go beyond emergency provision and be sustained over several years in coordination with development plans.³⁰⁵

Not only should education be equally accessible to everyone, including those seen as different, but it should also be physically accessible and within safe reach. Accessibility in this regard can be achieved if a school or education centre is in a convenient geographic location or there is provision for education through modern technologies.³⁰⁶ Therefore, schools should be in locations that allow all individuals to participate, including those in rural settings as well as those who have different needs due to their distinct circumstances.³⁰⁷ The CESCR has raised concerns about the need to address regional disparities between urban and rural areas and noted that the differences in fiscal policies resulting in differing qualities of education depending on geographic location might amount to discrimination.³⁰⁸

Another key aspect of accessibility is that it should be affordable to all, subject to the availability of resources.³⁰⁹ This dimension of accessibility is subject to the differential wording of art 13(2) in relation to primary, secondary, and higher education and differs depending on the obligations imposed by art 28.³¹⁰ The CRC recommends that state parties progressively take steps to ensure that all children have equal access to compulsory and free education without financial obstacles. As such,

³⁰¹ *Report of the Special Rapporteur on the Right to Education* UN Doc A/73/262 (27 July 2018) at [66].

³⁰² *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [82].

³⁰³ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above n 11, at 44.

³⁰⁴ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 25.

³⁰⁵ UNHCR *No More Excuses: Provide Education to all Forcibly Displaced People*, above n 288, at 4–5.

³⁰⁶ Courtis and Tobin, above n 2, at 1068.

³⁰⁷ Kalantry, Getgen and Koh, above n 85, at 227.

³⁰⁸ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [35].

³⁰⁹ At [6(b)].

³¹⁰ Courtis and Tobin, above n 2, at 1069.

there is a legal duty for financial constraints or barriers to be eliminated.³¹¹ Owing to the particular needs of refugee children, the CRC has stated other measures that will guarantee that refugee children have access to education. These include financial, technical, and human resources for special language programmes for refugee children to prepare them for full entry into the general educational system of the country and provide supplementary assistance to refugee children according to individual education plans to meet specific educational needs.³¹² Some of the challenges and inequalities that refugee children face arise due to their different wealth and socioeconomic status. These factors can compromise the quality of the compulsory education they receive. BenDavid-Hadar argues that refugee children living in wealthier locations are likely to benefit from additional financial support from the local authority or have access to a high-quality education system compared to refugees living in less wealthy settings.³¹³

UNESCO has emphasised that financial support plays a pivotal role in improving refugees' access to education. The financial difficulties that arise due to displacement make it challenging to cover education-related costs such as uniforms, textbooks, and other school supplies.³¹⁴ As such, there should be an examination of whether resource allocations at a national level are adequate and equitable for the education of refugee children.³¹⁵ To guarantee that processes for providing education, such as the admission and enrolment criteria, are applied in a non-discriminatory way, legal and administrative steps should be taken for refugees to receive equal treatment. The specific challenges and barriers refugees may face should be addressed in an acceptable way that results in equity.³¹⁶

4.5.3 Acceptability

Tomasevski contends that acceptability is broader than just quality.³¹⁷ In terms of art 28 of the UNCROC, acceptability relates to relevant, culturally appropriate, good quality education, content and teaching methods.³¹⁸ Sarah Dryden-Peterson expands on the quality of education and notes that it relates to teaching and learning in schools.³¹⁹ The CESCR also points out that for education to be acceptable, its form and substance, including curricula and teaching methods, should be relevant,

³¹¹ CRC *Concluding Observations: Belize* UN Doc CRC/C/15/Add.52 (31 March 2005) at [62(b)].

³¹² CRC *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations Czech Republic* UN Doc CRC/C/CZE/CO/3-4 (4 August 2011) at [66].

³¹³ BenDavid-Hadar, above n 280, at 223.

³¹⁴ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 31.

³¹⁵ BenDavid-Hadar, above n 280, at 223.

³¹⁶ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 25.

³¹⁷ Tomasevski *Human Rights Obligations in Education: The 4-A Scheme*, above n 11, at 69.

³¹⁸ Curtis and Tobin, above n 2, at 1069.

³¹⁹ Sarah Dryden-Peterson *Refugee Education A Global Review* (UNHCR, November 2011) at 30.

culturally appropriate and of good quality.³²⁰ Acceptability also relates to the need for education in the languages of minorities and Indigenous groups.³²¹ State parties have an obligation to meet a minimum standard of education. Therefore, quality standards should be well defined, regulated and monitored to ensure that the required standards are applied in the provision of education.³²² States, thus, have a duty to monitor and enforce the right to education.³²³ For quality education for disadvantaged groups, there is a need for additional special measures to ensure there is provision for equal opportunities.³²⁴

While there is a need to assess and monitor the quality of education, it has been contended that there is no human rights blueprint for the quality of education as it is beyond the scope of the law.³²⁵ Tomasevski notes that human rights nonetheless enable the challenging of poor quality education. In such instances, right-holders are enabled to hold the government responsible for its obligation to meet the minimum quality standards.³²⁶ In guaranteeing that education is acceptable to children, parents and teachers, states should take into account the needs of minorities and Indigenous people.³²⁷

The obligation to provide quality education has been set out in various international instruments and norms, which also expand on assessing quality education and how it can be achieved with regard to refugees.³²⁸ Refugee children should benefit from a satisfactory quality of primary education. In the realisation of their right to education, their cultural identity should be respected. It should be aimed at ensuring that they understand the new society and settings they are resettling in.³²⁹

While there are varying accounts of what quality education means, UNESCO suggests key elements of quality education. These include the need to ensure the cognitive development of each child and the extent to which education encourages the creative and emotional development of children.³³⁰ Curtis and Tobin, however, note that the UNCROC defines quality in terms of the aims set out in

³²⁰ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [6(c)].

³²¹ Saul, Kinley and Mowbray, above n 27, at 1097.

³²² Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 73.

³²³ Katarina Tomasevski *Education Denied* (Zed Books Ltd, London, 2003) at 51.

³²⁴ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 49.

³²⁵ Tomasevski *Human Rights Obligation in Education: The 4-A Scheme*, above 11, at 73.

³²⁶ At 73.

³²⁷ Anderson, Hyll-Larsen, and Hofmann, above n 15, at 98.

³²⁸ New York Declaration for Refugees and Migrants, above n 72, at [81]; *Transforming Our World: The 2030 Agenda for Sustainable Development*, above 193, at 17: goal 4: “ensure inclusive and equitable quality education and promote lifelong learning opportunities for all”; and The Incheon Declaration: Education 2030: Towards Inclusive and Equitable Quality Education and Lifelong Learning for All, above n 206, at [11]: states “commit to developing more inclusive, responsive and resilient education systems to meet the needs of children, young people and adults in the context of conflict and crisis, including internally displaced persons and refugees.”

³²⁹ UNHCR Executive Committee *Conclusion No 47 on Refugee Children* (1987) at [o].

³³⁰ UNESCO *EFA Global Monitoring Report 2005 Education for All: The Quality Imperative* (2005) at 29; and Curtis and Tobin, above n 2, at 1069.

art 29³³¹ and the extent to which state parties can provide settings that align with the aims.³³² The quality of education afforded to refugee children can be examined against the aims of education discussed in this chapter, which, to a certain extent, relate to the child's development. For instance, the CRC highlights that quality education programmes can positively influence the successful transition of young children to primary school, their educational progress and their long-term social adjustment.³³³ Therefore, the child's right to survival and development must be applied to enhance the quality of education and ensure that the right to education is adequately realised. The teaching methods, the content and the learning process should thus align with the aims of education as set out in the UNCROC.

Factors identified as having a crucial role in making education culturally appropriate and of good quality include respect for cultural diversity, intercultural understanding, human rights education, and multicultural education.³³⁴ The CRC emphasises that the content of the education provided should also be directly relevant to the child's specific social, cultural, environmental, and economic circumstances. Their current and future needs are to be taken into account. Teachers are central to refugee education and key to ensuring the quality of education.³³⁵ Therefore, modes of teaching should also be tailored to the unique needs that different children have.³³⁶ There is a need for teachers to be adequately supported and trained in addressing the specific needs and rights of refugees.³³⁷ It has been observed that they tend to lack the skill and experience required to deal with conditions arising in refugee contexts, such as different cultures, languages and ages, crowded classrooms and intensive working hours.³³⁸ As such, targeted training for teaching classes with refugees is essential.³³⁹ Whether this is the case in New Zealand will be explored in the following chapters.

The CESCR further notes that education should be aimed at transferring life skills to each child to provide them with the tools to deal with life challenges.³⁴⁰ In setting out the obligations of state parties, the CESCR notes that they are obliged to set minimum educational standards for all schools to meet. This includes implementing a transparent and effective system against which the standards can be

³³¹ These include the development of the child's personality and abilities to their fullest potential, the development of respect of human rights and fundamental freedoms, the development of respect for child's parents and child's culture, language and values, preparing the child for responsible life in a free society and development of respect for natural environment: UNCROC, above n 1, at art 29(1)(a)-(e).

³³² Courtis and Tobin, above n 2, at 1069.

³³³ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood*, above n 123, at [30].

³³⁴ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 49.

³³⁵ Dryden-Peterson, above n 319, at 23.

³³⁶ CRC *General Comment No 1 (2001), Article 29(1): The Aims of Education*, above n 141, at [9].

³³⁷ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 49.

³³⁸ Emily Richardson, Emily MacEwen and Ruth Naylor *Teachers of Refugees: A Review of the Literature* (Education Development Trust, England, 2018).

³³⁹ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 53.

³⁴⁰ CRC *General Comment No 1 (2001), Article 29(1): The Aims of Education*, above n 141, at [9].

measured.³⁴¹ Consequently, when examining the extent to which New Zealand meets its obligations in terms of providing acceptable education, there should be an assessment of whether there are minimum educational standards in place for schools to meet with regard to refugee children in particular.

It has been argued that without special measures aimed at meeting the needs of the most marginalised children, including refugees, quality education, which is also a sustainable development goal,³⁴² is unachievable. As such, better coordinated and targeted technical and financial efforts have been attributed to improving quality education, and it has been highlighted that refugees must be included in these efforts.³⁴³ A child's rights approach requires children to participate in matters affecting them.³⁴⁴ Therefore, education should foster the participation of refugee students in order for it to be acceptable.³⁴⁵ This requires education systems to be set up to allow the views of refugee children with regard to matters affecting them to be heard and taken into account.

4.5.4 Adaptability

Adaptability focuses on the need for education to be flexible and address students' different needs.³⁴⁶ It requires that all human rights within education be safeguarded and that education be directed at enhancing human rights.³⁴⁷ This element is very important for refugee children and their resettlement and integration into a new society. This thesis is based on the understanding, supported by a range of theories, that refugee children are right-holders and have different needs that should be taken into account when realising their right to education. Article 29(1) of the UNCROC states that education should be aimed at developing the child's personality, talents and mental and physical abilities to their fullest potential. It should also be aimed at the development of respect for the child's own cultural identity, language, and values. This suggests that education should be adapted to address the different developmental needs of each child. The Guiding Principles of the UNCROC should be considered. Every child has a right to life and development,³⁴⁸ which should be considered when determining whether education is adaptable. The CESCR notes that education should be aimed at

³⁴¹ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 4, at [54].

³⁴² United Nations *Sustainable Development Goal 4* <www.un.org>.

³⁴³ Global Refugee Forum Education Co-Sponsorship Alliance *Global Framework for Refugee Education* (UNHCR, November, 2019) at 8.

³⁴⁴ UNCROC, above n 1, at art 12.

³⁴⁵ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 49.

³⁴⁶ *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski Submitted in Accordance with Commission on Human Rights Resolution 1998/33*, above n 259, at [6(d)].

³⁴⁷ Tomasevski, *Education Denied*, above n 323, at 52.

³⁴⁸ UNCROC, above n 1, at art 6.

meeting the different needs of students in light of their diverse social and cultural settings and must be flexible to accommodate the changing needs of society.³⁴⁹

Likewise, education should be made adaptable to the circumstances of refugee children as emergencies create enhanced vulnerability for varying periods.³⁵⁰ Klaus Beiter Dieter notes that education should be flexible and adapt to the various needs of different groups of people and suggests that education should be diversified to fulfil the needs of refugees and other minority and Indigenous communities.³⁵¹ In achieving adaptability in education, state parties have a duty to provide resources for developing tailored education plans that meet the individual needs of the students.³⁵² The CRC notes that the curriculum should directly relate to the child's social, cultural, environmental, and economic context, as well as their present and future needs. Similar to the element of acceptability, the curriculum should also consider each child's evolving capacities, ensuring that the teaching methods adopted are tailored to the unique needs of different children.³⁵³ To ensure that education is adaptable, the education system should also monitor the performance of teachers and students so that modifications can be made where necessary.³⁵⁴ In adapting the schools to address each child's needs, the child's best interest should be taken into account, as set out in the UNCROC.³⁵⁵

For the right to education to be adequately realised, it has been emphasised that education should be adaptable and acceptable. States should thus develop intercultural and inclusive education models that enable education, and the teaching practices should respect diversity, which can contribute to the elimination of discrimination.³⁵⁶ The right to education requires states to create strategies in education aimed at integration to enhance the capabilities of those marginalised and for state parties to address the specific educational needs of refugees.³⁵⁷ Therefore, education systems should take measures that ensure that the needs of refugee children are met, an example of such being teacher training on teaching refugee children.³⁵⁸ Furthermore, it is important that states adapt their education systems to the problems refugees face, particularly with regard to the access, relevance and quality of education.³⁵⁹

³⁴⁹ CESCR *General Comment No 13: The Right to Education (Art 13)*, above n 4, at [6(d)].

³⁵⁰ Anderson, Hyll-Larsen, and Hofmann, above n 15, at 98.

³⁵¹ Beiter Dieter, above n 3, at 507.

³⁵² Kalantry, Getgen and Koh, above n 85, at 279.

³⁵³ CRC *General Comment No 1 (2001), Article 29(1): The Aims of Education*, above n 141, at [9].

³⁵⁴ Kalantry, Getgen and Koh, above n 352, at 279.

³⁵⁵ Tomasevski, *Education Denied*, above n 323, at 52.

³⁵⁶ *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [75].

³⁵⁷ At [83].

³⁵⁸ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective*, above n 132, at 19.

³⁵⁹ At 19.

Like the four Guiding Principles of the UNCROC, the elements of the right to education discussed above are interdependent. For education to be adaptable, the necessary resources should be made available for the provision of education, and the mechanisms adopted should be acceptable and accessible. As demonstrated above also, the 4As framework promotes the realisation of the right to education for refugees.³⁶⁰ It informs how states can adopt, implement and monitor legal and policy national frameworks in a child rights centred approach to ensure the rights of refugees in education are protected.

4.6 Conclusion

This chapter discussed the right to education under international human rights law, child rights law, and international refugee law. Although international refugee law does not provide any greater protection to refugee children, the right to education for refugee children is adequately provided under international human rights law and international child rights law. The international standards and guidelines discussed offer a comprehensive framework on what needs to be done for refugee children to enjoy their right to education adequately. The refugee children's right to education includes rights in education such as non-discrimination and the right to be heard. This underscores the indivisible and interdependent nature of rights and that the right to education is a multiplier right. They also have rights to education, that is, access to quality and flexible education. Refugee children can also enjoy their rights through education in that education is aimed at their development and their evolving capacities, and, as such, they are empowered to exercise their rights. All these rights can thus enhance the resettlement and integration of refugee children in a new host country.

The right to education imposes obligations on state parties, New Zealand being one of them as it has formally accepted all the legal instruments discussed. States are to develop solutions to ensure that the right to education is realised in all migration phases.³⁶¹ There should be mechanisms to monitor the implementation of legislation and obligations imposed by the right to education for refugees.³⁶² The obligations arising from the right to education are to be met in line with the aims of education. Therefore, in line with the theories underpinning this research, all measures adopted to realise the right to education for refugee children should contribute to the development of the child's personality and dignity. They should enable refugee children to actively participate in a free society and develop respect for human rights, fundamental freedoms, and the maintenance of peace.

³⁶⁰ At 24.

³⁶¹ CESCR *General Comment No 13: The Right to Education (Art 13)*, above n 4, at [21].

³⁶² *The Right to Education of Migrants, Refugees and Asylum Seekers, Report of the Special Rapporteur on the Right to Education*, above n 17, at [82].

The 4A framework should be applied from a child rights-based approach, which, as has been noted, is informed by the four Guiding Principles of the UNCROC, namely, non-discrimination, the right to express their views and have those views taken into consideration, survival and development and the best interest of the child to assess the realisation of the right to education for refugee children. This chapter has thus provided a basis for exploring and examining the extent to which the right to education for refugees in New Zealand is being realised

5. THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN UNDER NEW ZEALAND DOMESTIC LAW

5.1 Introduction

This chapter considers how the right to education for refugee children is provided for in New Zealand's domestic laws and policies. It seeks to examine the legislative context upon which the provision of education is premised, as well as the development of policy and practices relating to refugee children in education. The historical development of education laws and policies is explored, as well as the impact of education legislation and policies on refugee children. This will provide indicators of the extent to which the laws and policies take into account and address the unique needs and interests of refugee children in educational settings, and whether they ensure their rights are adequately realised.

The chapter will begin by discussing the legislative history of education in New Zealand. This includes an examination of the domestic education laws that regulate the provision of education to determine the extent to which children's rights were emphasised, highlighting how they provide or include refugee children. In line with the theories underpinning this research, the purpose of education will also be highlighted to establish how children have been seen in educational settings, specifically whether they are recognised as rights-holders and if their unique needs are considered. Policies underpinning the provision of education will be discussed to determine whether the education system is flexible enough to meet the different interests of refugee children. The chapter will also consider how the curriculum and practices relating to education address the needs of refugee children.

As the previous chapter set out the normative content of the right to education under international law and the obligations that arise, this chapter will examine how New Zealand complies with international standards, and themes will be identified. Although the right to education is provided for in domestic legislation, it will be shown that the right to education for refugee children is not adequately realised as required by international law.

5.2 *The Legislative History of Education in New Zealand*

Education was initially influenced by Christian values and philanthropic motives,¹ and this was partly a result of the influence of Christian missionaries.² The first settlements in the new colony were relatively isolated and responsible for making their own arrangements for educating their children. In some areas, the provision of education was by churches, private enterprises, and in other areas, by public associations.³ Formal early childhood education and care commenced with the establishment of kindergartens in the 1800s. When individuals and organisations first established creches, the purpose was to cater to working women, meet children's health and welfare needs, and guard them against crime.⁴ It was aimed at ensuring children were "trained in orderly ways and learn Christian values before they became wayward."⁵ In the 1840s, New Zealand was established as a crown colony with a governor and a nominated legislative council.⁶

Before the operation of the Abolition of Provinces Act 1875, education was provided by separate provincial councils.⁷ As such, education systems across New Zealand differed, leading to inequitable outcomes. Not all children had a fair chance of developing their capabilities.⁸ When the provincial councils were abolished, education became more centrally controlled.⁹ Though centrally controlled, schools still lacked uniformity as each province had established its own education system.¹⁰ A school system for "native and half-caste" children (a term reflective of the language of the period) was established within the Colony of New Zealand through the Native Schools Act 1867.¹¹ Around half of all Māori were literate in their native language, however, English was the primary language of instruction.¹² Education was aimed at preparing Māori children for the labour force in the Pākehā

¹ Claire McLachlan "An Analysis of New Zealand's Changing History, Policies and Approaches to Early Childhood Education" (2011) 36(3) *Australian Journal of Early Childhood* 36; and Beryl Hughes *Flags and Building Blocks, Formality and Fun: One Hundred Years of Free Kindergarten in New Zealand* (New Zealand Free Kindergarten Union, Wellington, 1989) at 9.

² Alan Cumming and Ian Cumming "New Zealand's Education Act of 1877" (1977) 17(2) *Paedagogica Historica* 305 at 305; Alan Cumming and Ian Cumming *History of State Education in New Zealand 1840-1975* (Pitman Publishing, Wellington, 1987) at 8; and Helen May *The Discovery of Early Childhood* (NZCER Press, Wellington, 2013) at 19.

³ Megan Cook "Private Education - Private Schools, 1820s to 1990s" (14 June 2012) Te Ara - the Encyclopaedia of New Zealand <www.teara.govt.nz>; John L Ewing and New Zealand National Commission for UNESCO *Compulsory Education in New Zealand: A Study Initiated by the National Commission for UNESCO* (UNESCO, Paris, 1972) at 12; and George E Wood *The New Zealand Official Yearbook, 1951-52* (Statistics New Zealand, Wellington, 1952).

⁴ May, above n 2, at 171, 208; see also McLachlan, above n 1, at 36.

⁵ At 171.

⁶ John Farrar "Early Conceptions of the State in New Zealand" (2012) 13-14 *Yearbook of New Zealand Jurisprudence* 51 at 54 - 55.

⁷ Cumming and Cumming *History of State Education in New Zealand 1840-1975*, above n 2, at viii.

⁸ 1869 NZPD (6) 523.

⁹ Caroline Bennett "The New Zealand Principal Post-Picot" (1994) 32(2) *Journal of Educational Administration* 35.

¹⁰ George E Wood *The New Zealand Official Yearbook, 1951-52* (Statistics New Zealand, Wellington, 1952) at ch 6.

¹¹ Native Schools Act 1867, at preamble.

¹² Alexander Gillespie and Claire Breen *People, Power, and Law: A New Zealand History* (Bloomsbury Publishing, Oxford, 2022) at 73.

world.¹³ The dominant policy during this time was one of assimilation. This approach involved educating Māori to abide by the habits of the Europeans by actively discouraging Māori language, belief systems and culture.¹⁴ Education legislation in the following 100 years, including the 1877, 1914 and 1964 Acts, was based on central funding from taxes.¹⁵

The Education Act 1877 was the first piece of legislation establishing a national education system. One of the main aims of education during this period was to produce “an obedient, disciplined and industrious labour force” to meet the economic needs and goals of the state.¹⁶ This aligns with the issues raised with a human capital approach to education discussed in Chapter Three.¹⁷ Initially, only primary education was compulsory. The Education Act 1877 provided free and compulsory education for children between seven and thirteen years, and parents or guardians had an obligation to ensure that children would attend school.¹⁸ The government also had a duty to ensure parents or guardians enrolled their children in school.¹⁹ The Act was based on the understanding that schools would instil discipline, morality and respect.²⁰ Although early childhood education commenced in the 1800s, it was not provided for in the Act. Not much provision was made for secondary schools in the Act either.²¹ As such, the legal guarantees for early childhood, primary and secondary education were different. While primary education was free and compulsory, secondary education was, on the other hand, limited.²² In this regard, under s 83 of the Act, no child above school age could be admitted to any public school without the special leave of the Committee unless the school was a district high school.²³

Although children’s rights developed much later,²⁴ rights and duties in education were addressed during the Parliamentary debates leading to the 1877 Act. Some arguments focused mainly on the

¹³ Tony Dowden “Locating Curriculum Integration Within the Historical Context: Innovations in Aotearoa New Zealand State Schools 1920s-1940s” (2011) 40(1) *History of Education Review* 47 at 51.

¹⁴ McGuinness Institute *Working Paper 2016/03: History of Education in New Zealand* (December 2016) <www.mcguinnessinstitute.org> at 17.

¹⁵ Bennett, above n 9, at 35.

¹⁶ Anne-Marie O’Neil, John Clark and Roger Openshaw *Reshaping Culture, Knowledge and Learning* (Dunmore Press, Palmerston North, 2004) at 28.

¹⁷ See Chapter Three footnotes 177-187 and accompanying text.

¹⁸ Education Act 1877, s 89.

¹⁹ Section 92.

²⁰ May, above n 2, at 171.

²¹ Alison Jones and others *Myths and Realities: Schooling in New Zealand* (The Dunmore Press Limited, Palmerston North, 1995) at 45.

²² Roy Shuker *The One Best System?: A Revisionist History of State Schooling in New Zealand* (Dunmore Press, Palmerston North, 1987) at 49; and Education Act 1877, s 84(6) states that the district high schools were also not free.

²³ School age was defined as any age between five and fifteen, reckoned in each case from the last preceding birthday.

²⁴ Historically, children were considered in the same group as adults. There were no specific children’s rights and children were mainly seen as needing protection. During the industrial period, children started to be seen and considered as distinct special group different from their parents. As such there was recognition of the responsibility that States had in protecting them from issues adversely affecting them. See Stuart N Hart “From Property to Person Status: Historical Perspective on Children’s Rights” (1991) 46(1) *American Psychologist* 53 at 53 and 55.

rights of the parents versus the state. For instance, Hon Mr Menzies noted that the parent had the right to educate the child but emphasised the “paramount right and interest” that the state had in determining the type of education to be provided for the child.²⁵ Hon Mr Richmond emphasised that a child had its own rights and should not be seen as the parents’ property. He noted that the state imposes the powers and duties of parents over the child as it has a right to insist on them.²⁶ In expanding on the state’s duties, he was of the view that the government had a duty to legislate for education and ensure that children were provided with education.²⁷ Although children’s rights had not emerged then, it has been highlighted in Chapter Three that some education theories advance recognition of children as rights-holders in education settings.²⁸ Richmond’s argument aligned with Locke’s theory on education, which recognised children as free and rational beings; thus, education was to produce an individual with a sound mind.²⁹ Locke was of the view that children had rights to nourishment and education.³⁰

As highlighted previously, concepts of education theory promote an understanding of childhood in a manner that ensures the realisation of children’s rights. It can be implied from Richmond’s argument that children could have rights in terms of the theory. He first pointed out that children had rights, and because children had rights, the state had a corresponding duty to ensure that children had access to education. As has been argued in this research, viewing children as rights-holders promotes the realisation of their rights. David McKenzie notes that the provision of education in New Zealand was based on the fact that by virtue of citizenship, everyone had a right to be educated.³¹ In considering the Parliamentary Debates, Richard Harker argues that compulsory education was aimed at ensuring that the individual rights to education for children were realised,³² enhancing economic productivity, having a discerning electorate, controlling society, and reducing crime.³³ Judith Simon also emphasises that one of the key reasons for the 1877 Act was to ensure that all children had equal access to education.³⁴

²⁵ (1877) 26 NZPD 121.

²⁶ (1870) 9 NZPD 48.

²⁷ (1870) 9 NZPD 47.

²⁸ See footnotes 188 to 202 and accompanying text.

²⁹ John Locke *Some Thoughts Concerning Education* (John W Yolton and Jean S Yolton (eds), Clarendon Press, Oxford, 1989) [first published 1693] at 142.

³⁰ John Locke *Two Treatises of Government* (Thomas I Cook (ed), Hafner Publishing Company, New York, 1947) [first published 1689] at 71.

³¹ David McKenzie “The Changing Concept of Equality in New Zealand” (1975) 10(2) *New Zealand Journal of Educational Studies* 93.

³² At 93.

³³ Richard Harker “Schooling and Cultural Reproduction” in John Codd, Richard Harker and Roy Nash (eds) *Political Issues in New Zealand Education* (The Dunmore Press, Palmerston North, 1990) at 29.

³⁴ Judith Simon “Historical Perspectives on Schooling” in Eve Coxon and others *The Politics of Learning and Teaching in Aotearoa – New Zealand* (Dunmore Press, Palmerston North, 1994) 37 at 43.

In 1903, the Secondary Schools Act was passed, making secondary school free. Students had to obtain a certificate of competency upon completion of primary school to be admitted to a secondary school.³⁵ Those who did not obtain the certificate could be admitted to a lower secondary school department and were to be taught separately. Unlike those who obtained the certificate, the school did not cover their fees.³⁶ While equality of opportunity was one of the main reasons for providing compulsory education, it had been recognised that not all children had an equal opportunity to develop and be educated due to the set-up of the education system in prior years. The introduction of the Secondary Schools Act still did not provide a fair chance for all children to attend school.³⁷ Simon argues that while the Act was aimed at addressing inequalities by facilitating access to schools through the provision of free secondary schools, the processes and requirements in place further perpetuated inequalities.³⁸

The Education Act 1914 had more coverage and was aimed at ensuring “better provision for education”³⁹ by providing for both primary and secondary education. Every child between seven and fourteen years was required to have their name enrolled on the register of a public school or any other school.⁴⁰ Native schools were also recognised as public schools, particularly Māori and Chatham Islands schools.⁴¹ They operated alongside the state system and Māori had the option of attending native or state schools.⁴² The Act also made provision for special schools to be established specifically for children with disabilities.⁴³ The school leaving age was increased from fourteen years to fifteen years through the Education Amendment Act 1920.⁴⁴ The proficiency examination to obtain a certificate of competency was later abolished by the Education Amendment Act 1936, thus eliminating one of the barriers to accessing education. All children had access to free secondary education.⁴⁵ While primary and secondary education was provided for in legislation, early childhood education was still not part of the state system during the Second World War. It was funded by voluntary contributions and limited government grants.⁴⁶

It was during the operation of this legislation that the first group of refugee children were resettled in New Zealand. The New Zealand Government provided for the education of Polish refugee orphan

³⁵ Jones and others, above n 21, at 47.

³⁶ Secondary Schools Act 1903, s 3.

³⁷ Equality of opportunity was based on merit, and schooling opportunities were different for boys and girls. See Simon, above 34, at 48-49.

³⁸ At 44.

³⁹ Education Act 1914, at Title.

⁴⁰ Section 59(1).

⁴¹ Education Act 1914, s 69(1); see also McGuinness Institute, above n 14, at 17.

⁴² McGuinness Institute, above n 14, at 17

⁴³ Education Act 1914, s 127 (1).

⁴⁴ Education Amendment Act 1920, s 10.

⁴⁵ Education Amendment Act 1936, s 9(1).

⁴⁶ New Zealand History “Children and Adolescents, 1930-1960” New Zealand History <www.nzhistory.govt.nz> at 3.

students through allowances to pay for their board, clothing, and education.⁴⁷ They had the same education as other New Zealand children who attended Catholic schools.⁴⁸ To address the English language barrier, English teachers were also appointed to assist refugee children.⁴⁹ The aim of equality of opportunity in education was pronounced in 1939 before the first group resettled in New Zealand. Since then, it has remained a central goal in educational policy statements.⁵⁰ Although at the time, no legislation explicitly stated the right to education, the Minister of Education, Peter Fraser, pronounced the statement of intent, which has also been considered the yardstick for education policy,⁵¹ noting that:⁵²

The Government's objective, broadly expressed, is that every person, whatever his level of academic ability, whether he be rich or poor, whether he live in town or country, has a right, as a citizen, to a free education of the kind for which he is best fitted and to the fullest extent of his powers.

With reference to the statement of intent pronounced by Fraser, McKenzie identified issues in meeting the government's objective, particularly within the context of equality. He was of the view that there was a need for further inquiry to determine the grounds on which each child was to be afforded the education best suited for them. He further questioned how the aim to develop each child to the fullest extent of their powers could be balanced with the state's economic needs and parents' expectations.⁵³ This can be seen as an early influence on a child rights approach to education in New Zealand. While economic interests can influence how education is perceived and eventually the right to education, as noted in Chapter Three, this research argues that a child rights approach can address these issues and ultimately result in a better realisation of the right to education for refugee children.

Although legislation provided for compulsory education, which was said to be free, equal, non-selective, and not politically influenced,⁵⁴ concerns and issues arose through the decades. These related mainly to the fact that schools did not respond to the different needs of children and could not provide for their varied abilities. John Ewing described the education system as "characterised by

⁴⁷ Krstyna Skwarko *The Invited: The Story of 733 Polish Children Who Grew Up in New Zealand* (Millwood Press, Wellington, 1974) at 65, 68.

⁴⁸ At 60.

⁴⁹ At 68-69.

⁵⁰ McGuinness Institute, above n 14, at 3.

⁵¹ Jones and others, above n 21, at 58; Helen May notes that children in early childhood education were not considered in the statement: Helen May "Towards the Right of New Zealand Children for Free Early Childhood Education" (2008) 2(1) *International Journal of Child Care and Education Policy* 77 at 80.

⁵² Clarence E Beeby *The Biography of An Idea: Beeby on Education* (Paula Wagemaker (ed), New Zealand Council for Educational Research, Wellington, 1992) at 124.

⁵³ David McKenzie "The Changing Concept of Equality in New Zealand" (1975) 10(2) *New Zealand Journal of Educational Studies* 93 at 103.

⁵⁴ Bennett, above n 9, at 35.

excessive standardisation and uniformity.”⁵⁵ The education system was reviewed at different times, taking into account the extent to which the needs of children were met.⁵⁶ These reviews reflect how the purpose of education was perceived over time and how it underpinned education law and policy. They are also helpful in reflecting the extent to which the education system accommodated refugee children’s unique needs and interests and consequently realised their rights. The Post-Primary School Curriculum (The Thomas Report)⁵⁷ was one of the main reports commissioned by the Minister of Education, in 1942.⁵⁸ It established a common, core, free secondary curriculum for all and the objectives of secondary education in New Zealand. One of the objectives of secondary education was to:⁵⁹

ensure, as far as possible, that all post-primary pupils, irrespective of their varying abilities and their varying occupational ambitions, receive a generous and well balanced education. Such an education would aim, firstly, at the full development of the adolescent as a person: and secondly at preparing him for an active place in our New Zealand society as worker, neighbour, home maker and citizen.

The report also addressed how the secondary school curriculum could be reorganised to ensure that individual differences were adapted to meet the different needs.⁶⁰ It was acknowledged in the past that the aim was to ensure that there were courses that were “rich and varied,” thus catering to the needs and abilities of children in schools.⁶¹ Although this was the case, it had been observed that schools’ curricula and teaching methods were stereotyped, and the needs of many students, though not specified, were disregarded.⁶² In addressing the issues raised, it was recommended that the curricula be tailored to meet and accommodate the different needs and interests of children⁶³ and to acknowledge the various paths they want to take through optional studies and activities.⁶⁴ This

⁵⁵ John L Ewing *Development of the New Zealand Primary School Curriculum 1877-1970* (New Zealand Council for Educational Research, Wellington, 1970) at 275.

⁵⁶ Department of Education *The Post-Primary School Curriculum: Report of the Committee appointed by the Minister of Education in November 1942* (Government Printer, Wellington, 1944) [Thomas Report]; George Currie *Report of the Commission on the Education in New Zealand* (Government Printer, Wellington, 1962) [Currie Report]; and Brian Picot *Administering for Excellence: Effective Administration in Education: Report of the Taskforce to Review Education Administration* (The Taskforce, Wellington, 1988) [Picot Report].

⁵⁷ Thomas Report, above n 56.

⁵⁸ The main legislation was the Education Act 1914 which was amended by the Education Amendment Acts of 1920 and 1936.

⁵⁹ Thomas Report, above n 56, at 4.

⁶⁰ At 6.

⁶¹ Beeby, above n 52, at 124 -125.

⁶² At 2.

⁶³ At 2.

⁶⁴ At 10.

approach aligns with an intersectional perspective as the different interests and abilities were to be considered. It is worth noting that the report referred to the “needs and interests” on several occasions.

Some of the Thomas Report’s findings were a forerunner of what we now understand to be the socio-cultural theory which suggests that children should be recognised as active rights-holders, enabling them to formulate and express their views and receive appropriate support. This establishes a link with a rights-based approach⁶⁵ and thus implies the need to recognise children’s rights. Recommendations arising from the Thomas report were addressed by the Education (Post-primary Instructions) Regulations 1945, which were aimed at the intellectual development of the individual in the broad sense. The curriculum was designed for everyone to possess the essential knowledge and understanding of their society and that of other people.⁶⁶ While it may appear that children’s needs and abilities were central to the development of secondary education and thus consistent with a child rights-based approach, education was ultimately aimed at ensuring that children were equipped and skilled to contribute to the economic needs at the time.⁶⁷

The report of the Currie Commission on Education (the Currie Report) was constituted in 1960, and was more encompassing as it included primary education. It was tasked with examining whether the publicly controlled education system, mainly primary, post-primary, and technical education, aligned with the present and future needs of the state at the time. The state was, like before, focused on producing well-trained, skilled, and knowledgeable citizens. The report was considered an influential policy statement that reflected the general consensus on the development, aims and role of education.⁶⁸ The report was based on equality of opportunity for all New Zealand children,⁶⁹ which, as indicated, was the basis of legislation and the provision of free and compulsory primary and secondary education.⁷⁰ Some of the issues considered in the Currie Report relate to the aims and purposes of the curriculum, teacher training, and the objectives of educational policy.⁷¹ Staffing was one of the challenges identified in attaining an ideal secondary education system.⁷² Although the statement uttered by Fraser would suggest that there was clarity on the objective of education, one of the findings of the Commission was that there was no certainty and agreement in New Zealand on

⁶⁵ Anne Smith “Interpreting and Supporting Participation Rights: Contributions from Sociocultural Theory” (2002) 10(1) *The International Journal of Children Rights* 73 at 74.

⁶⁶ Currie Report, above n 56, at 40.

⁶⁷ O’Neil, Clark and Openshaw, above n 16, at 28.

⁶⁸ Gary McCulloch “From Currie to Picot: History, Ideology and Policy in New Zealand” (1988) 7(1) *Access: Contemporary Issues in Education* 1 at 2.

⁶⁹ Jones and others, above 21, at 58. Currie Report, above n 56, at 16.

⁷⁰ Currie Report, above n 56, at 22 -23.

⁷¹ At 6-8

⁷² At 16.

the aims and scope of education in schools.⁷³ In such circumstances, evaluating and monitoring the right to education could be difficult and may present a challenge, thus hindering the adequate realisation of the right to education.

The report reiterated the right to education⁷⁴ and emphasised the important role and obligations the state has to ensure education is provided to children. It stated that:⁷⁵

in our society, as in many democratic societies, formal education is regarded not only as a right but also as a compulsion. Parents may claim education, as provided by the State, as their children's right. However, the state, as the embodiment of the popular will, not only offers them education as a right, it insists that they are not free to avoid or refuse it.

The Commission made other comments in the report on the right to education following some submissions relating mainly to parents' right to attend to their child's education and the right to establish private schools.⁷⁶ The report noted that the right to establish private schools was key to the right to education.⁷⁷ The need to ensure equality of educational opportunity for Māori was a priority.⁷⁸ The Commission emphasised the need for funding, knowledge and skill for Māori to ensure equality of educational opportunity. This was in contrast with other groups (other than refugee groups) where solutions were not provided.⁷⁹ Economic circumstances and geographical location were identified as other issues that posed many challenges for students.⁸⁰ Several groups of children who were likely to be disadvantaged were identified. These included children from rural communities, and because they needed special assistance, equality of opportunity for rural children could not be achieved.⁸¹ The Commission observed that geographical constraints, such as those arising from distance, prevented rural children from receiving an education fully equivalent to that available in larger centres.⁸² Special education was another area that needed attention. It was acknowledged that there was significant

⁷³ At 17.

⁷⁴ Though not explicitly mentioned, it can be implied that the right to education had been recognised and acknowledged as evidenced by the Parliamentary debates and the statement of intent by Mr Fraser.

⁷⁵ Currie Report, above n 56, at 17.

⁷⁶ The Catholic Education Council for New Zealand believed that a parent's right (though not absolute) to choose the type of education to be afforded to their child was key to equitable educational benefit. The Council further argued that children had the right to education and parents' rights stemmed from the duty they had to their children. See Currie Report, above n 56, at 834.

⁷⁷ At 835.

⁷⁸ At 15.

⁷⁹ At 15-16.

⁸⁰ At 14.

⁸¹ At 14.

⁸² At 14.

support for children with physical and intellectual disabilities.⁸³ However, progress in special education remained slow due to a lack of specialised knowledge and techniques rather than a lack of goodwill.⁸⁴

Opportunities for further improvements were highlighted, and it was noted in the report that there was not much progress on including “psychologically disturbed” children.⁸⁵ Although it was not specified which children would fall into this category, this was an acknowledgement that such children needed some form of special education. Even though these groups were identified, the report acknowledged that they did not include the majority of New Zealand students. This reflected concerns regarding the development of the education system, as controlled by the state, specifically that the education provided was not best suited for each child and did not cater to their powers’ full extent.⁸⁶ It is worth pointing out that although refugee children had been resettling in New Zealand for almost two decades at the time, there was no specific reference to them in any reports that reviewed the education system. This could be attributed to the fact that their resettlement was on an ad-hoc basis and data on refugees not being accurately captured before the Second World War, as highlighted in Chapter Two.⁸⁷ As such, historically, refugee children seemed to be invisible in the education system. It is, therefore, essential to assess how this impacted or continues to impact the realisation of their right to education, which will be examined in this thesis.

The Education Act 1964 incorporated some of the recommendations made by the Currie Report.⁸⁸ It provided for early childhood,⁸⁹ primary,⁹⁰ and secondary education.⁹¹ The Act also made provisions for Māori schools⁹² and Chatham Islands schools.⁹³ Although the Act did not specifically include refugee children or international students, it required all children between six and fifteen years of age to be enrolled on the register of some state primary school, secondary school, correspondence school or any other registered school.⁹⁴ While other groups had specific schools⁹⁵ to cater for their needs, there seemed to be no provision on how schools could be tailored to meet the needs of refugee children.

⁸³ At 15.

⁸⁴ At 15.

⁸⁵ At 15.

⁸⁶ At 12.

⁸⁷ Passports and travel documents did not reflect nationalities but only the escape routes from Europe. Ann Beaglehole *Facing the Past: Looking Back at Refugee Childhood in New Zealand 1940s–1960s* (Bridget Williams Books, Wellington, 1990) at 8.

⁸⁸ Education Bill 1964 (78-1), Explanatory Note at i.

⁸⁹ Education Act 1964, s 70.

⁹⁰ Section 71.

⁹¹ Section 82.

⁹² Section 101.

⁹³ Section 103.

⁹⁴ Section 109.

⁹⁵ Sections 98-100.

As highlighted, domestic legislation did not provide for early childhood education before 1964. The approach to early childhood was different as it was not considered serious education but rather as “care” or “play.”⁹⁶ The trajectory of early childhood education in New Zealand developed differently to that of education of children in the compulsory schooling age. This was the case until the early childhood education system was integrated in the reforms of the 1980s.⁹⁷ The Education Act 1964, which operated until 1989, provided for early childhood education through the provision for funding of preschool education, the establishment, maintenance, and management of kindergartens,⁹⁸ staffing and grading of kindergartens,⁹⁹ and training of preschool teachers.¹⁰⁰ During this time, mainly between the 1960s and 1980s, there was an equity approach to early childhood policies where education was seen as a “chance to be equal” and was a form of supporting the rights of women, children and minority groups.¹⁰¹ Several campaigns associated with women’s rights, children’s rights and Māori rights focused on early childhood education and care in the 1970s.¹⁰² This approach shifted more towards an “economic gaze” in the 1990s to 2010s, where the purpose of early childhood education was understood as providing necessary skills for building a knowledge economy. Children who did not attend early childhood education were considered an economic and social risk to society, and the curriculum was a way in which the government measured investments made.¹⁰³ In light of the relation between a human capital approach and a rights-based approach, as discussed in Chapter Three, children were not primarily seen as active rights-holders, and the curriculum and policies could not have been premised on the rights of children or their needs and interests. Consequently, children, particularly those in unique circumstances such as refugee children were under prioritised within the education system.

While the Act made provisions for early childhood education, there was still a need for a more equitable education system. A working group was thus established in 1988.¹⁰⁴ While previous reports were focused on primary and secondary education, the report of the working group (Meade report) highlighted areas of responsibility in early childhood care and education, being families, community and government. It emphasised government responsibilities, including costs of training staff,

⁹⁶ Carol Mutch “The Rise and Rise of Early Childhood Education in New Zealand” (2004) 6(1) *Citizenship, Social and Economics Education* at 1.

⁹⁷ At 2.

⁹⁸ Education Act 1964, s 70 (a).

⁹⁹ Section 70(c).

¹⁰⁰ Section 70(f).

¹⁰¹ May, above n 2, at 18.

¹⁰² McGuinness Institute, above n 14, at 4.

¹⁰³ May, above n 2, at 18.

¹⁰⁴ Anne Meade *Education to Be More: Report of the Early Childhood Care and Education Working Group* (Department of Education, Wellington, 1988).

provision of support to service providers, and monitoring standards.¹⁰⁵ The government was also to be responsible for providing acceptable standards within the legislative framework.¹⁰⁶ Despite this, there were no clear standards in place to be met in the provision of education. The working group highlighted that early childhood education in New Zealand was monocultural.¹⁰⁷ As such, it emphasised the need to preserve the cultures of families and children while giving equal weight to their needs.¹⁰⁸ According to the report, equity could be attained by considering different factors such as age, affordability of services, the responsiveness of service providers and location of services.¹⁰⁹ The working group identified some areas of improvement, including funding and equity of access.¹¹⁰ Early childhood care and education was not consistently provided in rural areas and for children with special needs.¹¹¹ As policies were considered inflexible, the needs of some children could not be adequately met by the services provided.¹¹² Like the various reports relating to primary and secondary education, refugee children were not considered during the review of early childhood education. As noted in Chapter Three, considering the intersecting identities can result in a better realisation of children's rights. In applying this approach, the distinct features of refugeehood and the peculiar effects of forced migration ought to have been considered to attain equity in early childhood education.

As a result of the many issues that were apparent within the education system, as set out in the various reports, the Report of the Taskforce to Review Education Administration (The Picot Report)¹¹³ was an effort to demonstrate the state's ability to create social equality in the provision of education.¹¹⁴ The task force was required to examine mainly the functions of the Department of Education and its role in other educational services.¹¹⁵ The report, published in 1988, led to the reform of education administration, which predominantly dealt with shifting authority from the Department of Education to the local school boards.¹¹⁶ Although this was the case, there were some responsibilities that the Department of Education retained. These related to policies, operations, and property management. It was also responsible for establishing national education guidelines, setting national curriculum objectives, and funding all state institutions, among other functions.¹¹⁷ Teachers were also required to teach responsively to address the different needs of students, especially groups of children that

¹⁰⁵ At 21.

¹⁰⁶ At 21.

¹⁰⁷ At 25.

¹⁰⁸ At 25.

¹⁰⁹ At 35.

¹¹⁰ At 32.

¹¹¹ At 35.

¹¹² At 36.

¹¹³ Picot Report, above n 56.

¹¹⁴ McCulloch, above n 68, at 1.

¹¹⁵ Picot Report, above n 56, at ix.

¹¹⁶ At 44 - 45. Each school, through its Board, was to set its objectives that aligned with the national objectives set by the State and were to reflect the particular needs of the community the school was in.

¹¹⁷ At 6.

seemed invisible.¹¹⁸ These key responsibilities are instrumental in guaranteeing equality of opportunity and equal access to education. They also reflect legal obligations that were to be met by the government for the adequate realisation of the right to education.

The education system assessment criteria by the task force included whether the administrative system was flexible, responsive, and adaptable to children's needs, whether it allowed them to participate in the decision-making process, and designing systems that ensured they had the best educational opportunities.¹¹⁹ These assessment criteria are consistent with the sociocultural theory, which, as has been noted, advances a child rights-based approach. As the sociocultural theory suggests, social and cultural settings encourage children to express their views and take responsibility. They also determine children's capacity to participate and act.¹²⁰

With a view to design flexible educational settings and systems that could respond to the community's educational needs,¹²¹ the task force considered specific issues relating to Māori, particularly the need for an education system that prioritised their language and culture to enhance the performance of Māori children.¹²² Again, there was no specific reference to refugee children even though they had been resettling in the country for decades and were part of the community.¹²³ While the task force received submissions from various minority groups, there was no specific mention of which groups, save for Māori and Pasifika groups. As such, most minority groups were considered as one group. The systems and structures recommended were considered culturally sensitive and flexible to meet the needs of minority groups.¹²⁴ This suggests that refugee children were grouped with other minority groups. It is likely that the needs of refugee children, which were not the focus at the time, could not have been adequately met. This is because, as noted earlier, refugees' migration process requires specific care throughout the integration process and their access to social and cultural rights.¹²⁵ This buttresses the importance of an intersectional perspective and the need for considering the differences within the refugee and migrant children groups. Such an underpinning is important for the research as refugee children are usually categorised together with other migrant children without taking into account their different identities and circumstances. Consequently, analysing the intersecting

¹¹⁸ At 98.

¹¹⁹ At 6.

¹²⁰ Nicola Taylor and Anne Smith "Thinking About Children: How Does It Influence Policy and Practice?" in Johanna Wyn and Helen Cahill (eds) *Handbook of Children and Youth Studies* (Springer, Singapore, 2015) 49 at 51.

¹²¹ Picot Report, above n 56, at ix.

¹²² At 65.

¹²³ During this time, an annual quota for refugees had been established. See Anna Gruner and Wendy Searle *New Zealand's Refugee Sector: Perspectives and Developments, 1987–2010 Quota Refugees Ten Years on Series* (Department of Labour, 2011) at 4.

¹²⁴ Picot Report, above n 56, at 99.

¹²⁵ Miquel Angel . Education of Children and Youngsters from Refugee Families in Europe" (2017) 28(2) *Intercultural Education* 206 at 207.

characteristics of refugee children and their impact on refugee experiences is often overlooked,¹²⁶ which can lead to laws and policies that fail to address their specific needs.

Although the right to education had been referred to in different reports and statements, previous Acts did not explicitly set out children's rights in education. The Education Act 1989¹²⁷ differed from previous legislation as it explicitly identified primary and secondary education rights.¹²⁸ The right to free primary and secondary education was explicitly set out therein. It provided that every person, excluding foreign students, was entitled to free enrolment and free education at any state school.¹²⁹ Paul Rishworth notes that the Act outlined two elements of the right to education. Firstly, entitlement, that is, every child was entitled to free education at any state school. Secondly, the Act placed an obligation¹³⁰ for all children to be enrolled at a registered school.¹³¹ The Education Act 1989 further provided equal rights to primary and secondary education for students with special educational needs (whether because of disability or otherwise) to enrol and receive education at state schools.¹³² The Act did not explicitly set out the right to early childhood education. Nevertheless, it established the early childhood development unit board.¹³³ The board was set up to promote "quality, accessible and culturally appropriate" education and developmental facilities for early childhood.¹³⁴

The Act made no specific mention of refugee children. Refugee children were not considered foreign students¹³⁵ as they were granted permanent residence upon arrival under the quota programme.¹³⁶ As such, they had the right to education. The Act presented a broader scope as it recognised "foreign" students. They were defined as persons who were not New Zealand citizens, persons to whom s 7 of the Immigration Act 1987 applied, which specifies persons not eligible for any exemption or permit,¹³⁷ and persons obliged to leave New Zealand immediately or within a specified time or those deemed to be in New Zealand illegally.¹³⁸ Foreign students were not entitled to free enrolment and free education at any state school.¹³⁹ The Minister could, however, declare particular classes or

¹²⁶ Edvina Bešić, Lisa Paleczek and Barbara Gasteiger-Klicpera "Don't Forget About Us: Attitudes Towards the Inclusion of Refugee Children With(out) Disabilities" (2020) 24(2) *International Journal of Inclusive Education* 202.

¹²⁷ Reference to the Education Act 1989 in this section relates to the Act prior any amendments.

¹²⁸ Education Act 1989, Part I.

¹²⁹ Section 3.

¹³⁰ Section 24 imposes penalties for a parent's failure to enrol a child in school.

¹³¹ Paul Rishworth "Recent Developments in Education in New Zealand" (1996) 1(1) *Australia New Zealand Journal of Law and Education* 33 at 34.

¹³² Education Act 1989, s 8.

¹³³ Section 43.

¹³⁴ Section 45.

¹³⁵ "Foreign" was subsequently substituted with "International". See the Education Amendment Act 200, s 6(1).

¹³⁶ Immigration New Zealand "New Zealand Refugee Quota Programme" <www.immigration.govt.nz>.

¹³⁷ Immigration Act 1987, s 7 outlines ineligibility criteria for an exemption or permit. It includes serious criminal convictions, removal orders and deportation among others.

¹³⁸ Education Act 1989, s 2.

¹³⁹ Section 3.

descriptions of foreign students entitled to enrol at state schools.¹⁴⁰ A foreign student could enrol at state schools with the board's consent.¹⁴¹ Unlike foreign students who did not have the right to free enrolment and education in schools, refugee children had better access to free education. It is essential to highlight that once foreign students were enrolled at a state school or special education, they had the same rights as any other person.¹⁴² Therefore, it could be said all students enrolled in schools had the same rights in education.

The 1989 Act removed the control and management of schools from the Ministry of Education to the Boards of Trustees of different schools.¹⁴³ Each school or board was required to make its own policies relating to the control and management of the school.¹⁴⁴ Even though this is the case, Rishworth notes that school policy and practice were still determined by national standards imposed by the Education Act and other legislation.¹⁴⁵ The powers placed on principals and boards to control the management of schools¹⁴⁶ were subject to other domestic laws, particularly the New Zealand Bill of Rights Act 1990 (BORA), Human Rights Act 1993 (HRA), and Privacy Act 1993. These pieces of legislation conferred on all persons, including students, rights, freedom of expression, natural justice, and freedom from discrimination.¹⁴⁷ The BORA has been recognised as one of the sources of legal rights relevant to education. Rishworth notes that these rights are abstract and not specific to education. They imply a duty on state actors not to infringe them.¹⁴⁸ Although the provisions of the BORA apply to education, legislators of the Act did not take into account the implications of rights set out therein on the curriculum.¹⁴⁹ Freedom of thought, conscience, and religion,¹⁵⁰ freedom of expression,¹⁵¹ and the rights of minorities¹⁵² are some of the rights in the BORA that are relevant to education. If understood and realised, these rights can ensure that the right to education for refugee children is adequately realised. They can ensure that education is adapted to the needs and interests of refugee children, such as upholding their culture, and they can ensure that they are able to participate in formulating education policies that relate to them. Although this is the case, the New Zealand education system is still not adequately adapted to the needs and interests of refugee children's education in New Zealand.

¹⁴⁰ Section 4.

¹⁴¹ Section 4(4).

¹⁴² Section 4(6).

¹⁴³ Rishworth, "Recent Developments in Education in New Zealand", above n 131, at 34.

¹⁴⁴ Education Act 1989, s 75; and Rishworth, "Recent Developments in Education in New Zealand", above n 131, at 35.

¹⁴⁵ Rishworth, "Recent Developments in Education in New Zealand", above n 131, at 35.

¹⁴⁶ Education Act 1989, ss 75 and 76.

¹⁴⁷ Rishworth, "Recent Developments in Education in New Zealand", above n 131, at 37.

¹⁴⁸ Paul Rishworth "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum" (1993) 3 NZLRFSP 12 at 17.

¹⁴⁹ At 17.

¹⁵⁰ Bill of Rights Act 1990, s 13.

¹⁵¹ Section 14.

¹⁵² Section 20.

The purpose and aims of education at any given period determine the measures taken to provide education. Even though there was recognition of the right to primary and secondary education, and while state schools were seen as vehicles for good education and equality of opportunity,¹⁵³ education was still considered part of the market economy, understood in terms of its effectiveness and profitability in the 1980s. As a result, students were considered consumers, the government an investor, and schools as providers.¹⁵⁴ This approach became less critical, and the focus in the early twenty-first century was more on the need for a curriculum that best met each child's individual needs.¹⁵⁵ As such, it could be argued that while there was capacity for the 1989 Act to make greater provision for refugee children who have unique needs, it did not do so.

The 1989 Act was repealed and replaced by the Education and Training Act 2020. The Act is the current legislation underpinning and regulating the education system. The Act was aimed at updating outdated legislation that had not been amended adequately or not at all. It was noted that some of the provisions and language in the previous Acts could amount to discrimination.¹⁵⁶ According to the Act, the purpose of education is to afford students the skills, knowledge, and capabilities they need to participate fully in the labour market, society, and community.¹⁵⁷ Education is to be aimed at supporting their health, safety, and well-being¹⁵⁸ and assuring the quality of education provided, the institutions and educators that provide and support it¹⁵⁹ while honouring te Tiriti o Waitangi¹⁶⁰ and Māori-Crown relationships.¹⁶¹ In addition to the purpose above, the educational objectives for early childhood education, primary education, and secondary education aligning with a child rights-based approach are set out in the Act. Education should be aimed at helping children attain their educational potential,¹⁶² promoting the development of each child,¹⁶³ and instilling in each child appreciation of the importance of inclusion of different groups and persons with unique characteristics,¹⁶⁴ diversity, cultural knowledge, identity, and different official languages.¹⁶⁵ As in the 1989 Act, students with special educational needs, such as those with disabilities, have the same rights to enrol, attend and

¹⁵³ Ewing, above n 55, at 273.

¹⁵⁴ McGuinness Institute, above n 14, at 16.

¹⁵⁵ At 16.

¹⁵⁶ (5 December 2019) 743 NZPD 15668

¹⁵⁷ Education and Training Act 2020, s 4(a).

¹⁵⁸ Section 4(b).

¹⁵⁹ Section 4(c).

¹⁶⁰ This is a foundational document signed in 1840 by Māori chiefs and representatives of the British Crown to establish a formal partnership between the two groups. See: Michelle Marston "Te Tiriti o Waitangi, School Boards, and Equitable Outcomes: A Bacchian Analysis of Recent Education Policy" (2025) *New Zealand Journal of Educational Studies* 1 at 4.

¹⁶¹ Education and Training Act 2020, s 4(d).

¹⁶² Section 5(4)(a).

¹⁶³ Section 5(4)(b).

¹⁶⁴ Section 5(4)(c)(i).

¹⁶⁵ Section 5(4)(c)(ii).

receive education as others in state schools.¹⁶⁶ It is worth noting that when issuing a statement of national education and learning priorities under s 5, the Minister is to consult different stakeholders and groups.¹⁶⁷ While this is the case, the interests of refugee children are not represented in the groups identified. This reflects the invisibility of refugee children within the education system. This research therefore highlights how this invisibility can impact the realisation of their rights and demonstrates why it is important for refugee children are recognised as a group.

The Act also applies and imposes duties on teachers as key state actors in the education field.¹⁶⁸ Teachers play a critical role in the realisation of the right to education for refugee children who, as has been emphasised, have different needs and interests. Rishworth argues that examining education law requires considering how students' rights are reconciled with schools' powers and responsibilities.¹⁶⁹ He notes that the area of education administration directly relates to children's rights. Children have a right to an education that is suitable for their age and ability. In accordance with the interest theory of rights, the right must be secured by making it someone's duty to cause them to receive it and to ensure that their interest in equality of opportunity is adequately protected.¹⁷⁰ As noted, implementation depends on key actors willing and able to effect change and the support they receive.¹⁷¹ In the context of this research, it is clear that the state has a duty to ensure that education is available to refugee children in an acceptable, accessible, and adaptable manner, thus realising their right to education. While refugee children have the right to education under the Act, it does not clearly state how it should be realised, especially as it relates to children with different needs and interests, like refugees.

With regard to refugee children, there have been studies showing that teachers require additional support and training.¹⁷² It has also been demonstrated how refugee children could be disadvantaged by teachers when upholding universal standards, enforcing neutral rules and providing the same treatment to all children despite the need for their differences to be taken into account.¹⁷³ Although this is the case, there is no requirement in the legislation and within the New Zealand education

¹⁶⁶ Section 34(1).

¹⁶⁷ Section 5(6)(b) provides that the Minister shall make reasonable efforts to consult teachers, principals, governing bodies of schools, early childhood services, parents, disability community, support staff in schools, Māori, and Pacific education organisations.

¹⁶⁸ Rishworth, "Biculturalism, Multiculturalism, the Bill of Rights and the School Curriculum", above n 148, at 18.

¹⁶⁹ Rishworth "Recent Developments in Education in New Zealand", above n 131, at 33.

¹⁷⁰ Jean Ether Floud "A Right to Education: A Test-Case for a Theory of Children's Rights (1976) 62(3) Archives for Philosophy of Law and Social Philosophy 319 at 322.

¹⁷¹ McGuinness Institute, above n 14, at 16.

¹⁷² Louise Humpage "Systemic Racism: Refugee, Resettlement, and Education Policy in New Zealand" (2001) 19(6) *Refugee Canada's Journal on Refuge* 33 at 41.

¹⁷³ Lousie Humpage and Augie Fleras "Systemic Bias and the Marginalisation of Somali Refugee Adolescents within New Zealand Education" (2000) 15(1) *New Zealand Sociology* 46 at 50.

system for teachers to be trained to work with refugee children during their formal training.¹⁷⁴ Jody Lynn McBrien notes that such training is ad hoc and dependent on those providing training to teachers to incorporate such aspects into the training. While teacher training programmes do not specifically require an understanding of refugee students and families, it has been acknowledged that they incorporate learning about diversity and multiculturalism.¹⁷⁵ While multicultural diversity training is provided in institutions of higher learning, many teachers tend not to have prior training or experience in teaching refugee children.¹⁷⁶

An issue that may hinder the realisation of the right to education for refugee children in the Education and Training Act 2020 is that children's rights are not clearly set out therein¹⁷⁷ as outlined in the UNCROC.¹⁷⁸ As a result, actions and measures taken to provide education may not be underpinned by a child rights-based approach, even though such an approach is essential for the adequate realisation of refugee children's right to education. During the enactment process of the Education and Training Act, it was submitted that the reference to children's rights in the proposed legislation was ambiguous and not well defined.¹⁷⁹ The lack of certainty on whether all children's rights are to be realised within the educational system or if the scope is limited to the right to attend school was noted. It was emphasised that the comprehensive inclusion of rights and the relevant Conventions to more explicitly recognise and enshrine children's rights in legislation would provide greater clarity. Ultimately, there would be better compliance with New Zealand's international treaty obligations.¹⁸⁰

Although previous and current legislation provides for education, the main aim of legislation has historically been equality of opportunity. The objective as initially set out was to ensure that everyone regardless of their abilities, socioeconomic status, geographic location has a right to free education that is best fitted and to their fullest potential as noted above.¹⁸¹ This aim relates to refugee children even today. It is a good measure of assessing whether systems were designed to meet the needs of refugee children and to realise their rights from a child's rights perspective. Education should be provided in a non-discriminatory manner regardless of academic ability, financial status, or geographic location. The objective also reflects that education should be in the best interest of the

¹⁷⁴ Jody Lynn McBrien *I Ōrea Te Tuātara Ka Patu Ki Waho: Competing Priorities in the New Zealand Refugee Resettlement Strategy* (Fulbright New Zealand, August 2014) at 16.

¹⁷⁵ At 34.

¹⁷⁶ Jody Lynn McBrien and Maria Hayward "Refugee-Background Students in New Zealand and the United States: Roots and Results of Educational Policies and Practices" (2022) 6(2) *Journal of Global Education and Research* 133 at 142.

¹⁷⁷ Save the Children "Submission to the Education and Workforce Committee on the Education and Training Bill" (19 February 2020) at [4].

¹⁷⁸ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

¹⁷⁹ Save the Children, above n 177, at [4].

¹⁸⁰ At [4].

¹⁸¹ Beeby, above n 52, at 124.

child and be aimed at their full development. It also highlights an intersectional approach, which suggests that the different needs and interests of children have to be taken into account to ensure that the education provided is best suited for each child. While this is a crucial part of children's rights, there has been no explicit recognition of children's rights and the need for such rights to be the basis of education policies and curricula in New Zealand. It is, therefore, worth examining the policies that underpin the education system to determine the extent to which the needs and interests of refugee children have been accommodated.

5.3 Policies Underpinning the New Zealand Education System

As this research seeks to examine the extent to which the rights of refugee children are protected in the New Zealand education system, it is necessary to highlight the general approach to refugee and migrant groups. Considering the various national policies that operated during different periods can further demonstrate whether the education system was flexible to meet the needs of refugee children. Until the 1970s, New Zealand adopted assimilationist policies.¹⁸² They were mainly aimed at Māori and Pākehā.¹⁸³ From the nineteenth century, policies sought to replace Māori beliefs with Pākehā beliefs and systems.¹⁸⁴ By promoting assimilation into New Zealand society, policies fostered the control and exclusion of non-British or non-northern European background people.¹⁸⁵ Schools were responsible for assimilating Māori into the culture and beliefs of Pākehā.¹⁸⁶ Likewise, other groups had to adopt the cultural values and norms of the host country.¹⁸⁷ This echoes New Zealand's approach to accepting refugees in the early 1900s as highlighted in Chapter Two. Resettlement was mainly influenced by economic interests rather than humanitarian reasons.¹⁸⁸ The selection based on refugees' perceived ability to easily assimilate into New Zealand industries.¹⁸⁹ Education policies were more directed to represent Pākehā culture and practices.¹⁹⁰ This would explain why there was

¹⁸² Neda Salahshour "A Critique of New Zealand's Exclusive Approach to Intercultural Education" (2021) 56(1) *New Zealand Journal of Educational Studies* 111 at 115; and Alexander Gillespie and Claire Breen *People, Power, and Law: A New Zealand History* (Bloomsbury Publishing, London, 2022) at 137.

¹⁸³ This is a term used to define a New Zealander of European descent. See John C Moorfield *Te Aka Māori-English, English-Māori Dictionary* (3rd ed, Edify, Whitianga, 2011).

¹⁸⁴ Jones and others, above n 21, at 174; Keith Sullivan *Bicultural Education in Aotearoa/New Zealand: Establishing a Tuiwi Side to the Partnership* (1994) 3(3) *New Zealand Annual Review of Education* 191; and Dowden, above n 13, at 51.

¹⁸⁵ New Zealand Productivity Commission *International Migration to New Zealand: Historical Themes & Trends* (NZPC Working Paper No 2021/04, November 2021) at 1.

¹⁸⁶ Jones and others, above n 21, at 174.

¹⁸⁷ Salahshour, above n 182, at 115.

¹⁸⁸ Ann Beaglehole *Refugee New Zealand: A Nation's Response to Refugees and Asylum Seekers* (Otago University Press, Dunedin, 2013) at 33.

¹⁸⁹ "Memo for Minister of Employment from Director of Employment" National Archives, LI 22/1/27, part 1 (23 December 1947) as cited in Ann Beaglehole *A Small Price to Pay Refugees from Hitler in New Zealand, 1936-46* (Allen & Unwin New Zealand Limited and Department of Internal Affairs, Wellington, 1988) at 6.

¹⁹⁰ Salahshour, above n 182, at 115.

no specific reference to refugee children and how their needs and interests were to be met. Adaptation policies were subsequently introduced, and Tony Dowden describes them as a nuanced version of the assimilation policy.¹⁹¹ Although some elements of Māori culture, such as arts and crafts, were included in the curriculum,¹⁹² native schools were established under this policy.¹⁹³ Some authors argue that, although the assimilation policy existed for more than a century, there were still concerns that the policy existed in the 1990s.¹⁹⁴ Even with the nuanced version of the assimilation policy, there seemed to be no overt acknowledgement of refugees' different needs and interests in education policy.

In the 1960s, integration was considered the official policy, particularly regarding the relation between Māori and Pākehā.¹⁹⁵ It was defined as a combination of Māori and Pākehā aspects to create one nation while keeping Māori culture distinct.¹⁹⁶ Jack Hunn considered integration as a "continuation of Māori culture."¹⁹⁷ Richard Hill notes that integration allowed for some cultural continuity.¹⁹⁸ While it was aimed at equality between the two races,¹⁹⁹ it has been argued that the official policy was still assimilative in nature.²⁰⁰ With regard to education, Hunn pointed out that schools were places where integration could be fostered.²⁰¹

Education policies based on assimilation and integration led to the more recent biculturalism and multiculturalism policies.²⁰² Although multiculturalism was adopted worldwide, it was different as New Zealand had adopted a bicultural policy within a multicultural context.²⁰³ Due to New Zealand's treaty obligations, multiculturalism was understood and applied within a broader bicultural context.²⁰⁴ Policies promoting multiculturalism have been used in education settings to include all ethnic groups,²⁰⁵ and these suggests refugees were included. The 1980s and early 1990s were characterised

¹⁹¹ Dowden, above n 13, at 51.

¹⁹² Judith Simon "Anthropology, 'Native Schooling' and Māori: The Politics of 'Cultural Adaptation' Policies" (1998) (69)(1) *Oceania* 61 at 72.

¹⁹³ Dowden, above n 13, at 51.

¹⁹⁴ Jones and others, above n 21, at 175.

¹⁹⁵ Jack K Hunn *Report on Department of Māori Affairs* (Wellington, 1960) at 15; and Jones and others, above n 21, at 175.

¹⁹⁶ Hunn, above n 195, at 15.

¹⁹⁷ At 15.

¹⁹⁸ Richard S Hill "Fitting Multiculturalism into Biculturalism: Māori-Pasifika Relations in New Zealand from the 1960s" (2010) 57(2) *Ethnohistory* 291 at 295.

¹⁹⁹ David V Williams, *New Zealand and Waitangi Tribunal Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (Waitangi Tribunal, Wellington, 2001) at 88.

²⁰⁰ Richard Hill *Māori and the State: Crown-Māori Relations in New Zealand/Aotearoa, 1950-2000* (Victoria University Press, Wellington, 2009) at 93.

²⁰¹ Hunn, above n 195, at 25; Hill "Fitting Multiculturalism into Biculturalism: Māori-Pasifika Relations in New Zealand from the 1960s.", above n 198, at 295.

²⁰² Jones and others, above n 21, at 198.

²⁰³ Salahshour, above n 182, at 115.

²⁰⁴ Angel Chan "Critical Multiculturalism: The Challenge of Multiculturalism within a New Zealand Bicultural Context - A Chinese Perspective" (2009) 7(1) *International Journal of Equity and Innovation in Early Childhood* 29 at 34.

²⁰⁵ At 30.

by multicultural education. The increased cultural and linguistic diversity in schools was addressed by multicultural education, which was considered instrumental in improving educational experiences and educational success of minority students, especially Māori.²⁰⁶ Although multiculturalism policies promote the consideration of the needs and interests of other minority groups, such as refugees, there has been no formal multiculturalism policy in New Zealand.²⁰⁷

There are different views on education policies, strategies, and the national curriculum based on biculturalism. Although biculturalism focuses on Māori and Pākehā, Justice Edward Durie was of the view that biculturalism and multiculturalism were not mutually exclusive as they addressed different things. He pointed out that biculturalism relates to the relationship between the state's founding cultures, while multiculturalism is the general acceptance of cultural differences.²⁰⁸ It has been argued that biculturalism, its application and its incorporation into policy have resulted in non-European migrants (with the exception of Pasifika communities) being ignored.²⁰⁹ Although this is the case, the current education system underpinned by bicultural policies reflects the different needs of Māori and Pasifika children and their communities. Such policies allow the education system to be flexible in considering different needs and interests in schools. Such flexibility can, therefore, be and must extend to other ethnic communities, such as refugee children. While concerns on biculturalism overshadowing other cultures have some validity, it is important to note that the New Zealand education system incorporates multicultural practices and acknowledges the needs of diverse ethnic communities. For example, the New Zealand Curriculum explicitly identifies cultural diversity as one of its Guiding Principles.²¹⁰ The Education Review Office, which reviews education services, and issues national reports on current education practice,²¹¹ monitors educational outcomes for different ethnic communities.²¹² These efforts may however, still be insufficient to adequately address the different multicultural needs in New Zealand.

²⁰⁶ Stephen May "Accommodating Multiculturalism and Biculturalism in Aotearoa New Zealand: Implications for Language Education" (2002) 8(1) *Waikato Journal of Education* 5 at 10.

²⁰⁷ Wendy Larner "Brokering Citizenship Claims: Neo-liberalism, Biculturalism and Multiculturalism in Aotearoa New Zealand" in Alexandra Dobrowolsky and Evangelia Tastsoglou (eds) *Women, Migration and Citizenship: Making Local, National and Transnational Connections* (Routledge, London, 2006) at 139.

²⁰⁸ Justice Edward Durie "The Rule of Law, Biculturalism, and Multiculturalism" (paper presented to Australasian Law Teachers Association Conference, University of Waikato, July 2005) at 1.

²⁰⁹ Salahshour, above n 182, at 119.

²¹⁰ Ministry of Education *The New Zealand Curriculum* (2015) at 9-10.

²¹¹ See Education and Training Act 2020, s 466; and Education Review Office "How ERO Operates" (04 March 2021) <www.ero.govt.nz>.

²¹² Education Review Office *Education for All Our Children: Embracing Diverse Ethnicities* (2023) at 3.

5.3.1 Policies Specific to Refugee Children

As noted earlier, there is currently no specific piece of legislation or formal policy that guides or underpins action or support for refugee children within the education system in New Zealand. The closest guidance in place for supporting refugee children is provided by the Ministry of Education. It has issued a teacher's Refugee Handbook on how refugee children are to be supported in schools.²¹³ The Handbook has five main sections: preparing the school to welcome refugees, enrolment, planning and delivering a teaching programme, identifying and managing at-risk students, and planning for the transition from school.²¹⁴ The Handbook makes reference to the definition of refugees as provided for in the Refugee Convention,²¹⁵ as well as the various groups of refugees settling in New Zealand. It further identifies the challenges that refugee children may face when transitioning to a new education system in a new country.²¹⁶ These challenges include being introduced to a different education system than what they were familiar with in their home country, and experiencing disruptions in their past education, whilst some children may have no formal education at all. It is often challenging for them to bridge this gap.²¹⁷ Recommendations are provided on how refugee children can be welcomed and how their needs can be identified.²¹⁸ In addition to these, since each school is responsible for formulating its own school policies, the Handbook provides guidelines on how policies and practices for students from refugee backgrounds can be formulated and developed.²¹⁹ There is a significant reliance on senior government officials of the Ministry of Education for support in developing policies that recognise refugee students' needs.²²⁰ Some provide in-school training that equips teachers to understand refugee experiences and the conditions in their home countries.²²¹

Even though the Handbook does not explicitly mention the rights of refugee children, some elements of the rights to and in education can be identified. It is noted that one of the ways their needs can be identified is by considering what the best interest of the child is.²²² It is also acknowledged that the needs of refugee children should be balanced with the availability of appropriate teachers.²²³ Learning

²¹³ See generally Ministry of Education *English for Speakers of Other Languages: Refugee Handbook for Schools* (2003).

²¹⁴ At 2.

²¹⁵ Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention].

²¹⁶ Ministry of Education *English for Speakers of Other Languages: Refugee Handbook for Schools*, above n 213, at 6.

²¹⁷ At 6.

²¹⁸ At 6.

²¹⁹ At 10, 12.

²²⁰ At 12.

²²¹ McBrien and Hayward, above n 176, at 141.

²²² Ministry of Education *English for Speakers of Other Languages: Refugee Handbook for Schools*, above n 213, at 21.

²²³ At 21.

plans for refugee children are to be adapted for refugee students.²²⁴ These suggestions are consistent with the child rights-based approach. Other sources of information that are relied upon in supporting refugee children in schools are provided by the Ministry of Education. The information available is on the refugee journey, support available for students, the needs of refugee students, challenges they face, and funds available to support language learning.²²⁵ Although these are all useful, there could be more focus on the rights of refugee children to ensure that all actions are underpinned by an understanding of the Guiding Principles of the UNCROC.

Although there is no specific policy on education for refugee children in New Zealand, the Refugee Resettlement Strategy has been considered a policy by some scholars.²²⁶ It sets out key areas to be prioritised in the resettlement of refugees and makes reference to education.²²⁷ It provides recommendations that are applicable to all settlement stages, from pre-arrival to social integration at the five-year mark.²²⁸ It is noteworthy that the Ministry of Education mainly issues policy, strategy documents, reports and publications on Māori²²⁹ and Pasifika²³⁰ to support teachers in acquiring intercultural competencies. No formal and consistent guidance on other ethnic communities is provided.²³¹ Even though the laws have developed over the years and have become more flexible so the framework can apply to protect the rights of refugee children, the visibility of refugee children has not changed much. This can be attributed to the fact that refugee children are not explicitly recognised in education policies. This research seeks to enhance the recognition and representation of refugee children and inform the development of more targeted measures that address their unique needs and interests.

5.4 *The Current New Zealand Curriculum*

The main focus of the current education system is to ensure access to future opportunities and student achievement. This is achieved through an emphasis on what is taught, how it is taught and how success is measured.²³² The New Zealand Curriculum²³³ and Te Mātauranga o Aotearoa²³⁴ make up the current National Curriculum, which is aimed at directing and guiding schools to design and review

²²⁴ At 27.

²²⁵ Ministry of Education “Refugee Background Students” (21 December 2020) <www.education.govt.nz>.

²²⁶ McBrien and Hayward, above n 176, at 144.

²²⁷ Immigration New Zealand “Refugee Resettlement Strategy” <www.immigration.govt.nz> at 3 and 7.

²²⁸ McBrien and Hayward, above n 176, at 135.

²²⁹ For example: Ministry of Education *Tātaiako: Cultural Competencies for Teachers of Māori Learners* (2011).

²³⁰ For example: Ministry of Education *Tapasā: Cultural Competencies Framework for Teachers of Pasifika Learners* (2018).

²³¹ Salahshour, above n 182, at 120.

²³² McGuinness Institute, above n 14, at 17.

²³³ Ministry of Education *The New Zealand Curriculum* (2015).

²³⁴ Ministry of Education *Te Mātauranga o Aotearoa* (2017).

their curriculum. The New Zealand Curriculum is the main framework for the provision of both primary and secondary education in English medium schools.²³⁵ It is described as:²³⁶

a statement of official policy relating to teaching and learning in English-medium New Zealand schools. Its principal function is to set the direction for student learning and to provide guidance for schools as they design and review their curriculum.

The framework sets out principles that should underpin all curricula and school decisions. One of the principles relates to inclusion, which requires recognising and affirming students' different identities, languages, and talents. It also acknowledges that their different needs are to be addressed.²³⁷ It has been noted earlier in Chapter Three that while refugee children have needs and interests in common with other children, refugee children, have different interests that should be protected.²³⁸ The New Zealand Curriculum operates on the premise that it is "non-sexist, non-racist, and non-discriminatory."²³⁹ The curriculum requires education to be tailored to meet the different needs of communities and the distinct interests of students.²⁴⁰ Though not explicitly mentioned, since refugee children have different needs and interests, the curriculum requires schools to acknowledge and address their different needs. While the curriculum is not phrased from a rights perspective, it addresses components of intersectionality, which, when considered in the context of children's rights, require taking into account children's different needs and interests. Other principles of the curriculum include achievement of personal excellence, acknowledgement of the Treaty of Waitangi, cultural diversity and values of everyone, and community engagement, among others.²⁴¹ It has been argued, however, that the curriculum focuses more on academic progression.²⁴² She notes that while there have been efforts to widen the curriculum scope, these attempts are disrupted by the focus on economic demands for schools to produce suitably qualified individuals.²⁴³

The Tomorrow's Schools Independent Taskforce was assigned, in 2018, to review the compulsory education system in New Zealand to ensure that the system promotes equity and excellence for all children.²⁴⁴ The purpose of education was also outlined in the report of the taskforce, so that education is aimed at reflecting biculturalism, genuine equity and partnership between Māori, Pākehā and

²³⁵ Ministry of Education *The New Zealand Curriculum*, above n 233.

²³⁶ At 6.

²³⁷ At 9.

²³⁸ Chapter Three at 69.

²³⁹ Ministry of Education *The New Zealand Curriculum*, above n 233, at 9.

²⁴⁰ McGuinness Institute, above n 14, at 3.

²⁴¹ Ministry of Education *The New Zealand Curriculum*, above n 233, at 9.

²⁴² McGuinness Institute, above n 14, at 3

²⁴³ At 3.

²⁴⁴ Tomorrow's Schools Independent Taskforce *Our Schooling Futures: Stronger Together Whina Nga Kura Tuatinitini* (Ministry of Education, Wellington, 2018) at 8.

Tauiwi.²⁴⁵ It seeks to ensure that children’s rights and interests are fairly considered when developing and evaluating education policies. In addition to this, education is also aimed at ensuring that the best interests of the most disadvantaged and marginalised students are prioritised when resources are allocated, meeting the needs and potential of learners and communities from diverse backgrounds.²⁴⁶ The task force was of the view that the education system was not well equipped to address a series of issues that were regarded as significant.²⁴⁷ These included the performance gap between disadvantaged students and others,²⁴⁸ the varied quality of education and performance of students, and inconsistent practice in the provision of education.²⁴⁹ It also acknowledged that the education system is not suited for particular groups of students, noting that they were not well served. The groups included Māori, Pacific, new migrants, and refugee children.²⁵⁰ It is noteworthy that there is no specific mention of how the needs and interests of refugee children have not been met in the report. As noted, refugee children tend to be categorised with other migrants. Since they have different experiences, needs, and interests, their rights and interests may be overlooked. This research seeks to address this gap.

Although children’s needs have been acknowledged and considered throughout the development of the education system, there is a lack of consideration of the complexities of the intersecting factors relating to refugee children. As Nicole Etherington and Linda Baker emphasise, intersectionality is instrumental in facilitating a more in-depth understanding of children’s diverse experiences required for effective policies.²⁵¹ Recognising the different needs of refugee children in educational settings can thus strengthen measures taken to ensure their right to education is adequately realised. However, the reports that have been examined show that there are no policies, strategies, or guidelines on how the needs and interests of refugee children can be addressed, nor do they deal with factors that hinder the enjoyment of the right to primary and secondary education for refugee children.

With regard to early childhood education, Rosslyn Noonan has noted that:²⁵²

²⁴⁵ Tauiwi is the Māori term for a foreigner. “Tauiwi” Te Aka Māori Dictionary <www.maoridictionary.co.nz>.

²⁴⁶ Tomorrow’s Schools Independent Taskforce, above n 244, at 33.

²⁴⁷ At 31.

²⁴⁸ At 29.

²⁴⁹ At 29.

²⁵⁰ At 29.

²⁵¹ Nicole Etherington and Linda Baker “From “Buzzword” to Best Practice: Applying Intersectionality to Children Exposed to Intimate Partner Violence” (2018) 19(1) *Trauma, Violence & Abuse* 58.

²⁵² Rosslyn Noonan “Early Childhood Education—A Child’s Right?” (paper presented to the Early Childhood Education for A Democratic Society Conference, Wellington, October 2001) at 67.

The early childhood sector in New Zealand has a crucial role to play in ensuring that our children grow up celebrating diversity, respecting difference, and with the confidence to feel at ease with ‘others’ rather than to fear them.

The current early childhood curriculum, *Te Whāriki*,²⁵³ was first introduced in 1996²⁵⁴ and was based on Māori and Western principles of learning and teaching. The curriculum also recognises children as rights-holders.²⁵⁵ Although the introduction of the new curriculum presented a positive development, it was observed that due to political influence and the nature of the curriculum, education lacked neutrality. Some tensions between practice and theoretical knowledge were identified in the application of *Te Whāriki*.²⁵⁶ Despite *Te Whāriki* being championed internationally, Sarah Te One and Jane Ewen raise valid questions regarding the implementation of the right to education in New Zealand and whether the goals and objectives set out in *Te Whāriki* can be met.²⁵⁷ These questions are also applicable to primary and secondary education. They consider whether key personnel working with, and caring for, children take into account the rights of all children, particularly the right to reach their potential, rights relating to their language, identity and culture and whether they are recognised as “capable, competent and actively contributing to their worlds?”²⁵⁸ How children are viewed can be a huge barrier to realising their rights, as has been demonstrated throughout the research, particularly when children are not seen as active social actors, as suggested by the sociology of childhood and as rights-holders.

5.5 *New Zealand’s Compliance with International law*

International treaties ratified by New Zealand also form part of the legal framework governing the provision of education to refugee children. The right to education is set out in the UDHR,²⁵⁹ which New Zealand adopted in 1948. As noted in the previous chapter, the content of the right to education is extensively set out in the ICESCR,²⁶⁰ ratified by New Zealand in 1978. The UNCROC was ratified in 1993, which also sets out children’s rights to and in education. The principles of equality and discrimination are key aspects of realising the right to education, and New Zealand ratified both the

²⁵³ Ministry of Education *Te Whāriki* (2017).

²⁵⁴ Ministry of Education *Te Whāriki* (1996).

²⁵⁵ Sarah Te One and Jane Ewens “*Te Whāriki, 2007: A Refreshed Rallying Point for the Early Childhood Sector in Aotearoa New Zealand*” in Alexandra C Gunn and Joce Nuttall (eds) *Weaving to Whāriki: Aotearoa New Zealand’s Early Childhood Curriculum Document in Theory and Practice* (3rd ed, NZCER Press, Wellington, 2019) at 7.

²⁵⁶ At 10.

²⁵⁷ At 19.

²⁵⁸ At 19.

²⁵⁹ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR].

²⁶⁰ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 03 January 1976) [ICESCR].

CADE²⁶¹ and ICERD.²⁶² While New Zealand has ratified the different treaties and documents that provide for the right to education for children, including refugee children, adequate implementation is not always guaranteed and may be different.

Despite the right to education being provided for in domestic legislation, various monitoring bodies have issued observations and recommendations regarding the implementation of the right to education in New Zealand over the years. The principles set out in the national curriculum were reiterated in the first Universal Periodic Review (UPR). It recommended that more action be taken to address racism, discrimination, and inequalities in education. This related mainly to Māori, Pasifika and migrants, with no specific mention of refugee children.²⁶³ It was emphasised that national plans on issues such as health and education should meet the disparities and inequalities affecting vulnerable groups comprising children, migrants, and ethnic and Indigenous people.²⁶⁴ In subsequent reviews, New Zealand has been urged to emphasise initiatives that promote children's rights, particularly in education, eliminating child poverty, and addressing the needs of vulnerable and at-risk children.²⁶⁵ While there is no mention of refugee children, in particular, it has been shown in this thesis that they also have unique needs to be met.

New Zealand reported that it had a high-quality education system²⁶⁶ but could attain more equitable and good outcomes for all children.²⁶⁷ It was acknowledged that New Zealand's diverse society, which is comprised of different abilities, religious beliefs, ethnic groups, and income levels, was reflected in the education system.²⁶⁸ Furthermore, it has been recognised that the New Zealand education system is progressively evolving to accommodate the diverse needs of children in education.²⁶⁹ In addition, New Zealand recognised the challenges refugees face in integrating and

²⁶¹ Convention Against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962) [CADE].

²⁶² International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 04 January 1969) [ICERD].

²⁶³ *Report of the Working Group on the Universal Periodic Review, New Zealand* UN Doc A/HRC/12/8 (4 June 2009) at [27], [33], [39], [40], [47] and [60].

²⁶⁴ *Report of the Working Group on the Universal Periodic Review, New Zealand* UN Doc A/HRC/26/3 (7 April 2014) at [128.69] and [128.80].

²⁶⁵ At [128.55]; and *Report of the Working Group on the Universal Periodic Review, New Zealand* UN Doc A/HRC/57/4 (11 June 2024) at [132.207].

²⁶⁶ It reported that the curriculum is tailored to protect against sexism, racism and discrimination, schools are urged to recognise the different identities, languages, and abilities of all students, educational outcomes are improved through culturally responsive teaching, and efforts are being made to address racism and bias. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, New Zealand* UN Doc A/HRC/WG.6/32/NZL/1 (13 November 2018) at [58] and [64].

²⁶⁷ *Report of the Working Group on the Universal Periodic Review, Zealand* UN Doc A/HRC/41/4 (1 April 2019) at [13].

²⁶⁸ *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, New Zealand*, above n 266, at [57].

²⁶⁹ *National Report Submitted Pursuant to Human Rights Council Resolutions 5/1 and 16/21 New Zealand* UN Doc A/HRC/WG.6/46/NZL/1 (18 March 2024) at [135].

participating in society and accessing services.²⁷⁰ It is worth pointing out, nonetheless, that there was no specific reporting on refugee children. Efforts have focused more on the needs of Māori and Pacific children, students with disabilities, and those identified as needing extra learning support.²⁷¹ The need for New Zealand to address problems and inequalities in education among vulnerable groups of women, children, migrants, and ethnic and Indigenous people was emphasised.²⁷² It was further urged to remove barriers to access to free education²⁷³ and to combat discrimination against migrants, refugees, and asylum seekers.²⁷⁴ In its most recent review, it was recommended that a strategy be developed to address social inequalities in areas such as education, in order to better support groups experiencing disproportionately adverse outcomes.²⁷⁵ Other recommendations included enhancing policies and initiatives designed to reduce inequalities in areas such as education by allocating more funding and implementing targeted programmes for ethnic minority groups,²⁷⁶ and incorporating the right to education in domestic legislation.²⁷⁷

The CESCR has also previously raised concerns regarding access to education and high dropout rates for Māori, disadvantaged and marginalised groups, as well as inequalities arising between Māori and non-Māori.²⁷⁸ The CESCR has consequently urged New Zealand to provide disaggregated data comparing enrolment and dropout rates between Māori children and disadvantaged and marginalised groups.²⁷⁹ This is important as disaggregated data can highlight disparities in the realisation of rights and therefore instrumental in monitoring and implementation of these rights.²⁸⁰ This is particularly important for the adequate realisation of the rights of refugee children who tend to be invisible within the education monitoring system.

The CESCR has acknowledged the different measures taken by New Zealand to promote the realisation of economic, social, and cultural rights, particularly the development and implementation of the new education curriculum. The education system was said to be more responsive to the different needs and circumstances of students.²⁸¹ Despite this, concerns were raised regarding the

²⁷⁰ At [37].

²⁷¹ *Report of the Working Group on the Universal Periodic Review, New Zealand*, above n 267, at [13].

²⁷² *Report of the Working Group on the Universal Periodic Review, New Zealand*, above n 264, at [128.69].

²⁷³ At [128.140].

²⁷⁴ At [80].

²⁷⁵ *Report of the Working Group on the Universal Periodic Review, New Zealand*, above n 265, at [132.119].

²⁷⁶ At [132.138] and [132.122].

²⁷⁷ At [132.138], [132.139] and [132.140].

²⁷⁸ CESCR *Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand* UN Doc E/C.12/1/Add.88 (26 June 2003) at [20].

²⁷⁹ At [36].

²⁸⁰ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [48].

²⁸¹ CESCR *Concluding Observations of the Committee on Economic, Social and Cultural Rights: New Zealand* UN Doc E/C.12/NZL/CO/3 (31 May 2012) at [5(c)].

disadvantages that Māori and Pasifika continue to face in the enjoyment of their rights, including education. The CESCR has also urged New Zealand to improve the education system through the development of culturally appropriate education, setting targets for better outcomes for students, and ensuring that qualified teachers are available.²⁸² The CESCR has also urged the state to increase funding for all children to have adequate access to education.²⁸³ The existence of access and availability issues indicates that, on a general level, the right to education is still not adequately realised. While these recommendations relate directly to Māori and Pasifika students, they can be useful when applied to refugee children. New Zealand has recently reported on education initiatives and programmes to improve education outcomes, including for Māori, Pacific and children with disabilities.²⁸⁴ However, there remains an absence of specific reporting or targeted measures to address the educational needs of refugee children.

The Committee on the Elimination of Racial Discrimination (CERD) has also commented on rights to accessing education and rights to be enjoyed within educational settings. It commended New Zealand for measures taken to ensure the realisation of human rights through the establishment of policies, one of them being the provision of English language support in schools for refugee background and migrant students.²⁸⁵ Like the CESCR, much of the recommendations on education by the CERD relate to Māori and Pasifika children.²⁸⁶ In the past, the CERD has noted with concern the lack of information or indicators showing the improvements in educational outcomes for Māori and Pasifika students.²⁸⁷ The same can be said for refugee children owing to the lack of disaggregated data and the non-reporting on refugee children. This presents a barrier to the realisation of their right to education.

The CRC has also, on several occasions, commented on the right to education for children, with a few remarks relating specifically to refugee children. These remarks are particularly important as they can indicate the extent to which the right to education is realised in New Zealand, whether the legal framework is flexible to accommodate the needs and interests of refugee children in education and

²⁸² CESCR *Concluding Observations on the Fourth Periodic Report of New Zealand* UN Doc E/C.12/NZL/CO/4 (1 May 2018) at [49].

²⁸³ At [49(c)].

²⁸⁴ CESCR *Fifth Periodic Report Submitted by New Zealand under Articles 16 and 17 of the Covenant* UN Doc E/C.12/NZL/5 (29 April 2025) at [49].

²⁸⁵ UN Committee on the Elimination of Racial Discrimination (CERD) *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand* UN Doc CERD/C/NZL/CO/21-22 (22 September 2017) at [4(d)].

²⁸⁶ CERD *Concluding Observations on the Eighteenth to the Twentieth Periodic Reports of New Zealand* UN Doc CERD/C/NZL/CO/18-20 (17 April 2013) at [15]; and CERD *Combined Twenty-Third and Twenty-Fourth Periodic Reports Submitted by New Zealand under Article 9 of the Convention, Due in 2021* UN Doc CERD/C/NZL/23-24 (15 February 2022) at [15], [190], and [233-234].

²⁸⁷ CERD *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand*, above n 285, at [37-38].

how this may affect their enjoyment of the right to education. In 2003, the CRC recognised services provided by the state to ensure the integration of refugee children and equal opportunities afforded to refugee children but raised concerns that the activities undertaken were not fully effective in achieving integration.²⁸⁸ It further recommended that New Zealand continue its efforts to integrate refugee children into society and undertake an evaluation of current programmes, particularly language training, to improve their effectiveness.²⁸⁹ This indicates that even if there is some provision for refugee children in domestic law and policy, integration is not always effective and, as such, should be evaluated. The effectiveness of integration programmes is currently measured through the outcomes set out in the Refugee Resettlement Strategy.²⁹⁰ The educational goal is measured against the proportion of secondary school refugee students attaining NCEA level two for at least five years, as pointed out in Chapter One.²⁹¹ The same goal applies to all New Zealand students, and this may result in refugee children in other age groups and those who have not met the set standard within the timeframe being overlooked.²⁹² In light of the elements of the right to education discussed in the previous chapter, this measure does not adequately assess the extent to which education is accessible, adaptable, available, and acceptable. This makes the determination of whether the right to education for refugee children is being realised challenging.

There was also concern about key personnel working with children not being well informed on the UNCROC and a rights-based approach.²⁹³ The lack of systemic education or training programmes on the UNCROC for professionals working with children and young people by the government was highlighted.²⁹⁴ The issue of teacher training is crucial to the adequate enjoyment of the right to education. It has been noted that the quality of the education teachers provide is associated with educational outcomes, especially in primary and secondary schooling. It has been argued that education outcomes are limited by teacher quality unless resources are increased or changes are made to how education is delivered.²⁹⁵ The lack of systemic training on children's rights can, therefore, lower the yardstick for education provided to refugee children. In light of the above, the CRC has recommended that there be systemic education and training for professionals as well as children.²⁹⁶

²⁸⁸ CRC *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: New Zealand* UN Doc CRC/C/15/Add.216 (27 October 2003) at [45].

²⁸⁹ At [46].

²⁹⁰ Immigration New Zealand "Refugee Resettlement Strategy", above n 227.

²⁹¹ See Chapter One footnote 150 and accompanying text.

²⁹² McBrien and Hayward, above n 176, at 37.

²⁹³ CRC *Consideration of Reports Submitted By States Parties Under Article 44 of the Convention, Concluding Observations: New Zealand*, above n 288, at [18].

²⁹⁴ Action for Children and Youth Aotearoa Incorporated (ACYA) *Children and Youth in Aotearoa 2010, New Zealand Non-Governmental Organisations Alternative Periodic Report to the United Nations Committee on the Rights of the Child* (June 2010) at 7.

²⁹⁵ McGuinness Institute, above n 14, at 3.

²⁹⁶ CRC *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: New Zealand*, above n 288, at [19(b)].

In 2011, the CRC recommended that New Zealand develop and strengthen systematic training on responsibilities that all professional groups²⁹⁷ working for and with children, including the state sector and local government officials, have under the UNCROC. It noted that this could be achieved through the inclusion of human rights education in the official curriculum at all levels of education and in professional training.²⁹⁸ It is, therefore, essential to consider whether teachers are being trained on the rights of refugee children and how they should be implemented. This question will be explored in the next chapter.

Further comments and recommendations have been issued regarding the rights in and to education in recent years. The lack of adequate respect for the views of children within different settings, such as schools, is an area of concern. The CRC identified the need to establish means for children to express their views. It noted that children's views were not adequately considered and respected when laws and policies affecting them were formulated and during judicial and administrative proceedings.²⁹⁹ The CRC recommended that New Zealand promote, facilitate and implement, in legislation as well as in practice, within the family, schools and the community as well as in institutions and administrative and judicial proceedings, the principle of respect for the views of the child.³⁰⁰ In its most recent Concluding Observations, the CRC urged the state to evaluate the effectiveness of legislative provisions outlined in the Education and Training Act 2020, to ensure that children's views are duly heard and adequately considered in matters impacting their education.³⁰¹ These comments and recommendations reflect that children are not always seen as active social actors and rights-holders. This has evidently impacted the realisation of their rights.

New Zealand was also urged to continue strengthening its efforts to reduce the adverse effects of children's ethnic (cultural, regional) and social background on their enrolment and attendance in school.³⁰² This relates to the content of the right to education discussed in the previous section and demonstrates the shortfalls in domestic legislation. Although there is no specific mention of refugee children, these shortfalls impact refugee children as well as their enjoyment of the right to education. In addition to this, the CRC has also emphasised the need for New Zealand to take steps against discrimination through strengthening measures combating negative attitudes among the public and

²⁹⁷ including teachers, health personnel and social workers.

²⁹⁸ CRC *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: New Zealand* UN Doc CRC/C/NZL/CO/3-4 (11 April 2011) at [21].

²⁹⁹ At [26].

³⁰⁰ At [27(a)].

³⁰¹ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/6 (28 February 2023) at [19(a)]-[19(b)].

³⁰² CRC *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: New Zealand*, above n 298, at [46(b)].

other preventive activities against discrimination for the benefit of children in vulnerable situations, including refugee children, among other groups of children.³⁰³ The need to address discrimination was reaffirmed in 2023 and the CRC urged New Zealand to collect disaggregated data on disparities faced by children.³⁰⁴

One of the elements of the right to education is availability. The CRC recommended that particular attention be paid to the full implementation of art 4³⁰⁵ by prioritising budgetary allocations to ensure the implementation of the economic, social and cultural rights of children, particularly those belonging to economically disadvantaged groups, to the maximum extent of available resources.³⁰⁶ The CRC further urged New Zealand to gather disaggregated data on budget allocations for children and to systematically assess the impact of all its economic policy initiatives on children.³⁰⁷ In this context, it has highlighted the need for strengthening the child rights-based approach in the development of the state budget.³⁰⁸ While there have been several recommendations on how education can be made available to children, research shows that budgetary allocations for refugee children in New Zealand are not always adequate,³⁰⁹ providing further evidence of the challenges this study seeks to address,

There has been an emphasis on the need for domestic legislation relating to children to comply with the UNCROC.³¹⁰ The CRC recommended the implementation of a comprehensive children's code that complies with all the provisions of the Convention and ensures that new legislation is consistent with the principles of the Convention.³¹¹ It has also recommended that New Zealand ensure children's rights are realised in accordance with the UNCROC.³¹² It is, thus, necessary to examine whether the current Education and Training Act 2020 complies with the provisions of the UNCROC. The earlier Education Act 1989 did not incorporate rights set out in the UNCROC like other legislation affecting children. The Education Act 1989 had no statutory objects or principles.³¹³ The CRC recommended

³⁰³ CRC *Concluding Observations on the Fifth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/5 (21 October 2016).

³⁰⁴ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 301, at [16].

³⁰⁵ UNCROC, above n 178, at (2): provides that states parties shall with regard to economic, social, and cultural rights, undertake all appropriate legislative, administrative, and other measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

³⁰⁶ CRC *Concluding Observations on the Fifth Periodic Report of New Zealand*, above n 303, at [15].

³⁰⁷ At [15].

³⁰⁸ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 301, at [10(b)].

³⁰⁹ Chris Mahony and others "Aspirational Yet Precarious: Compliance of New Zealand Refugee Settlement Policy with International Human Rights Obligations" (2017) 3 *International Journal of Migration and Border Studies* 5.

³¹⁰ CRC *Concluding Observations on the Fifth Periodic Report of New Zealand*, above n 303, at [6].

³¹¹ At [6].

³¹² CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 301, at [5].

³¹³ Sarah Te One *A Review of New Zealand's Education in Light of the Convention on the Rights of the Child* (Provisional Working Paper, Action for Children and Youth Aotearoa Incorporated, Wellington, 2007) at 10.

that the state review the Education Act 1989 to ensure it complies with the provisions and principles of the Convention. The review was to be made in consultation with children to ensure that budget allocations in education are adequate, sufficient, and protected in case of economic crisis or other financial factors.³¹⁴ The 2023 Concluding Observations highlighted the need for assessing legislative amendments in the Education and Training Act 2020 that require consultation with children on matters affecting them.³¹⁵ Furthermore, the CRC recommended strengthening children's ability to have meaningful input in educational decisions affecting them and establishing accessible, independent dispute resolution mechanisms.³¹⁶ Despite comments and recommendations, the current Education and Training Act 2020 still does not incorporate or reference the UNCROC. As such, the domestic legislative framework for education cannot adequately protect and realise refugee children's rights.

As pointed out in the introductory chapter, Louise Humpage notes that even though New Zealand has been recognised internationally for providing quality compulsory education, access to compulsory education in New Zealand by a refugee child may still be affected by limited access to information technology, English language ability, gender, geographic region, level of disability and a school's response to bullying and discrimination.³¹⁷ While these issues are prevalent, no specific laws and policies underpin the support provided to refugee children as they tend to be considered in the same group as other minority groups. Therefore, this demonstrates that there is a need for targeted measures to ensure that the right to education for refugee children in New Zealand is adequately realised.

5.6 Conclusion

It is quite clear that for the longest time, New Zealand has sought to provide education that caters to the different needs and interests of children. Even though the education system seems to be based on principles that align with a child rights-based approach through an intersectional lens, the interpretation and application of the laws do not result in refugee children being viewed and treated as rights-holders and as social actors who take part in matters affecting them. In the early history of education in New Zealand, equality of opportunity and equity were highlighted as some key aspects of an ideal education system. The development of the education system has thus been centred around that through the years. Although this is the case, there seems to be no development or legal reforms on the improvement of the realisation of the rights of refugee children, mainly on how rights to and

³¹⁴ CRC *Concluding Observations on the Fifth Periodic Report of New Zealand*, above n 303, at [37].

³¹⁵ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 301, at [19(a)].

³¹⁶ At [37(a)].

³¹⁷ Louise Humpage "Refugee Protection and Settlement Policy in New Zealand" in Steven Ratuva (ed) *The Palgrave Handbook of Ethnicity* (Springer Nature, Singapore, 2019) at 1703.

in education can be better realised. Some of the issues raised decades ago are still prevalent for children in general, and these are even more challenging for refugee children. The education laws do not explicitly identify refugee children as a group with special needs nor provide guidelines on how they should be protected. They are drafted broadly to allow for the interpretation of rights to include them.

International law mechanisms demonstrate that although the right to education is provided for in domestic legislation, more is required to realise the right to education than what is currently offered. With regards to refugee children, it is not clear how education is to be availed and adapted to their needs. It has been noted that individual schools are governed by their board of trustees, which are at liberty to make their own policies within the broader national curriculum. Although equity and diversity form part of the values and principles, there is a lack of targeted measures, guidance, or a set of laws on how these can be translated to ensure the rights of refugee children are adequately protected.

The historical and doctrinal developments examined in this chapter help explain the continuing invisibility of refugee children within legal and policy frameworks. Both immigration law and policy, and the education system, developed along trajectories that did not prioritise refugee children as distinct rights-holders. Refugee protection in New Zealand has historically been administered through immigration frameworks shaped primarily around the experiences of adult refugees, while the education system evolved largely in response to economic priorities and assimilationist objectives. When these two frameworks intersect, the particular needs and rights of refugee children tend to be overlooked. The limited attention afforded to refugee children within education law and policy is therefore not accidental. Rather, it reflects long-standing structural patterns that have failed to recognise refugee children as rights-holders. This analysis highlights the limits of approaches that prioritise economic objectives without explicit attention to children's rights. A child rights-based approach is therefore important, as it provides a framework through which economic and policy considerations can be reconciled with children's rights obligations, helping to address the invisibility of refugee children identified in this chapter.

6. SNAPSHOT OF THE IMPLEMENTATION OF THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN IN NEW ZEALAND

6.1 Introduction

While New Zealand has laws and policies that ensure the general realisation of the right to education, it is currently not clear how the realisation of the right to education, particularly for refugee children, is monitored and realised in New Zealand. As demonstrated in the previous chapter, there are no specific laws and policies governing the provision of education to refugee children. Empirical research is instrumental in providing insight into the extent to which the rights of refugee children in education are understood and realised. Although there is a plethora of empirical studies on the experiences and interventions for refugee children in New Zealand,¹ there is limited research on how these experiences relate to their right to education and how the interventions enhance or limit the realisation of the right. As such, the main aim of this research is to examine how the current New Zealand legal framework implements international human rights law obligations in education and how it underpins the provision of education to refugee children.

To supplement the examination of laws and policies, this chapter will present findings from the empirical data collected on how the right to education for refugees is understood and realised by different key stakeholders at the planning, implementation, and monitoring stages of the right. This aligns with the objective of the thesis of considering and assessing New Zealand's performance in implementing the right to education for refugee children. Furthermore, the empirical research provides pointers in addressing some of the other objectives,² which include determining if there is a need for legal and policy reform relating to the resettlement and integration of refugee children in

¹ Linda Mitchell and Olivera Kamenarac "Refugee Children and Families' Positioning within Resettlement and Early Childhood Education Policies in Aotearoa New Zealand" (2022) 17(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 224; also examines policies and how they are understood; Richard Hamilton and others *Literature Review: Interventions for Refugee Children in New Zealand Schools: Models, Methods, and Best Practice* (Ministry of Education, June 2000); Linda Mitchell and Amondi Ouko "Experiences of Congolese Refugee Families in New Zealand: Challenges and Possibilities for Early Childhood Provision" (2012) 37(1) *Australasian Journal of Early Childhood* 99; Richard Hamilton and Dennis Moore (eds) *Educational Interventions for Refugee Children: Theoretical Perspectives and Implementing Best Practice* (Routledge, London 2003); Andrew Butcher, Paul Spoonley and Andrew Drago Trlin *Being Accepted: The Experience of Discrimination and Social Exclusion by Immigrants and Refugees in New Zealand* (Massey University, Palmerston North, 2006); and Nadia A Charania and others "Exploring Immunisation Inequities Among Migrant and Refugee Children in New Zealand" (2018) 14(12) *Human Vaccines & Immunotherapeutics* 3026.

² The other objectives are to provide a child-centred, rights-based framework for delivering educational services and supports for the resettlement and integration of refugee children, to ensure there is a holistic approach to the educational resettlement of refugee children.

relation to education and establishing how best to measure and monitor the realisation of the right to education necessary for the resettlement and integration of refugee children in New Zealand.

The chapter first outlines the research design and explains how many participants were selected, how, and why they were selected. The data collected will be analysed and presented in terms of five main themes, namely, general understanding of the right to education for refugee children, factors enhancing the realisation of the right, challenges faced by refugee children and service providers, barriers to the enjoyment of the right to education, and changes and improvements required to enhance the realisation of the right. These were designed to answer all the research questions.

6.2 *Research Design*

The methodology adopted in this research is a combination of both doctrinal research and empirical research. Doctrinal research was the basis of the previous chapters, which indicate that no specific domestic laws govern the provision of the right to education for refugee children. It is also apparent that there is a lack of research on how and whether the right to education for refugee children is implemented and monitored. Empirical research was undertaken because it has been noted that qualitative research (which includes semi-structured interviews) mainly focuses on identifying the existence or absence of something and not on “measuring the degree to which some feature is present” as intended by quantitative research.³ As this research is focused on a smaller group of refugee children in a larger population, qualitative research is the most suitable. This is also because qualitative research is not dependent on quantity but on understanding trends and their meanings.⁴ It has been argued that it is important to understand the social phenomena of a particular group before quantifying each group. Martin Bauer, George Gaskell and Nicholas Allum give the below example to emphasise this:⁵

If one wants to know the colour distribution in a field of flowers, one first needs to establish the set of colours that are in the field; then one can start counting the flowers of a particular colour. The same is true for social facts.

³ Jerome Kirk and Marc L Miller *Reliability and Validity in Qualitative Research, Beverly Hills* (Sage Publications, London, 1986) at 1.

⁴ Lisa Webley “Qualitative Approaches to Empirical Legal Research” in Peter Cane and Herbert Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010) at 928.

⁵ Martin W Bauer, George Gaskell and Nicholas C Allum *Qualitative Researching with Text, Image and Sounds: A Practical Handbook* (Sage Publications, London, 2000) at 9.

Likewise, empirical research was aimed at understanding how key actors and stakeholders understand the right to education for refugee children and how the right to education is being realised. As Lisa Webley notes, qualitative research should be used to obtain an understanding of “individual’s experiences and behaviour, structures and organisations, or other social phenomena.”⁶ Semi-structured interviews with professionals and organisations working with refugee children were thus undertaken.⁷ Such interviews are instrumental in gaining a deeper meaning of issues regardless of the number of participants.⁸ The qualitative research undertaken helped identify gaps in the education system and how the legal and policy frameworks can be improved to ensure the better realisation of the rights of refugee children in education. The interviews were conducted with teachers, representatives from non-government organisations, and experts in different fields. As different groups of participants were approached, the interview questions varied slightly as they were tailored for their roles in realising the right to education.⁹ Even though the questions differed, they were similar in that they were designed to highlight the general understanding of the rights of refugee children and the right to education by all participants. The questions were also designed to highlight issues that hinder the realisation of the right to education for refugee children and determine ways in which it could be enhanced. The data collected was transcribed and coded according to the themes mentioned above using NVivo software.

6.2.1 Selection of Participants

The selection of participants was mainly based on the objectives of this research, as mentioned above. Schools that enrol or have enrolled refugee students were identified and interview requests were sent to principals of the various schools for interviews with teachers. The selection was also based on the different geographical areas where refugees resettled. This was to identify any intersecting factors that may result in any differences in how refugee children experience education. In selecting school teachers and to preserve their confidentiality, the principals were asked for a list of teachers and their contact details. The intention was to select participants from the list provided randomly. There were only a few participants to choose from owing to the limited number of teachers working specifically with refugee children at the various schools. The aim was to interview twelve teachers, three being from preschools, three primary schools, three intermediate schools and three secondary schools. This was to ensure that the data collected would relate to education at the different stages of childhood.

⁶ Webley, above n 4, at 934.

⁷ Ethics approval for conducting interviews was obtained from the University of Waikato’s Division of Arts, Law, Psychology and Social Sciences Human Research Ethics Committee: see Appendix 10.1

⁸ Webley, above n 4, at 933.

⁹ All variations of interview questions were also approved by the University of Waikato’s Division of Arts, Law, Psychology and Social Sciences Human Research Ethics Committee.

This was especially important, bearing in mind that one of the problems identified at the onset of the research was that the Refugee Resettlement Strategy had a narrow scope, with the only success target relating to refugee school leavers receiving NCEA level two.¹⁰ It has been noted that the target does not account for other stages of education, and, makes it difficult to determine how other refugee children are doing. It was anticipated that the information gathered would fill this gap to a certain degree. The interviews held were centred around how teachers understand and implement the right to education of refugee children and to gain further insight into their opinions, knowledge, and experience of the right to education and any barriers to the provision of education for refugee children.

Non-governmental organisations in different geographical areas working closely with the government and schools to ensure refugee that children are well integrated into society were also approached. The selection criteria were similar to those of teachers and comprised only organisations responsible for implementing and monitoring the realisation of the rights of refugee children in education. This included different local community groups and international organisations based in New Zealand. The interviews were centred around obtaining greater insight into how they understand the right to education, their role in facilitating the provision of education to refugee children and any barriers faced in securing education for them.

Government officials from the Ministry of Education, being senior advisors providing refugee and migrant support, were approached to obtain a detailed account of how the state understands the right to education as it relates to refugee children and an understanding of what their responsibilities are in relation to the provision of the right to education under international and domestic legal obligations. This was crucial as the doctrinal research demonstrates there is a lot of reliance on the advisors for support with education provided to refugee children.¹¹ Empirical data was sought to obtain more information and to supplement the existing literature. While the data from interviews with senior advisors on education policies and the extent to which they are designed to cater for refugee children would have enriched the research, these could not be secured. As advised by one of the senior advisors, the Ministry of Education senior advisors are not mandated to participate in external research relating to education policies. A link to information on the various support initiatives available to former refugee students and their families was nonetheless provided.¹²

A research request was also sent to Immigration New Zealand for interviews with staff. Their participation was crucial as the Refugee and Protection Unit is aimed at promoting the interests of

¹⁰ See Chapter One footnote 150 and accompanying text.

¹¹ Ministry of Education *English for Speakers of Other Languages: Refugee Handbook for Schools* (2003).

¹² Ministry of Education “Refugee Background Students” (21 December 2020) <www.education.govt.nz>.

refugees resettling in New Zealand and is tasked with coordinating support provided by officials and community groups. It also plays a role in developing policies and practices assisting refugees.¹³ The interviews were intended to gather information on their general understanding of the human rights of refugees, on the rights of refugee children, including the right to education and how they influence immigration policies. Upon considering the interview guide provided, Immigration New Zealand declined the research request. The interview request was declined on the basis that the Ministry of Education was better fitted to participate in the research. Although this is the case, an Official Information Act request was submitted to Immigration New Zealand, and the findings will be presented in this chapter.

In addition to the above, experts in education, international human rights, children's rights, and refugee resettlement were approached to obtain information on their views on implementing and monitoring the right to education for refugee children in New Zealand. These experts were predominantly academics in their respective fields.

6.2.2 Limitations

Refugee children were not interviewed as part of this study due to ethical considerations and the research's focus on the implementation of the right to education, rather than on children's lived educational experiences. The research therefore examines whether New Zealand's legal and policy framework puts in place measures that enable the realisation of children's rights in practice, including the right to express their views and have those views heard. In this context, participation is treated as an implementation obligation that must first be structurally enabled before it can be meaningfully exercised by children themselves. The empirical component was therefore designed to examine how legal obligations are understood and operationalised by duty-bearers within the education and refugee resettlement system.

As noted above, the Ministry of Education did not authorise interviews relating to policy. Immigration NZ also declined to participate on the basis that the Ministry of Education was better placed to contribute to the research. The absence of interviews with policymakers is therefore a limitation of this study, as such perspectives would have provided further insight into the rationale underpinning certain implementation measures and the gaps identified.

¹³ Immigration New Zealand "Refugee and Protection Unit" <www.immigration.govt.nz>.

A total of thirty-seven research requests were sent, and only fourteen interviews were held. Four were teachers, six representatives of non-government organisations and four experts. It was challenging to secure interviews with schools, particularly early childhood centres as well as primary schools. As such, the interviews with teachers are mainly from a secondary school perspective. Several schools could not participate as they were approached during COVID, and this period was not suitable because most teachers were inundated with work.

Despite the limited number of interviews conducted, there is great value in the data collected due to the in-depth nature of qualitative research. Webley notes that although qualitative research usually focuses on a smaller number of participants or documents, the data collected tends to be rich and should be examined.¹⁴ As a result, there are valuable insights to be drawn from the collected data in this research, which will be highlighted in this chapter.

6.3 Analysis

This section will discuss and analyse the data collected from the interviews. While the interview guides comprised several questions, these questions were designed to indicate the general understanding of the right to education for refugee children, how the needs and interests of refugee children are met by schools and personnel working with refugee children, issues and barriers that arise in the realisation of the right to education for refugee children, how the realisation can be enhanced and lastly whether the New Zealand education system adequately realises the rights of refugee children in education.

As highlighted in the thesis so far, there have been no specific developments or legal reforms to improve the realisation of the rights of refugee children, particularly the right to education. An examination of the domestic laws indicated that although education laws and policies are intended to cater for the needs and interests of refugee children, they do not explicitly identify refugee children as a group requiring additional support nor provide guidelines on how their needs and interests should be protected. It is, therefore, essential to determine whether key stakeholders working with refugee children understand the rights of refugee children before examining whether practices are underpinned by a recognition that refugee children have rights.

¹⁴ Webley, above n 4, at 933.

6.3.1 General Understanding of the Rights of Refugee Children

The manner in which the right to education for refugee children is understood is key to the implementation of the right. As such, all participants were asked how they understood the rights of refugee children in general and the right to education for refugee children in particular. This inquiry is crucial, as it has been observed that there is limited research on the understanding of children's rights by research participants.¹⁵ Ruth Brittle and Ellen Desmet note that researchers tend not to explicitly ask how the rights of children in the context of migration are understood.¹⁶ From the discussion with participants, there is a general understanding that refugee children have rights which are the same as those of other New Zealand or resident children. Although most of the participants explained the rights of refugee children as being the same as other New Zealand children's rights, some participants recognised that refugee children's rights require that additional support is provided to refugee children so that they have equal rights and opportunities as other children. This has been attributed to the disadvantage that is out of their control.¹⁷

Most teachers did not refer to the international treaties providing for the rights of refugee children. A few participants made reference to the UNCROC.¹⁸ One of the experts emphasised the importance of understanding international instruments to ensure that refugee children's rights in education are realised. This is in line with a child rights approach. The expert noted that international instruments, once signed, imply an obligation on the country to meet the requirements of the particular instrument.¹⁹ In further explaining the rights of refugee children, there is an understanding and acknowledgement that they also have other rights, such as the right to be heard, a good life, and to be able to learn, progress, gain skills, and become independent. Although most teachers and representatives of non-governmental organisations did not explicitly state rights as set out under international law, the explanations and examples provided relate to the rights set out in international instruments, such as the right to an adequate standard of living,²⁰ health,²¹ and the right to be heard.²² As stated in Chapter One, rights are indivisible and interdependent, and this was evident in how participants explained their understanding. This further emphasises the importance of this research in

¹⁵ Ruth Brittle and Ellen Desmet "Thirty Years of Research on Children's Rights in the Context of Migration" (2020) 28(1) *The International Journal of Children's Rights* 36 at 50-51.

¹⁶ At 51.

¹⁷ Interview with Participant C (27 January 2022).

¹⁸ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

¹⁹ Interview with Participant N (22 May 2022).

²⁰ UNCROC, above n 18, at art 27.

²¹ At art 24.

²² At art 12.

highlighting the need to realise the right to education for refugee children to advance the enjoyment of their other rights.

Education is also understood as a right that refugee children have at all levels of education and requires that they have equal access to rights. It is important to note that some participants explained that education involves making sure that children have a sense of belonging and that they integrate well into society. Education is, therefore, key to the resettlement of refugee children, and this further shows the importance of the right to education for refugee children. One of the theoretical approaches underpinning this research is an intersectionality approach to the interest theory of rights. In terms of this approach, a rights approach should be combined with cultural, socioeconomic and political contexts to ensure that the different needs and interests of refugee children are taken into account. As noted in Chapter Three, intersectionality has also been used to identify the connection of different factors that may lead to discriminatory school processes towards different student groups²³ and in refugee research.²⁴ From a migration perspective, the right to education is to be realised by taking into account the migratory experiences of refugee children. This was echoed by one expert, who reflected on the ways in which the right to education intersects with the lived realities of refugee children:²⁵

...basically the right to education is kind of enshrined in,, the Education Act or something like that. Children are to attend school, primary and secondary schooling. So in the sense that, the right to education is realised through that, in terms of its availability but also the ways in which the right education is. I guess, in relation to the right to education for children with a refugee background, how that's realised as it intersects with migration histories, with diversity, can tell more of a mixed story around who can access the right, who cannot.

These insights underscore the importance of an approach that takes into account the unique circumstances faced by refugee children, situating education rights within broader social and migration contexts, and emphasising the need for a more comprehensive strategy to ensure adequate realisation of the right to education for refugee children.

²³ Edvina Bešić “Intersectionality: A Pathway Towards Inclusive Education?” (2020) 49 *Prospects* 111.

²⁴ Dina Taha *Intersectionality and Other Critical Approaches to Research* (Local Engagement Refugee Research Network Paper No 3, December 2019).

²⁵ Interview with Participant O (02 June 2022).

6.3.2 Factors Enhancing the Realisation of the Right to Education for Refugee Children

Currently, different measures are in place to ensure that the right to education for refugee children is realised. The previous chapter establishes that the early childhood education curriculum also makes reference to children's rights,²⁶ and it has been acknowledged from qualitative research undertaken for this research that the curriculum emphasises the rights of all children, which influences a positive approach to all children, including those from refugee backgrounds. One factor identified from the qualitative research that could enhance the realisation of the right to education is the recognition that not only do refugee children have rights, but the acknowledgement and understanding that differential treatment or support is required to guarantee equitable access. The interviews with some of the teachers show that there is a considerable focus on the interests of refugee children and how they can be met. Students' needs are a key guiding factor in teaching refugee children, and practices are developed around meeting those needs. For instance, in one of the schools, programmes are tailored to meet each child's specific needs. There is a one-on-one enrolment process to identify the needs of every single student. To cater to the different needs of all children, one school celebrates cultural festivals such as Easter and Diwali and has dedicated prayer rooms.²⁷ This is of great benefit to refugee children. Although this is the case, it is unclear if all schools in New Zealand have this kind of approach, which is child rights-centred. It is important to point out that teachers who participated explained different ways their schools provide education and support to refugee children. This is consistent with the existing framework where schools have independent boards responsible for determining their school processes. As such, the quality of education and additional support afforded to refugee children differs depending on the school.

Another important element enhancing the realisation of the right to education for refugee children is the view that the enjoyment of education is linked to other rights such as food, health, and dignity as noted in Chapter One. Although not explicitly recognised as realising other rights, the reference to pastoral care offered by schools demonstrates this and is crucial in ensuring refugee children resettle well and succeed. In most schools represented, there was not only a focus on the actual provision of education but also a pastoral care focus that ensures that refugee children integrate into a new school. It has been highlighted in Chapter Three that the broader social context of schools and the learning experiences of refugee-background students should be considered because the differences between home and school

²⁶ Sarah Te One and Jane Ewens "Te Whariki, 2007: A Refreshed Rallying Point for the Early Childhood Sector in Aotearoa New Zealand" in Alexandra C Gunn and Joce Nuttall (eds) *Weaving to Whariki: Aotearoa New Zealand's Early Childhood Curriculum Document in Theory and Practice* (NZCER Press, Wellington, 2019) at 7.

²⁷ Interview with Participant B (26 January 2022).

settings can be more pronounced for them as they resettle in a new environment.²⁸ Some schools offer counselling to refugee children, support to their families, provide driving courses and other opportunities for the child's personal development. It has been observed during the interviews that it can take a bit longer for children who have had traumatic experiences to settle well and feel comfortable in schools. To address this, some teachers visit such children at home to build a stronger connection with them.²⁹ All these supports differ between schools, which may lead to some refugee children's rights not being fully realised due to a lack of coordination and tailored approaches.

UNESCO has emphasised the need for an intersectional approach to address the many challenges that come with newcomers in a country, such as health, psychological support, and housing which affects education.³⁰ The need and focus on pastoral care highlighted above align with such an approach. The interviews have also, in the same theme, emphasised that there should be a focus on other areas of a refugee child's life for them to succeed.

One element of the right to education is accessibility. It has been defined, in the context of education, as education being open to all, especially those viewed as vulnerable and the most marginalised groups.³¹ Accessibility is particularly relevant to refugee children who tend to have many barriers to the enjoyment of their rights due to their historic and different experiences. Although not standard across schools, some schools have taken measures to eliminate barriers to the realisation of the right to education for refugee children. One school in particular ensures that young refugee children have access to early childhood education by making it free for refugee-background students.³² This, therefore, enhances the realisation of their right to education.

Most participants discussed issues from educational and sociological contexts, and these can also be applied to determine the extent to which the right to education is realised. It has been established earlier on in this research that a better understanding of the social conditions of childhood provides a strong foundation for implementing children's rights.³³ The engagement with refugee students in some schools demonstrates that children are viewed as rights-holders. Students have an active role in

²⁸ Clemence Due, Damien W Riggs and Martha Augoustinos "Diversity in Intensive English Language Centres in South Australia: Sociocultural Approaches to Education for Students with Migrant or Refugee Backgrounds" (2016) 20(12) *International Journal of Inclusive Education* 1286 at 1287.

²⁹ Interview with Participant Q (17 February 2022).

³⁰ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective* (Working Papers on Education Policy 8, 2019) at 56.

³¹ Christian Curtis and John Tobin "Article 28 The Right to Education" in John Tobin (ed) *The UN Convention on the Rights of the Child* (Oxford University Press, Oxford, 2019) at 1068.

³² Interview with Participant Q, above n 29.

³³ Berry Mayall "The Sociology of Childhood in Relation to Children's Rights" (2000) 8(3) *The International Journal of Children's Rights* 243.

planning their future and deciding what they want to achieve. In one of the schools, children participate in designing the kind of education they receive, and the school facilitates this.³⁴

So we have a meeting with the student and will say look this is your result, but you know, and maybe, you don't want to go to university at this stage it's a bit early, but would you like to try something, so that maybe that might interest you and when they are [a] little bit older in year 12.

Teachers have found different ways of learning and sharing knowledge on providing education to refugee children, despite the lack of formal induction. This is mainly through on the job experiences and mentoring by more experienced teachers. Speaking within the context of a preschool setting, one participant noted that,³⁵

We work together as a team, the teaching team. So, it's not like a classroom, we have got a group of teachers that work together and some of those teachers, over the last five years, have built very good understanding. They have participated in some networks and learning and even had conversations with Māngere, the school up there. So [they] built up their own knowledge base, and then when we have bought new teachers into that team, they also, they get background in [working with refugee children through knowledge-sharing within the team].

As highlighted in Chapter One, upon arrival, all refugees, including children, are enrolled in a five-week reception programme that prepares them for their new lives in New Zealand.³⁶ This programme, which includes an education component, is conducted at Māngere Refugee Resettlement Centre.³⁷ It has been noted that the Refugee Education Centre provides a good and supportive learning environment for refugees arriving in New Zealand.³⁸

Another aspect that enhances the realisation of the right to education is that organisations and key stakeholders work collaboratively to support refugee children. In some regions of the country, there is some collaborative work among schools relating specifically to refugees. There are platforms such as information-sharing sessions to provide teachers with tools to support refugee children better. It is

³⁴ Interview with Participant B, above 27.

³⁵ Interview with Participant Q, above n 29.

³⁶ Chris Mahony and others "Aspirational Yet Precarious: Compliance of New Zealand Refugee Settlement Policy with International Human Rights Obligations" (2017) 3(1) *International Journal of Migration and Border Studies* 5 at 13.

³⁷ Immigration New Zealand "Te Āhuru Mōwai o Aotearoa – Māngere Refugee Resettlement Centre" <www.immigration.govt.nz>.

³⁸ AUT "AUT Refugee Education Centre" <www.rec.aut.ac.nz>.

worth noting, however, that some of these platforms are not available to all teachers. Participants also acknowledged the support and resources available by the Ministry of Education. The guidance provided by the senior advisors when dealing with refugee children was found helpful by some teachers. One of the main supports that most teachers identified as positively contributing to the experiences of refugee children is bilingual support funded by the Ministry of Education. In addition, teachers utilise the initiatives in place, such as symposiums and online resources.³⁹

I've struggled a lot of times to get the type of materials that we need or the resourcing we need. I think the Ministry of Education is getting a little bit better at that. I know that they have put some strategic people into different roles of late, and I have noticed that during COVID, there's a lot more translated material available which is fairly good around COVID.

Although it has been noted that these are not adequate, teachers are innovative, do their best with the resources they have and are willing to do more. There are efforts to ensure that the right to education for refugee children is realised.

Non-governmental organisations also play a vital role in the resettlement and integration of refugee children and families. A few organisations play an active role in the school enrolment process. The manner in which the most suitable school is identified reflects a child rights-centred approach. The Red Cross, which assists most quota refugee children with the enrolment process, takes into account how accessible the school location is. This is especially important for refugee children who are still adjusting and settling in a new environment. It also considers the cultural background of the child and determines if there are other children from the same ethnic community as they are deemed to be of great support.⁴⁰ It is worth pointing out that the information and advice on enrolment are provided to the parents of refugee children, who ultimately have to make a decision on the school the child will be enrolled in. This may give rise to more issues as some parents face language barriers and may not be adequately equipped to support their children.⁴¹ Another limitation that also relates to accessibility, is that there are schooling zones⁴² in place, so options are limited. Depending on availability, the Red Cross will attempt to secure a space in a school located in a different zone if the school is likely to

³⁹ Interview with Participant Q, above n 29.

⁴⁰ Interview with Participant D (19 November 2021).

⁴¹ Interview with Participant C, above n 17; Interview with Participant P (6 October 2022); see also Ashley E Cureton "Strangers in the School: Facilitators and Barriers Regarding Refugee Parental Involvement" (2020) 52(3) *The Urban Review* 924 at 928.

⁴² These are specified geographical areas around the school guaranteeing enrolment for students who live within the zone. See Ministry of Education "School Zones and Enrolment Schemes" (12 August 2024) <www.education.govt.nz>.

meet the needs of the child. Although zoning predominantly determines which school a refugee child is enrolled at, enrolment is not restricted to zoning if a child has special needs.

Even though Immigration New Zealand staff did not participate in the research as intended, valuable information was obtained by submitting the following questions through an Official Information Act request: How many refugee children have resettled in New Zealand in the last five years? How is data on refugee children in New Zealand collected and disaggregated? What factors are taken into account when deciding where refugee children resettle after the five weeks orientation at the Māngere Refugee Resettlement Centre? There are a few factors that Immigration New Zealand considers when placing refugee families in settlement locations across New Zealand after they have completed the reception programme at Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre). These include the availability of adequate support services and appropriate facilities in each settlement location and where other linguistic, cultural, and ethnic groups have been settled, as well as the extent of preparatory work completed to consider the community and internal and external stakeholders. This may include local government (regional councils), NGOs and public agencies (such as the Ministry of Education, Ministry of Health and Ministry of Social Development); the settlement support services provided by each Immigration New Zealand contracted service provider in the settlement locations. This may include access to a GP, school enrolment, community orientation, and resettlement support for up to a year, as well as consultation and consent by each family to the settlement location chosen for them.⁴³ There is no explicit consideration of the rights of the child. However, the above factors can promote the realisation of the rights of refugee children to a certain degree, including education. They indicate there is an aim to ensure that services, which would include education, are available, adequate and accessible. Although this is the case, it remains unclear whether the aim is, in fact, achieved.

6.3.3 Challenges Faced by Refugee Children and Teachers

While there are some good measures in place to ensure that the right to education for refugee children is adequately realised, and although there is research on the experiences of refugee children, some participants were asked about the challenges that refugee children face. This question was asked to gauge the extent to which refugee children enjoy their right to education. As noted in Chapter One, the term “refugee children” within this research encompasses a wider range of children, including not only those who are refugees but also children of refugees. In terms of the sociology of childhood, sociological facts about children are to be considered and can be evidence that a child has a right to

⁴³ Response to questions 26 October 2022 DOIA 2223-0647 at 2 (Obtained under Official Information Act 1982 Request to the Immigration New Zealand, Ministry of Business, Innovation and Development).

be treated in law as an autonomous person in their own right.⁴⁴ Some of the complexities that can interfere with the realisation of refugee children's rights in education were identified during the interviews. The first relates to the right of the child to express their opinion and have those opinions heard in all matters affecting them. Even though it has been noted earlier that this right is fostered in some schools, issues relating to the child's right to be heard still exist. An early childhood teacher, when describing the challenges refugee children face, noted that:⁴⁵

Being able to be heard you know, to be able to make themselves understood at times. To be able to express those emotions you know. To be able to explain why they are feeling quite upset at the time. It can be overwhelming sometimes and that's very challenging for young children who don't share the same language. So those sorts of things, being able to socialise with peers..

This shows that the realisation of the right can affect children differently depending on the age of the child. Therefore there should be measures in place for all refugee children catering to the different ages. As rights are indivisible and interdependent, other external factors can impact the realisation of refugee children's rights in education, particularly refugee children owing to their different circumstances. With regard to issues with refugee children expressing their views, the CRC has made some relevant comments. It emphasised that within a migration context, the child is to be afforded the opportunity to be heard on several issues, one of them being their educational expectations to ensure they integrate into school.⁴⁶ The issues mentioned above show that refugee children's interests are to be the basis for the rules governing the provision of education as required by the interest theory of rights. In addition to this and in accordance with the new sociology of childhood, historical, cultural and social factors shape and construct childhood. Consequently, family dynamics and education may differ depending on context.⁴⁷ As such, education laws and policies should clearly impose obligations that the state has to ensure that additional measures are adopted to meet the particular interests of refugee children, taking into account their need for protection. In this regard, the state should provide the necessary support and resources for teachers and personnel working with refugee children.

Another challenge affecting refugee children is the fact that schools do not have a formal induction process, guide or framework for teachers on how to support refugee children. Each school determines its processes, which is usually the teachers' responsibility. Some teachers rely on the support of the

⁴⁴ Michael King "The Child, Childhood and Children's Rights within Sociology" (2004) 15(2) Kings Law Journal 273.

⁴⁵ Interview with Participant Q, above n 29.

⁴⁶ CRC *General Comment No 12 (2009): The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (20 July 2009) at [123].

⁴⁷ Madeleine Leonard *The Sociology of Children, Childhood and Generation* (Sage Publications, London, 2016) at 24.

Ministry of Education senior advisors for direction. One of the teachers described the process as figuring it out by oneself and noted that teachers are not aware of all the education systems in place. With regard to the systems, she further stated that, “We find out by accident, nobody is out there telling us how it works.”⁴⁸ It can be a challenge for teachers to prepare and cater for the needs and interests of refugee children when they arrive, as they are usually not aware of the details of the children coming in. To address this issue, some schools have a dedicated teacher responsible for facilitating the support provided to refugee children and is usually responsible for guiding other teachers on issues they need to be aware of when they have refugee students in their classes.

Representatives of non-government organisations also identified several challenges. Participants were asked how appropriate schools were identified for refugee children. Although it has been highlighted that there are instances when appropriate schools are selected for students with special needs, for the most part, there are strict schooling zones, resulting in some children being in schools that are not appropriate to meet their needs. Since each school has its own policies and processes, a refugee child with particular needs may not be catered for if enrolled in a school with no experience working with refugee children. It also appears there is no clear way to monitor or assess the integration of refugee children in schools. When asked how the realisation of the rights of refugee children is monitored, it is unclear to a few of the participants how this is done. This explains the lack of research on the extent to which the right to education for refugee children is realised. This is highlighted in this research.

6.3.4 Barriers to Implementing the Right to Education of Refugee Children

While some measures are in place for the realisation of the right to education, barriers impacting the enjoyment of the right to education for refugee children were identified during the interviews. Although participants highlighted them, they were not particularly understood as a failure to meet legal obligations. One participant noted that they were not in a position to address issues from a legal point of view but recognised the need for more awareness on what various schools are doing.⁴⁹

One of the key elements of the right to education is accessibility. As highlighted Chapter Four, accessibility relates to the obligation to protect and eliminate barriers to the enjoyment of the right.⁵⁰ Refugee children tend to face barriers in accessing educational opportunities regardless of their location, and these include language, among others.⁵¹ Language is a common barrier identified

⁴⁸ Interview with Participant Q, above n 29.

⁴⁹ Interview with Participant B, above n 27.

⁵⁰ See Chapter Four at 130.

⁵¹ *Report of the Special Rapporteur on the Right to Education* UN Doc A/73/262 (27 July 2018) at [66].

throughout the qualitative research. It has been acknowledged from the qualitative research undertaken for this research that while students are capable, language gets in the way.⁵² It is well understood that language can limit the enjoyment of a child's right to education for several reasons. When refugee children are unfamiliar with the language in a new host country, access to education can be affected, thus posing a barrier to the enrolment process. Academic progress can also be impacted.⁵³ Not only is language a barrier for children, but for parents as well as pointed out above.⁵⁴ There is a current need for interpreters during the enrolment process. To demonstrate this, one participant noted that:⁵⁵

It's absolutely vital to have an interpreter who is not necessarily a family member because sometimes the family member may not understand the systems and policies. I mean, not always, but an interpreter will be able to explain more about how things actually work.

Although this research focuses on children's rights, parents or guardians require assistance to support their children in a new host country. The above example shows how some of the challenges they face can also affect the resettlement of their children in schools. Participants also talked about the need for easily accessible services to enhance education provided to refugee children and to ensure that it is adequate. It has been observed that:⁵⁶

So even if teachers are willing and want to help, sometimes it is hard to access services. An example is a need for specialist services for some refugee children who have been through very traumatic situations.

Another critical aspect of the right to education is economic accessibility. Owing to the particular needs of refugee children, the CRC has stated other measures that will guarantee that refugee children have access to education. These include financial, technical and human resources for special language programmes for refugee children to prepare them for full integration into the national educational system and provision of supplementary assistance according to individual education plans to meet specific educational needs.⁵⁷ While the Ministry provides funding, most participants

⁵² Interview with Participant B, above n 27.

⁵³ Júlia Palik and Gudrun Østby "Interventions to Improve Refugee Children's Access to Education and Quality Learning: A Scoping Review of Existing Impact Evaluations" (2023) 69(1-2) *International Review of Education* 227 at 231.

⁵⁴ Interview with Participant C, above n 17; Interview with Participant P, above n 41; and Cureton, above n 41, at 928.

⁵⁵ Interview with Participant A (18 February 2022).

⁵⁶ Interview with Participant M (13 December 2021).

⁵⁷ *CRC Consideration of Reports Submitted by State Parties Under Article 44 of the Convention Concluding Observations Czech Republic* UN Doc CRC/C/CZE/CO/3-4 (4 August 2011) at [66].

noted there was a need for more funding for adequate education to be provided to refugee children. Most participants identified funding as a barrier in tailoring services for refugee children. One interviewee commented that:⁵⁸

The government needs to give us more money so that we can widen our scope, we can increase the amount of work that we're doing. At the moment, we are really limited for money, and because we don't have enough funding, there are some things that we'd like to do, we just cannot do.

Similarly, a further interviewee remarked:⁵⁹

I think the will is there, but certainly, the teachers seem to bend over backwards to support the children, so I'm sure if there were more resources, there would be able to use them.

The need for more resourcing was also echoed:⁶⁰

I think the commitment is there for all children, it's just how much, given the resourcing, you know, they can do?

Another barrier identified is the lack of a structured approach and framework for supporting refugee children in educational settings. This is supported by assertions by some teachers that there is no guide on how refugee children are to be supported. As it seems that there is no structured approach, the quality of support provided to refugee children in schools is not consistent. One comment made in this regard was:⁶¹

No framework within which we can work on or platform in which we can interact, and I think that is really really the need of the hour ... so what are we doing to make it a better experience for them and unless they educate us on government policies. At the moment, it is, go online, what is the Ministry saying about this, what is the Ministry saying about that, can I do this, is there funding available?

⁵⁸ Interview with Participant B, above n 27.

⁵⁹ Interview with Participant D, above n 40.

⁶⁰ Interview with Participant D, above n 40.

⁶¹ Interview with Participant B, above n 27.

Most of these barriers have been identified in existing research,⁶² which shows that these problems continue to exist. As such, there is a need for improvements to the current system for the right to education for refugee children to be better realised.

6.3.5 Suggested Changes and Improvements

Participants were also asked how the status quo can be improved to better realise the right to education for refugee children. The suggestions provided included the provision of cultural education in schools, thus supporting aspects of an intersectional approach to the rights of refugee children. As stated in existing research,⁶³ teacher training is required to enhance the experiences of refugee children in schools. This includes ongoing professional development and equipping teachers to understand systemic injustice, barriers and attitudes. One teacher said, “..I think I need to know more about the specific rights of former refugee children...”⁶⁴ Participants provided various suggestions, including the need for training on discrimination and inclusion. One participant noted:⁶⁵:

...How to be inclusive for all children from all backgrounds because, at the moment, it's the schooling system, it's very much set out for a certain type of learner from a certain type of background. Yeah, just looking at how they can broaden that.

One suggestion made was:⁶⁶

...I think that teachers need to maybe know more about the legal frameworks of inclusion...

There has also been an emphasis on the need for a guide or framework teachers can follow when providing education to refugee children. The CESCR has noted that differences in fiscal policies result in differing qualities of education, and this might amount to discrimination.⁶⁷ A formal framework can thus result in consistent and reduced disparities in the quality of education. One participant also stated:⁶⁸

⁶² Louise Humpage “Refugee Protection and Settlement Policy in New Zealand” in Steven Ratuva *The Palgrave Handbook of Ethnicity* (Springer Nature, Singapore, 2019) 1689 at 1703; Toby Measham and others “Refugee Children and Their Families: Supporting Psychological Well-Being and Positive Adaptation Following Migration” (2014) 44(7) *Current Problems in Pediatric and Adolescent Health Care* 208; and Mahony and others, above n 36, at 5.

⁶³ Hamilton and others, above n 1 at 92 and 70 - 72; and Hamilton and Moore, above n 1, at 83 - 96.

⁶⁴ Interview with Participant B, above n 27.

⁶⁵ Interview with Participant E (26 January 2022).

⁶⁶ Interview with Participant M, above n 56.

⁶⁷ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [35].

⁶⁸ Interview with Participant B, above n 27.

We have decided that this is what we want to do in our school but is there a government guideline? Using something that every school in New Zealand that has refugee students need to follow a certain policy. Who's making those policies? Who's going to tell us these policies? We need more of that kind of thing.

Another suggestion provided to better realise the right to education is to amend the legal framework to include the right to education in the Bill of Rights Act 1999 and to incorporate the UNCROC in the Education and Training Act 2020.⁶⁹

Although the participants' opinions are of a select few personnel, the data provides indicators of areas of concern. When asked whether, in their opinion, New Zealand education meets the needs and rights of refugee children, some participants acknowledged that a lot had been done, but there is room for improvement. This underscores the relevance of this research and the necessity for further improvements.

6.4 Conclusion

The semi-structured interviews conducted were beneficial as valuable information was obtained. The information provides indicators on the extent to which the right to education of refugee children in New Zealand. There is a relatively good understanding of refugee children's rights and the view that they are rights-holders. As highlighted, some practices and processes reflect a child rights-based approach to the provision of education to refugee children, even though children's rights do not explicitly underpin them. Although this is commendable, it appears these measures are not consistently applied owing to the lack of formal policies and framework governing education for refugee children. The findings indicate that the quality of education is likely not the same in schools that enrol refugee children. While government measures are recognised and play a pivotal role in ensuring refugee children access education, there is also a common view that more effective action can be taken within the New Zealand education system.

⁶⁹ Interview with Participant F (08 September 2022).

7. A CHILD RIGHTS APPROACH TO THE RIGHT TO EDUCATION FOR REFUGEE CHILDREN IN NEW ZEALAND

7.1 Introduction

Chapter Seven discusses the implications of the findings from both the doctrinal and empirical research on the realisation of refugee children's right to education. It determines the extent to which New Zealand laws and policies respect, protect, and fulfil refugee children's rights to education, using the UNCROC Guiding Principles as an analytical framework. In doing so, the chapter lays a foundation for how children's rights can be examined in practice, particularly the realisation of the right to education of refugee children in New Zealand.

This chapter operationalises the child rights-based approach presented in Chapter Three. The Guiding Principles of the UNCROC, namely the best interests of the child, non-discrimination, the right of the child to express their opinion and have those opinions heard in all matters affecting them, and the right to life, survival and development provide the normative foundation for this approach by ensuring that education-related decision-making reflects children's rights standards. To give practical effect to these principles, the chapter applies the 4A framework which comprises availability, accessibility, acceptability and adaptability. First set out in regard to the right to education by the Special Rapporteur on the Right to Education,¹ the 4A framework provides a structured method for identifying what the right to education requires in concrete terms. As pointed out, the 4A framework is useful in obtaining a comprehensive understanding of state obligations and providing interpretative tools for examining legislation and policy.²

Read together, the Guiding Principles and the 4A framework address the core elements of a child rights-based approach and provide a structured basis for assessing the implementation of refugee children's right to education in New Zealand. This is crucial as the previous chapters have demonstrated that the assessment of the realisation of the right to education for refugee children in New Zealand remains limited. This thesis therefore adopts these frameworks to analyse the extent to which the right to education is implemented and realised. In this regard, this chapter demonstrates

¹ *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33 UN Doc E/CN.4/1999/49* (13 January 1999) at [50].

² Chapter Four footnote 266 and accompanying text.

how the UNCROC's Guiding Principles are appropriate in achieving this to measure compliance with the right.

The importance of a rights-based approach to education has been shown to improve policies and programmes in the education field.³ A child rights-based approach extends beyond formal access to education and requires legal and policy frameworks in education to explicitly recognise refugee children as rights-holders with particular vulnerabilities. It also demands that measures are adapted to their circumstances, and that implementation is evaluated against children's rights standards, rather than solely economic or integration outcomes.

The main areas in which a rights approach can be applied include assessment (situation and implementation), programme content and implementation, and monitoring and evaluation.⁴ Human rights standards, principles and values are to be observed through the implementation process. Programmes and policies based on a rights-based approach are beneficial in that they identify human rights issues in education and states' corresponding obligations. Such programmes and policies can also highlight reasons why rights are not realised and examine individuals' capacity to claim their rights and states' capacity to fulfil their obligations.⁵ Consequently, measures are designed for capacity building, monitoring, and evaluation of outcomes and processes that are in line with human rights standards and principles.⁶ A child rights-based approach, in particular, can enhance the programming, assessment, monitoring, and evaluation of education available for refugee children in New Zealand. This will be demonstrated in depth throughout this chapter.

Currently, some ways in which schools' performance is monitored and reported include school self-review, external school review⁷ and external reporting by schools.⁸ These are not explicitly informed by children's rights nor directly aimed at realising children's rights. Although this is the case, Beeckman argues that there is a need for indicators to be informed by human rights obligations, which reflect the implementation of the child's right to education.⁹ This chapter, therefore, seeks to apply the four Guiding Principles as educational indicators from a child's rights perspective.

³ United Nations Children's Fund (UNICEF) *A Human-Rights Approach to Education for All: A Framework for the Realisation of Children's Right to Education and Rights within Education* (UNESCO, 2007) at 13.

⁴ At 13.

⁵ At 13.

⁶ At 13.

⁷ Education and Training Act 2020, s 462.

⁸ Barbara Annesley "Performance Indicators for New Zealand Schools: The Problems and the Potential" (1997) 6(6) *New Zealand Annual Review of Education* 105 at 107.

⁹ Katrien Beeckman "Measuring the Implementation of the Right to Education: Educational Versus Human Rights Indicators" (2004) 12(1) *The International Journal of Children's Rights* 71.

Some of the key findings from consideration of the domestic laws and empirical research undertaken for this research indicate that domestic laws and policies do not explicitly identify refugee children as a group requiring additional support nor provide guidelines on how their needs are to be protected. This is evident in the limited data collected regarding refugee children. Most of the educational data on refugees is combined with that of migrants despite their different interests. Although this is the case, there is an indication from several key stakeholders that the realisation of refugee children's rights requires additional support, such as pastoral care. The previous chapter highlighted that most schools that participated in the research have a pastoral care focus, ensuring that refugee children integrate into a new school. Examples include offering counselling to refugee children and supporting their families. One teacher stated that they sometimes visit children who had traumatic experiences at home to help them build a connection with them.¹⁰ Some interviews held show that students' needs are considered and, to some degree, guide the support given to refugee children. In discussing how children are viewed, one of the teachers stated, "So we have a meeting with the student and will say look, this is your result, but you know, and maybe, you don't want to go to university at this stage it's a bit early, but would you like to try something, so that maybe that might interest you and when they are [a] little bit older in year 12".¹¹ This suggests that students' needs are a guiding factor in teaching refugee children, and practices are developed around meeting them, as mentioned in Chapter Six.¹² While this is the case, there seems to be no shared understanding of these needs across different schools and practices developed for refugee children are not applied consistently in schools. These issues may impact the realisation of the right to education.

It has also been shown that the right to education cannot be realised without taking into account other rights. Although not phrased from a rights perspective, there is some reference to children's rights in the New Zealand curriculum.¹³ There is also no specific training for teachers on the realisation of the right to education. If well understood and implemented, the Guiding Principles can address these issues and ensure that the right to education is better realised.

¹⁰ See Chapter Six footnote 29 and accompanying text.

¹¹ Interview with Participant B (27 January 2022).

¹² Some programmes are tailored to meet each child's specific needs; some schools provide one-on-one enrolment to identify needs of each student. See Chapter Six footnote 27 and accompanying text.

¹³ The New Zealand Curriculum is described as "non-sexist, non-racist and non-discriminatory": see, Ministry of Education *The New Zealand Curriculum* (2015) at 9; The early childhood curriculum recognises children as rights-holders: see, Sarah Te One and Jane Ewens "Te Whāriki, 2007: A Refreshed Rallying Point for the Early Childhood Sector in Aotearoa New Zealand" in Alexandra C Gunn and Joce Nuttall (eds) *Weaving to Whāriki: Aotearoa New Zealand's Early Childhood Curriculum Document in Theory and Practice* (NZCER Press, Wellington, 2019) at 7.

7.2 *The Best Interest of the Refugee Child and the Right to Education*

Article 3 of the UNCROC requires that:¹⁴

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In explaining the above provision, Brian Howe and Katherine Covell note that all actions referred to include all educational actions.¹⁵ The CRC further highlights that decisions made by administrative authorities include those relating to education, care, health, the environment, living conditions, protection, asylum, immigration, and access to nationality, among others.¹⁶

It has been noted that the phrase “best interests” is to be interpreted and applied in conjunction with the UNCROC and other international legal norms.¹⁷ Consistent with a child rights-based approach, the child’s best interest should be the basis for evaluating laws and policies of state parties.¹⁸ This includes the provision of education to all children, including refugee children. In emphasising the importance of the best interest of the child principle for refugee children, it has been noted that it is useful in determining suitable support when integrating or resettling refugee children in another country.¹⁹

The CRC points out three main obligations under art 3(1) that are also relevant to New Zealand refugee children. Firstly, to ensure that:²⁰

...the child’s best interests are appropriately integrated and consistently applied in every action taken by a public institution, especially in all implementation

¹⁴ United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC], at art 3.

¹⁵ Brian Howe and Katherine Covell *Education in the Best Interests of the Child* (University of Toronto Press, Toronto, 2013) at 16.

¹⁶ UN Committee on the Rights of the Child (CRC) *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [30].

¹⁷ United Nations High Commissioner for Refugees (UNHCR) *Guidelines on Formal Determination of the Best Interests of the Child Provisional Release* (May 2006) at 6.

¹⁸ Stephen Parker “The Best Interests of the Child: Principles and Problems” in Phillip Alston (ed) *The Best Interests of the Child* (Clarendon Press, New York, 1994).

¹⁹ Dina Imama Supaat “The Principle of the Best Interest of the Child as the Basis of State Obligation to Protect Refugee Children in Malaysia” (2012) (1) *South East Asia Journal of Contemporary Business, Economics and Law* 146 at 150.

²⁰ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [14(a)].

measures, administrative and judicial proceedings which directly or indirectly impact on children.

It has been noted that children have a right to have their interests assessed, appropriately integrated, and consistently applied when there are different interests at stake in a decision that affects an individual child, a group of children, or children in general.²¹ Such decisions may, in the context of refugee children, relate to selecting appropriate schools for them and what teachers ought to do to assist them to integrate in a new learning environment. There is an evident lack of similar and consistent support offered to refugee children in New Zealand schools. Chapter Six highlighted the lack of a structured approach to education provided to refugee children. The results obtained from the qualitative research conducted also suggest that the quality of support provided to refugee children in schools is not consistent.²²

The CRC has also set out what is in the child's best interest in educational settings. This includes free access to quality education, including early childhood education, non-formal or informal education and related activities; there is a need also for "well-trained teachers and other professionals working in different education-related settings, as well as a child-friendly environment and appropriate teaching and learning methods" to promote quality education for more children.²³ Although some educational programmes and practices implemented for refugee children are consistent with children's rights in New Zealand, they are not underpinned by an understanding of children's rights.²⁴ This may, consequently, impact the extent to which the right to education is realised. As such, there is a need for training for teachers and others working with refugee children on children's rights and the rights of refugee children in particular, as noted by several participants.²⁵ Research on children's rights in education has highlighted that the successful implementation of children's rights in education can be linked to teachers' knowledge about children's rights in some states. Although this is the case, it has been noted that the importance of teachers' knowledge about children's rights is not acknowledged in New Zealand policy.²⁶ UNESCO has stated that teachers should be fully supported

²¹ Wouter Vandenhoele and others *Children's Rights: A Commentary on the Convention on the Rights of the Child and Its Protocols* (Edward Elgar Publishing, Cheltenham, 2019) at 62.

²² See Chapter Six footnote 61 and accompanying text.

²³ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [79].

²⁴ The qualitative research conducted for this research suggest this is the case. Most teachers did not refer to international treaties providing for the rights of refugee children.

²⁵ Interview with Participant B (26 January 2022): "... I think that teachers need to maybe know more about the legal frameworks of inclusion..." Interview with Participant E: "How to be inclusive for all children from all backgrounds because, at the moment, it's the schooling system, it's very much set out for a certain type of learner from a certain type of background. Yeah, just looking at how they can broaden that."

²⁶ Ann Quennerstedt "The Political Construction of Children's Rights in Education – A Comparative Analysis of Sweden and New Zealand" (2011) 2(3) *Education Inquiry* 453 at 465.

and trained to respond to the specific needs and rights of refugees. As such, legal, technical, and administrative actions are required to provide high-quality education on human rights, and the way in which they are exercised in real life should also be taken.²⁷ Howe and Covell suggest that improvements should be made to make way for positive school cultures and children's rights education. This means not only education on the child's rights but also on educational practices that are respectful of children and consistent with their fundamental rights. This serves the best interests of the child.²⁸ This can significantly benefit refugee children, as it fosters the recognition of refugee children as rights-holders whose unique interests should be protected.

It is also in the child's best interest for states to enhance children's responsibilities to overcome the limitations of their vulnerability of any kind.²⁹ This will ensure that the rights of refugee children are better realised, as it has been noted that children's rights are interdependent. Accordingly, the evolving capabilities of refugee children should be recognised, and their right to be heard³⁰ should be realised. Schools, classroom practices and education policies must provide meaningful opportunities for child participation, ensure the absence of discrimination, and ensure not only the survival but also the development of the child to their fullest potential.³¹ The best interest of the child is best secured by talking to the children themselves. When children are excluded from participating in decision making processes affecting them, the perception of children as passive subjects of social structures and processes³² can be perpetuated. This can result in children not being seen as active actors in constructing and determining their lives. Consequently, such a view can hinder the realisation of children's rights, as it deviates from children as rights-holders. From the doctrinal and empirical research conducted, it does not appear that refugee children are consulted on their rights to any great extent. Due to the interdependency of children's rights, this could present a problem with other rights that enhance the enjoyment of the right to education, such as non-discrimination. Exclusion of children from participating can amplify age discrimination, which intersects with other grounds on which refugee children are marginalised.

²⁷ United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Protecting the Right to Education for Refugees* (Working Papers on Education Policy No 4, 2017) at 23.

²⁸ Howe and Covell, above n 15, at 11.

²⁹ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [79].

³⁰ As required by UNCROC, above n 14, at art 12.

³¹ *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child* (May 2021) at 35.

³² Alan Prout and Allison James *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Routledge, London and New York, 2015) at 7.

It is worth noting that modern education systems do not have advancing the best interests of the child as their core purpose.³³ Although this is the case, the principle has been recognised as a valuable guide to educational practice. Issues of underachievement, disengagement, and inequality of opportunity for disadvantaged children have been said to arise as a result of the absence of consideration of the best interest of the child in educational practice.³⁴

The second obligation is:³⁵

...to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.

This obligation relates mainly to the need to show that the best interests of the child have been a primary consideration in all decisions, policies and legislation pertaining to refugee children's education, as emphasised by the CRC.³⁶ Roberta Ruggiero notes that art 3 of the UNCROC requires states to review domestic legislation dedicated to institutions and services and ensure that the relevant standards and services are adopted and monitored.³⁷ In the context of this research, this, therefore, means that New Zealand laws and policies on education should be reviewed and standards implemented to ensure the best interest of the child is upheld. Services provided within education should also be monitored. With regard to reviewing domestic legislation on education, Joy Cumming and Ralph Mawdesley are of the view that legislation and policy should explicitly make reference to the best interest of the child principle to ensure that quality education is afforded to children.³⁸ This is especially important as one of the purposes of the Education and Training Act 2020 is to assure the quality of education provided and the institutions and educators that offer and support it.³⁹

³³ Howe and Covell, above n 28, at 4.

³⁴ At 4.

³⁵ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above 16, at [14(b)].

³⁶ States are urged to review and amend domestic legislation (where necessary) to ensure art 3 is incorporated therein and to ensure all laws, regulations and policies relating to children include and implement the child's best interests as a substantive right and as a rule of procedure: see CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n16, [15(a)].

³⁷ Roberta Ruggiero "Article 3: The Best Interest of the Child" in Ziba Vaghri and others (eds) *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer, Cham, 2022) 21 at 28.

³⁸ Joy Cumming and Ralph Mawdesley "Australia, Quality Education and the Best Interest of the Child" (2013) 57(3) *Australian Journal of Education* 292 at 305.

³⁹ Education and Training Act 2020, s 4(c).

The Education and Training Act 2020 makes no specific reference to the need for the best interest of the child to be a primary consideration.⁴⁰ While it is common for this to be omitted in different countries, it results in there being no concerted efforts to ensure that all the interests of children are indeed taken into account when making educational decisions affecting them. This is problematic as it may result in the right to education not being adequately realised. It has been noted that education systems where decisions and policies are made without the benefit of evidence-based studies of child impact and best practices are inconsistent with the child's best interests.⁴¹ Incorporating this principle in laws and policies will guarantee that the education system takes directed action for the benefit of refugee children.⁴² This will be beneficial to refugee children as education can be tailored to meet their unique interests and ensure that the barriers and challenges they face in accessing education are eliminated.

Another critical aspect of the principle and the second obligation stated above is coordinating and implementing national, regional, and local policies.⁴³ There should also be educational policies in place that advance the best interest of the child.⁴⁴ Reference to the best interests of the child is very limited in policies relating to the overall provision of education. Thomas Hammarberg highlighted this trend, noting that the full policy potential is not adequately used and understood. He notes with great concern that most states fail to take the best interest of the child seriously, save for family issues.⁴⁵ In New Zealand, the best interest of the child is only reflected in legislation relating to family issues, such as s 4A of the Oranga Tamariki Act 1989, s 4(1) of the Care of Children Act 2004 as well as s 105(2) of the Family Violence Act 2018.⁴⁶ Education policies referred to in the previous chapter do not refer to the best interest of the child principle either. Each school has its own board, processes, and programmes. This, therefore, shows the lack of consistent coordination and implementation of this principle, which can hinder the adequate realisation of the right to education for refugee children.

⁴⁰ Unlike the family laws relating to custody issues, such as the Care of Children Act 2004.

⁴¹ *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, above n 31, at 42.

⁴² At 45.

⁴³ *CRC General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [15(b)].

⁴⁴ Ann Quennerstedt notes that in New Zealand, much of the policy attention has been directed to early childhood education specifically on the improvement of quality through teacher qualifications and removing barriers to access. See Quennerstedt "The Political Construction of Children's Rights in Education – A Comparative Analysis of Sweden and New Zealand", above n 26, at 458

⁴⁵ Thomas Hammarberg *The Principle of The Best Interests of The Child – What It Means and What It Demands from Adults*, Commissioner for Human Rights Council of Europe Warsaw (CommDH/Speech 30 May 2008) at 3.

⁴⁶ Relating more specifically to protection orders.

There is also no evidence to suggest that the best interest of refugee children, in particular, is understood. As noted earlier in the previous chapter, parents are relied upon to inform teachers of the interests of their children.⁴⁷ Despite this, there are language barriers as some parents cannot communicate these well.⁴⁸ As such, the best interests of refugee children may not always be captured. Jose-Luis Gavina emphasises the need for a legal framework that allows for the curriculum to incorporate the interests of children. He notes that education viewed as a child's right means that curricula should be developed in their interests and not those of the society.⁴⁹ This should, therefore, be assessed when considering the New Zealand curriculum. In the Australian context, it has been noted that the lack of attention to the best interests of the child in the development of the national curriculum is concerning.⁵⁰ England is an example of an instance when the national curriculum review was undertaken, and the implementation was delayed, allowing for further consideration and consultation to ensure outcomes would be in the best interest of the child.⁵¹

Part of the second obligation is the need for states to show the examination and assessment of the best interest of the child and the weight given to such assessments.⁵² As such, it should be evident that the best interest of the child is considered when deciding which schools refugee children are placed in and that it is considered in the school curricula or programmes. One of the main decisions to be made with regard to education provided to refugee children is which school they are enrolled in.⁵³ From interviews with those involved in the resettlement and integration of refugee children, there is some consideration of their best interests. These include determining whether a school enrolls or has previously enrolled students with refugee backgrounds and providing assistance when this is not the case.⁵⁴ Assistance provided to schools includes training on understanding different cultural backgrounds.⁵⁵ Since refugee children have unique needs, additional support is also provided during the enrolment process.⁵⁶ This requires consideration of each child's specific needs. This goes a long way in ensuring refugee children have access to adequate education and indicates to an extent that the best interests are examined and assessed when deciding which school a child is placed in. While there is an effort to ensure that refugee children in New Zealand are placed in schools that best meet

⁴⁷ See Chapter Six at 185.

⁴⁸ See Chapter Six at footnote 41 and accompanying text.

⁴⁹ Jose-Luis Gavina "Education: A Compulsory Right? A Fundamental Tension with a Fundamental Right" (2022) 70(6) *British Journal of Educational Studies* 653 at 670.

⁵⁰ Cumming and Mawdesley, above n 38, at 305.

⁵¹ At 305.

⁵² *CRC General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [14(b)].

⁵³ As highlighted in Chapter Six, assistance with enrolling refugee children is provided in some areas. One of the participants, the Red Cross, an organisation that assists with the enrolment of refugee children, considers the accessibility of the school and the cultural background.

⁵⁴ Interview with Participant D (19 November 2021).

⁵⁵ Interview with Participant M (13 December 2021).

⁵⁶ Interview with Participant D, above 54.

their needs and interests, this is not always the case due to issues such as zoning and availability of schools.⁵⁷ As noted in the previous chapter, the placement of children in school depends on the enrolment scheme of each school in New Zealand. Such a scheme specifies a geographical area around the school called a home zone and guarantees enrolment for students who live within the zone (school zoning). Some schools do not have enrolment schemes and are open to enrolment for all. However, such schools are not always available as enrolment is not guaranteed.⁵⁸ From the qualitative research undertaken for this research, this can result in some refugee children being in schools that are not appropriate to meet their needs.

With regard to data collection and the establishment, monitoring, and evaluation thereof, the CRC has noted that the best interests should be explicitly outlined, and there should be support for research on issues relating to children's rights.⁵⁹ The data collected on refugee children is very limited in New Zealand and cannot be used to adequately monitor and evaluate how the best interest of the child is applied, nor can the data be used to identify and highlight factors hindering the application of the best interests of the refugee child in education. This is mainly because refugee children are not well captured in official statistics. There is no breakdown of how many of the quota refugees are children. The education component of the Strategy is the only one measured against a target compared to others that rely on success indicators. The only success target is the proportion of refugee school leavers receiving NCEA level 2 after five years or more in the New Zealand education system. The latest report on this measure suggests this was attained by 77% of quota refugees who performed better than all school leavers with a rate of 75%.⁶⁰ While this shows some success, this target is a very narrow measure and does not reflect consideration of the best interest of the child, as mentioned in Chapter One. While it can be argued that refugee children are doing well despite hindrances to the realisation of their rights, there are still grounds for further improvement. This is line with the need for the ongoing revision of the current Strategy. It has been noted that indicators such as those tracking lower-level qualifications indicate the bare minimum requirements for successful settlement, which the current indicators focus on.⁶¹

Regarding the decision-making component of the obligation, it has been emphasised that actions and decisions that will substantially affect the child should incorporate a “full and formal process” for the

⁵⁷ See Chapter Six at footnote 42 and accompanying text.

⁵⁸ Ministry of Education “School Zones and Enrolment Schemes” (12 August 2024) <www.education.govt.nz>.

⁵⁹ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [15(e)].

⁶⁰ Immigration New Zealand “New Zealand Refugee Resettlement Strategy: Success Indicators and Measures Outcome Update for 2023” <www.immigration.govt.nz>.

⁶¹ Cabinet Economic Development Committee “Refreshing the Refugee Resettlement and Migrant Settlement Strategies” (15 September 2023) DEV-23-MIN-0147 at [42.1].

determination and assessment of the best interest of the child. In such circumstances, there is a need for more protection and comprehensive procedures.⁶² Decisions and actions relating to education for refugee children significantly impact their livelihood and future.⁶³ Therefore, a formal process and comprehensive procedures should be in place within New Zealand's domestic legislation and policies on education provided to refugee children.

In terms of outlining a formal process and procedure for determining the best interest of the child, the CRC has valuable guidelines to be applied. As a start, there is a need to identify and set out what is in the best interest of all children (including those in vulnerable circumstances).⁶⁴ As Chapter Four demonstrates, it is in the best interest of refugee children to receive quality education.⁶⁵ This is to be done flexibly to ensure the unique circumstances of each child are considered. Various circumstances, such as the age, gender, level of maturity and experiences of the child, determine the best interests of the child. The CRC has set out a non-exhaustive list of factors to be considered in the assessment of the best interest of the child,⁶⁶ and these include, among others, the child's views,⁶⁷ the identity of the child,⁶⁸ preservation and maintenance of the family environment,⁶⁹ the child's care, protection and safety⁷⁰ and the situation of vulnerability.⁷¹ The CRC notes that the list is instrumental in establishing which elements to consider and how to weigh them.⁷² While these are useful, they should be consistent with the UNCROC and other international legal values.⁷³ Once these are identified and set out, the best interests of the child can be given primary consideration in legislation and policy development and delivery.⁷⁴

⁶² CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [20].

⁶³ Sarah Dryden-Peterson and others "The Purposes of Refugee Education: Policy and Practice of Including Refugees in National Education Systems" (2019) 92(4) *Sociology of Education* 323 at 347; and ANM Zakir Hossain "Preparedness for Education to Rohingya Refugee Children in Bangladesh-Potentials and Challenges to Citizenship Education" (2021) 20(2) *Journal of Social Science Education* 103 at 115

⁶⁴ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [33].

⁶⁵ At [79].

⁶⁶ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [50].

⁶⁷ At [53].

⁶⁸ At [55].

⁶⁹ At [58].

⁷⁰ At [71].

⁷¹ At [75].

⁷² At [49].

⁷³ 2021 *UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, above n 31, at 31.

⁷⁴ The UNHCR has recommendations for States to engage in a continuous process of child rights impact assessment (CRIA) to determine the possible impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual effect of implementation. See 2021 *UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, above n 31, at 35.

Assessing the child's best interest is a unique activity that should be undertaken in each individual case, including individual characteristics as well as the social and cultural context in which the child finds themselves.⁷⁵ As such, when determining the best interest of the refugee child in educational settings, their unique circumstances should be taken into account. Although this may require additional time and resources, it is essential to ensure that decisions meet each child's needs and result in equitable educational opportunities.

Another element of the best interest of the child principle is that mechanisms and procedures for complaints, remedy, or redress should be established. States are required to establish procedures and mechanisms that will assess and determine the best interests of all children.⁷⁶ This is to ensure that the right is adequately integrated and applied consistently in measures and proceedings affecting children.⁷⁷ The Education and Training Act 2020 does provide mechanisms for complaints.⁷⁸ However, most of them do not directly relate to children but rather to teachers.

It is evident, therefore, that the New Zealand education system is not entirely consistent with the best interest of the refugee child. This is because the best interest of the child principle is not incorporated in legislation and policy. Furthermore, the principle is not even used as a guide in education provided to refugee children specifically. Cumming and Mawdesley suggest that where there is no reference to the best interest of the child in domestic legislation, the best interests of the child can be addressed through policies that provide educational accountability, good educational outcomes as well as policy directives that ensure quality education.⁷⁹ There should thus be targeted measures to ensure that policies address the interests of refugee children and that there are good educational outcomes for them.

The third obligation is related to decisions and actions taken by the private sector and services provided by private entities and institutions making decisions concerning children. The CRC notes that the interests of the child should be assessed and taken as a primary consideration in such decisions.⁸⁰ Private sector organisations include profit and non-profit organisations as they play a role in the provision of services that are critical to children's enjoyment of their rights.⁸¹ There are a

⁷⁵ Ruggiero, above n 37, at 25.

⁷⁶ *2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child*, above n 31, at 31.

⁷⁷ *CRC General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [15(c)].

⁷⁸ Education and Training Act 2020, s 263, s 495, s 499.

⁷⁹ Cumming and Mawdesley, above n 38, at 296.

⁸⁰ *CRC General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [14(c)].

⁸¹ At [26].

number of non-profit organisations that assist with the resettlement of refugee children, such as the Red Cross, Save the Children and local community groups. The obligations discussed extend to such organisations. It is worth noting that the obligation to ensure the implementation of the rights under the UNCROC is imposed on states rather than non-state actors.⁸² States are thus directly responsible for human rights violations by non-state actors within their respective jurisdictions.⁸³ Although this is the case, such actors have great potential to both positively and negatively impact the implementation of children's rights. States are thus required to take appropriate measures,⁸⁴ to regulate the private sector to protect children against threats to their rights and actively involve and secure the support of private entities in the implementation of children's rights.⁸⁵

7.3 *Non-discrimination*

Article 2(1) of the UNCROC requires that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic, or social origin, property, disability, birth, or other status.

This article above recognises children's special status and needs due to their very dependency through a child-specific non-discrimination clause.⁸⁶ Non-discrimination is a vital principle provided for in other various international instruments including arts 2 and 7 of the UDHR,⁸⁷ arts 2(1) and 26 of the ICCPR,⁸⁸ art 2(2) of the ICESCR,⁸⁹ art 5 of the CRPD,⁹⁰ art 7 of the ICERD,⁹¹ art 10 of the

⁸² John Tobin "Article 4 A State's General Obligation of Implementation" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 119.

⁸³ Manisuli Ssenyonjo "Non-State Actors and Economic, Social, and Cultural Rights" in Mashood Baderin and Robert McCorquodale (eds) *Economic, Social, and Cultural Rights in Action* (Oxford Academic, Oxford, 2007) at 110.

⁸⁴ UNCROC, above n 14, at art 4 states that "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention."

⁸⁵ Tobin "Article 4 A State's General Obligation of Implementation", above n 82, at 119.

⁸⁶ Samantha Besson and Eleonor Kleber "Article 2 The Right to Non-Discrimination" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford 2019) at 48.

⁸⁷ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR].

⁸⁸ International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR].

⁸⁹ International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976) [ICESCR].

⁹⁰ Convention on the Rights of Persons with Disabilities 2515 UNTS 3 (opened for signature 30 December 2006, entered into force 3 May 2008) [CRPD].

⁹¹ International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 04 January 1969) [ICERD].

CEDAW,⁹² art 21 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),⁹³ and art 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).⁹⁴ Non-discrimination is also provided for in regional human rights treaties such as the American Convention on Human Rights (ACHR),⁹⁵ the African Charter on Human and Peoples' Rights (ACHPR),⁹⁶ the African Charter on the Rights and Welfare of the Child (ACRWC),⁹⁷ the European Convention on Human Rights (ECHR),⁹⁸ and the Charter of Fundamental Rights of the European Union.⁹⁹

In promoting human rights without discrimination, the UN Charter provides equal enjoyment of the right to education, among other human rights.¹⁰⁰ The Convention against Discrimination in Education (CADE)¹⁰¹ affirms the importance of the principles of non-discrimination and equality of educational opportunities in adequately realising the right to education. It explicitly prohibits any form of discrimination based on social origin, economic condition or birth to ensure that educational opportunities are accessible to all, including refugees.¹⁰² UNESCO has also highlighted that, for the right to education to be effectively guaranteed, it is vital that all people equally access good-quality education, including refugees.¹⁰³

Samantha Besson and Eleonor Kleber note that while the right to non-discrimination is provided for generally under the international and regional human rights treaties, which apply to all including children, they offer limited protection against discrimination specific to children.¹⁰⁴ As such, a special instrument providing for children's rights to non-discrimination is needed to address them.¹⁰⁵ They highlight that art 2 offers protection to "the child in all her or his specificities and not only as any

⁹² Convention on the Elimination of All Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981) [CEDAW].

⁹³ United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 (2007) [UNDRIP].

⁹⁴ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003) [CMW]. It is worth noting that New Zealand is not a signatory to the Convention.

⁹⁵ American Convention on Human Rights (entered into force 18 July 1978) [ACHR], at art 24.

⁹⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) [ACHPR], at art 2.

⁹⁷ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) [ACRWC], at art 3.

⁹⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [ECHR], at art 14.

⁹⁹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391 [CFR EU], at art 21.

¹⁰⁰ Charter of the United Nations 1 UNTS XVI (24 October 1945) [UN Charter], at art 1(3).

¹⁰¹ Convention Against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962) [CADE].

¹⁰² At art 1(1).

¹⁰³ UNESCO *Protecting the Right to Education for Refugees*, above n 27, at 6.

¹⁰⁴ Besson and Kleber "Article 2 The Right to Non-Discrimination", above n 86, at 47.

¹⁰⁵ At 48.

other human being” and also protects children against discrimination as a result of their parents’ or families’ attributes.¹⁰⁶

In further explaining art 2(1), Bruce Abramson highlights three main components of the provision. These are the prohibition of differential treatment of the right holder regarding an interest; the differential treatment should impair the right-holder’s enjoyment of the interest as compared to others’ enjoyment of the interest; and lastly, that the UNCROC provides for the said interest.¹⁰⁷ He notes that if this is the case, the action is unlawful.¹⁰⁸ When applying these elements to discrimination and the right to education for refugee children, there should be an examination of whether the refugee child is treated differently based on a particular ground of discrimination, if the differential treatment harms the refugee child’s interests in education and whether the interests are protected by a right under the UNCROC, in this case being the right to education, as provided for by art 28 of the UNCROC.

As highlighted in Chapter Four, the CRC has noted on several occasions instances where refugee children faced discrimination with regard to accessibility, as such education systems are to be inclusive and responsive. Access to all types and levels of education can be secured through non-discriminatory and inclusive policies. Such policies are to support refugees in learning the language of the host country at an early stage and provide for cultural orientation.¹⁰⁹ It is, therefore, prudent to determine whether refugee children equally enjoy the right to education in New Zealand by considering the extent of their access to quality education,¹¹⁰ as well as their inclusion in laws and policies governing education in New Zealand.

The New Zealand Bill of Rights Act 1990 (BORA), to which the Education and Training Act 2020 is subject,¹¹¹ provides that everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993 (HRA).¹¹² These grounds are sex,¹¹³ marital

¹⁰⁶ At 49.

¹⁰⁷ Bruce Abramson *A Commentary on the United Nations Convention on the Rights of the Child, Article 2: The Right of Non-Discrimination* (Leiden, Martinus Nijhoff Publishers, 2008) at 29.

¹⁰⁸ At 40.

¹⁰⁹ *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants* UN Doc A/70/59 (21 April 2016) at [65].

¹¹⁰ It has been noted in Chapter Four that there are different definitions for quality education. In terms of the UNCROC quality education is one that aligns with the aims of education under art 29. See Christian Curtis and John Tobin “Article 28 The Right to Education” in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 1069. It is one that ensures and encourages the development and each child. It has been characterised by having well trained teachers and other professionals in educational settings which are child friendly and teaching methods that are appropriate. See Chapter Four at 120.

¹¹¹ BORA, s 3(b) states that the Act applies to acts done by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

¹¹² BORA, s 19(1).

¹¹³ Human Rights Act 1993 [HRA], s 21(1)(a).

status,¹¹⁴ religious belief,¹¹⁵ ethical belief,¹¹⁶ colour,¹¹⁷ race,¹¹⁸ ethnic or national origins, which include nationality or citizenship,¹¹⁹ disability,¹²⁰ age,¹²¹ political opinion,¹²² employment status,¹²³ family status,¹²⁴ and sexual orientation.¹²⁵ The HRA also makes it unlawful for educational establishments or any authority responsible for such establishment, any person managing or teaching at an establishment, to do the following by reason of any of the prohibited grounds of discrimination: to deny a student admission,¹²⁶ to admit a student on less favourable terms and conditions that would otherwise be made available,¹²⁷ to deny or restrict access to benefits or services provided,¹²⁸ or to exclude a person as a student or subject one to any detriment.¹²⁹ While there is no explicit reference to refugee children, all children have the right to education in terms of the Education and Training Act 2020. More specifically, the Education and Training Act 2020 is to be interpreted in light of the BORA, and refugee children are to enjoy their right to education free from discrimination. This is relevant to refugee children as they are susceptible to facing discrimination on more than one of the grounds set out in the BORA. Discrimination has been seen to arise due to systemic racism found in “rules, organisation, norms, goals, and procedures of social institutions.”¹³⁰ While there is reference to biculturalism or multiculturalism in education policy in New Zealand, as demonstrated earlier, there has been caution on applying to unequal situations rules and standards that are often considered “neutral” and “universal”.¹³¹ This results in discrimination based on differences among refugees.¹³²

While the education laws in New Zealand may include refugee children, it is also crucial to examine any policies or strategies in place, as was carried out in Chapter Five. Examining the education policy is vital as it “can influence and support inclusive thinking and practices by establishing the equal right of every individual to education and by outlining the forms of teaching, support and leadership that lay the foundation for quality education for all.”¹³³ UNESCO emphasises that all educational policies

¹¹⁴ Section 21(1)(b).

¹¹⁵ Section 21(1)(c).

¹¹⁶ Section 21(1)(d).

¹¹⁷ Section 21(1)(e).

¹¹⁸ Section 21(1)(f).

¹¹⁹ Section 21(1)(g).

¹²⁰ Section 21(1)(h).

¹²¹ Section 21(1)(i).

¹²² Section 21(1)(j).

¹²³ Section 21(1)(k).

¹²⁴ Section 21(1)(l).

¹²⁵ Section 21(1)(m).

¹²⁶ HRA, above n 113, s 57(1)

¹²⁷ Section 57(1)(b).

¹²⁸ Section 57(1)(c).

¹²⁹ Section 57(1)(d).

¹³⁰ Louise Humpage “Systemic Racism: Refugee, Resettlement, and Education Policy in New Zealand” (2001) 19(6) *Canada’s Journal on Refugees* 33 at 34.

¹³¹ At 34.

¹³² At 34.

¹³³ UNESCO *A Guide for Ensuring Inclusion and Equity in Education* (Paris, 2017) at 12.

and practices should be guided by principles of inclusion and equity.¹³⁴ It has been noted that the current education system in New Zealand, underpinned by bicultural policies, allows for the education system to be flexible in considering the different needs and interests in school and can be extended to refugee children. Although this is the case, the lack of a specific policy on education for refugee children limits the visibility of refugee children and the targeted measures required to ensure that their right to education is adequately realised. As has been observed, in some jurisdictions, while education is seemingly available to refugee children, access may be hindered by other policies, such as those relating to enrolment.¹³⁵

Besson and Kleber also posit that art 2 is aimed at ensuring substantive equality.¹³⁶ The CRC emphasised that the application of the non-discrimination principle of equal access to rights does not always translate to identical treatment.¹³⁷ In expanding on this idea, it has been noted that art 2 imposes positive duties that include adopting special measures.¹³⁸ The CRC has, in this regard, pointed out that the non-discrimination obligation under the UNCROC requires states to identify individual children and groups of children who, owing to their rights, require special measures.¹³⁹ Ensuring equal access and equality of treatment in educational settings, as well as substantive equality, involves adopting legal and administrative steps in a manner that allows for the consideration of the unique challenges refugees face, which is critical.¹⁴⁰ While the right to education is provided for within New Zealand's domestic legislation, as highlighted in this research, it is unclear how, from an intersectional approach, the specific difficulties refugee children face are considered in legal and administrative measures adopted in the provision of education. In this regard, UNESCO has emphasised the need for human rights education, specifically for teacher training and support in responding to refugee rights and needs.¹⁴¹

Article 2 is particularly crucial for refugees as it places an obligation on states to actively address child-specific forms of discrimination in the refugee context. Under art 2, states are also obliged to identify a child-specific, durable solution that promotes the protection and development of such a

¹³⁴ At 18.

¹³⁵ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective* (Working Papers on Education Policy 8, 2019) at 12. A study carried out by the UNHCR showed that while most refugee-hosting countries have eliminated formal legal and administrative barriers to accessing education, there may still be restrictions in place relating to enrolment.

¹³⁶ Besson and Kleber, above n 86, at 57.

¹³⁷ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12].

¹³⁸ Besson and Kleber, above n 86, at 65.

¹³⁹ CRC *General Comment No 11 (2009): Indigenous Children and their Rights Under the Convention* UN Doc CRC/C/GC/11 (12 February 2009) at [24]; and CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 137, at [12].

¹⁴⁰ UNESCO *Protecting the Right to Education for Refugees*, above n 27, at 22.

¹⁴¹ At 23.

child, such as access to education, as provided by the UNCROC.¹⁴² The UNHCR has, in its Education Strategy, emphasised that refugees and nationals have the same rights to education and access to national education programmes at all levels.¹⁴³ As noted earlier, the provision for education for all children in domestic legislation does not always result in equal access to quality education for refugee children. The need for inclusion policies has been emphasised when dealing with refugees. This is because inclusion also requires access to education in all forms and levels. States have been urged to implement national policies of inclusion for refugees (and migrants) as they are aimed at integrating refugees (and migrants) in host countries through facilitating early access to learning the host country's language and training on culture.¹⁴⁴ Such policies should be developed within New Zealand's education policy. To develop policies that are inclusive and equitable, the difficulties that students face should be recognised as stemming from aspects of the education system itself. These aspects include how education systems are organised, the forms of teaching provided, the learning environment, and the ways in which students' progress is supported and evaluated.¹⁴⁵

The intersectionality approach,¹⁴⁶ forming part of the theoretical framework of this research, highlights multiple levels of discrimination and serves as a guide for identifying significant barriers that impede access to education. Cultural awareness, or the lack thereof, was mentioned in some of the interviews with participants.¹⁴⁷ Jody Lynn McBrien suggests that "cultural misunderstandings can result in prejudice and discrimination, with the result that students, already struggling with an unfamiliar language and confusing cultural changes, must also work to overcome the impact of negative."¹⁴⁸ As a result, the right to education for refugee children may not be adequately realised. McBrien notes that discrimination has been linked to negative experiences and consequences in refugee students' academic and career goals.¹⁴⁹ When resettling in a new country, refugee children tend to experience discrimination and bullying, which arise during the process of adapting to a new

¹⁴² Sonia Human "The Importance of Article 2 of the Convention on the Rights of the Child for Refugee Children" in Marit Skivenes and Karl Harald Søvig (eds) *Child Rights and International Discrimination Law: Implementing Article 2 of the United Nations Convention on the Rights of the Child* (Routledge, Milton, 2019) at 186.

¹⁴³ UNHCR *Education and Protection* (Education Issue Brief 1, 2015) at 3.

¹⁴⁴ *In Safety and dignity: Addressing Large Movements of Refugees and Migrants*, above n 109, at [65].

¹⁴⁵ UNESCO *A Guide for Ensuring Inclusion and Equity in Education*, above n 133, at 13.

¹⁴⁶ This is consistent with an intersectionality approach which explains how students' refugee identities expose them to varying levels of exclusion in schools.

¹⁴⁷ Interview with Participant A (18 February 2022); Interview with Participant N (12 May 2022); Interview with Participant M (13 December 2021); and Interview with Participant E, above n 25.

¹⁴⁸ Jody Lynn McBrien "Educational Needs and Barriers for Refugee Students in the United States: A Review of the Literature" (2005) 75(3) *Review of Educational Research* 329 at 330.

¹⁴⁹ At 351.

language and culture.¹⁵⁰ Racism has been highlighted as one of the experiences of discrimination that can impact the integration of children with immigrant background, including refugees.¹⁵¹

Article 2(2) of the UNCROC further places obligations on states that:

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

One of the key ways to protect refugees' right to education is by guaranteeing all access to schools and programmes, thus ensuring non-discrimination. There must be efforts to prevent discriminatory practices against refugees.¹⁵² It should, therefore, be evident within the New Zealand education system that refugee children are included and that their interests are taken into consideration in all practices, policies and laws affecting them. This can indicate the extent to which their right to education is realised. In this regard, Curtis and Tobin emphasise that, to ensure children susceptible to unequal access and opportunity in education have equal access, state parties are obligated to implement special measures.¹⁵³ Measuring equality of access and whether there are special measures in place can be achieved through monitoring relevant policies, institutions, programmes, and spending patterns to identify evidence of discrimination.¹⁵⁴

Such monitoring can be achieved through data collection on any variance in accessing education due to one's race, colour, sex, language, religion, national, ethnic or social origin, disability, birth, parental circumstances, and cultural resistance.¹⁵⁵ Data collection on refugee children, in particular, and their interaction with the education system can be instrumental in identifying discrimination that would not have otherwise been detected. Such discrimination can be seen as unintentional and cannot be

¹⁵⁰ Ziba Vaghri and others "Refugee and Asylum-Seeking Children: Interrupted Child Development and Unfulfilled Child Rights" (2019) 6(11) *Children* 120 at 126.

¹⁵¹ Franka Metzner and others "Experiences of Discrimination and Everyday Racism Among Children and Adolescents with an Immigrant Background—Results of a Systematic Literature Review on the Impact of Discrimination on the Developmental Outcomes of Minors Worldwide" (2022) 13 *Systematic Review* 1.

¹⁵² UNESCO *Protecting the Right to Education for Refugees*, above n 27, at 22.

¹⁵³ Gerison Lansdown and Ziba Vaghri "Article 28: The Right to Education" in Ziba Vaghri and others *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer, Switzerland, 2022) at 253; Curtis and Tobin, above n 110, at 1077.

¹⁵⁴ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [37].

¹⁵⁵ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood* UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) at [77(g)]; and CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 16, at [52(d)] and [53(f)].

challenged if not recognised.¹⁵⁶ In stressing the need for disaggregated data to uphold the non-discrimination principle, Beeckman notes that those subjected to discrimination and disadvantage in New Zealand educational settings should be identified.¹⁵⁷ Data on refugee children in educational settings is limited, as highlighted earlier in this chapter. It does not account for the educational achievement of refugee children at other stages of education, as its main focus is on NCEA level two. Therefore, it is difficult to determine how other refugee children are doing. This arguably shows that the implementation of the right to education for refugee children is not adequately monitored. It is thus challenging to identify any discrimination they face or could potentially face. As an example, it has been observed that when there are “extensive gaps” in data collection, it may be impossible to assess primary and secondary enrolment rates for refugee children.¹⁵⁸

Some measures to be implemented to ensure equal access to education and the benefits thereof include, inter alia, the provision of funding, flexible educational arrangements, additional provision in rural areas, free early childhood education and alternative education programmes for children struggling in the mainstream education system.¹⁵⁹ While this applies to all children, it is particularly important and applicable to refugee children in New Zealand. This is because, from the discussion held with stakeholders, it is evident that some refugee children face barriers that hinder equal access. These include the need for additional support, such as learning the English language and access to early childhood education, as school fees are required for enrolment. Most interviewees identified funding, language barrier and cultural differences as the main barriers.¹⁶⁰ Currently, there is provision of English language support. However, some participants indicated the need for funding to ensure the support offered is sustainable and adequate. With regard to access to early childhood education, it appears that access depends on whether each family can afford schools. There are some efforts to overcome these barriers in some areas, such as one of the schools offering early childhood education to refugee children for free.¹⁶¹

Ultimately, if the right to non-discrimination is upheld, the right to education for refugee children will be better realised. One of the main aims of the right is development, and it has also been

¹⁵⁶ Claire Breen “The Ageing of Article 2(1)” in Marit Skivenes and Karl Harald Søvig (eds) *Child Rights and International Discrimination Law* (Routledge, London, 2019) 55 at 63.

¹⁵⁷ Beeckman, above n 9, at 75.

¹⁵⁸ Bill Van Esveld “A Will and a Way: Making Displaced Children’s Right to Education Enforceable” (2023) 12(16) *Laws* 1 at 8.

¹⁵⁹ Lansdown and Vaghri, above n 153, at 254.

¹⁶⁰ Interview with Participant B, above 25; Interview with Participant D (19 November 2021); Interview with Participant C (27 January 2021); Interview with Participant N (12 May 2022); Interview with Participant L (06 September 2022); and Interview with Participant P (6 October 2022).

¹⁶¹ Interview with Participant Q (17 February 2022).

emphasised that the right to development is undermined when the right to non-discrimination is violated.¹⁶²

7.4 *The Right of the Child to Express their Opinion and Have Those Opinions Heard in All Matters Affecting Them*

Article 12 of the UNCROC provides that:

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

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This right and principle is two fold; firstly, the child has the right to express their views and have such views given due weight. Secondly, the child is to be given the opportunity to be heard in judicial and administrative proceedings affecting them.¹⁶³ It is instrumental in ensuring that refugee children are able to express their interests, which can positively enhance the protection of their rights. The extent to which state parties have successfully implemented the principle of respect for the opinions of the child in schools, both formally and informally, is addressed herein, paying particular attention to whether they have been implemented through legislation or otherwise.

The right of the child to express their opinion and have those opinions heard in all matters affecting them within education requires children to be seen as active players in their education and not as just recipients of education. This also buttresses the importance of how children are perceived, as discussed in Chapter Three. As such, the recognition and respect of the child's dignity should form part of a good educational system.¹⁶⁴ While it is settled that one of the main ways of determining the realisation of this right is through consulting with children themselves, this research focuses on

¹⁶² Noam Peleg *The Right to Development* (Cambridge University Press, Cambridge, 2019) at 97. The CRC has, on several occasions, suggested that discrimination violates the child's right to development. CRC *Concluding Observation Burundi* UN Doc CRC/C/15/Add 133 (16/10/2000) at [77]; and CRC *Concluding Observation Sudan* UN Doc CRC/C/15/Add19 (9 October 2002) at [46].

¹⁶³ UNCROC, above n 14, at art 12(2).

¹⁶⁴ UNICEF *Fact Sheet: The Right to Participation* (01 January 2010).

examining the laws and policies in place and the extent to which they allow refugee children to express their views and if such views are heard. The child's right to be heard is fundamental to the enjoyment of the right to education.¹⁶⁵ One of the issues affecting children's lives at school relating to children's rights is respect for their views. Many children tend to be dissatisfied with the opportunities they are given to express their views in educational settings.¹⁶⁶ In line with this issue, the CRC has urged New Zealand to ensure that children participate meaningfully in the design and implementation of policies and programmes affecting children.¹⁶⁷ In addition to this, there should be evaluation of how amended legislation requiring consultation with children in all matters affecting them is implemented within legislation relating to children,¹⁶⁸ including the Education and Training Act 2020.¹⁶⁹ The CRC has asserted that educational settings should recognise and foster children's active role in schools.¹⁷⁰ New Zealand has in particular, been urged to implement requirements on consultation with children and student representation in governance structures, and establishing accessible, independent dispute resolution mechanisms under the Education and Training Act 2020 to ensure children's ability to have meaningful input into decisions that affect them at school is strengthened.¹⁷¹ One of the benefits of the realisation of the child's right to express their opinion and have those opinions heard in all matters affecting them in education is the potential to increase a student's motivation and thereby their learning processes. The quality of education can also be enhanced through participation as it has the potential to cultivate a good school environment and can result in school improvement.¹⁷² Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures.¹⁷³ Refugee children tend to be particularly susceptible to such issues. As a result, some barriers to the right to education of refugee children can be eliminated.

The views expressed by children can also add relevant perspectives and experiences. They should be considered in decision-making, policymaking and preparation of laws and measures, as well as their

¹⁶⁵ Lansdown and Vaghri, above n 153, at 250.

¹⁶⁶ Lothar Krappman "The Rights of the Child as a Challenge to Human Rights Education" (2006) 5(1) *Journal of Social Science Education* 60 at 66.

¹⁶⁷ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/6 at [19(a)].

¹⁶⁸ Under the Oranga Tamariki Act 1989, s 5(1)(a); the Children's Act 2014, s 6D; and the Care of Children Act 2004, s 6.

¹⁶⁹ See CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 167, at [19(b)].

¹⁷⁰ CRC *General Comment No 12 (2009): The Right of the Child to be Heard* UN Doc CRC/C/GC/12 (20 July 2009) at [107].

¹⁷¹ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 167, at [37(a)].

¹⁷² Julia Häbig and others "Participation and Social Exclusion – Are They Mutually Exclusive Phenomena?" in Jenna Gillett-Swan and Nina Thelander (eds) *Children's Rights from International Educational Perspectives, Transdisciplinary Perspectives in Educational Research* (Springer Cham, Switzerland, 2021) at 130.

¹⁷³ CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above n 170, at [109].

evaluation.¹⁷⁴ Another benefit of fostering children's voices is that it promotes the view that they should be seen as human beings and not citizens in the making.¹⁷⁵ As explained in the Chapter Three, when children are recognised as human beings capable of constructing their own development and life, they are seen as rights-holders. This can arguably result in a more intentional focus on their education in the context of refugee children. Michael Freeman emphasises the importance of art 12 "not only for what it says but because it recognises the child as a full human being with integrity and personality and the ability to participate freely in society."¹⁷⁶

It has been noted that children's right to education relates to access as well as the content of education. It has also been highlighted that art 12 requires education to be provided in a way that respects children and allows them to express their opinions freely and participate in school life.¹⁷⁷ In ensuring that children can freely express their opinions, there must be recognition of the fact that students' voices are "not homogeneous and that all opinions can be heard and not only those of a few students with greater social and cultural capital."¹⁷⁸ Listening to each child in a group setting is a significant challenge that can result in some children's voices being prioritised while silencing others, particularly children with another home language, newly arrived immigrant and refugee children or children with perceived language or developmental issues.¹⁷⁹ Several authors have noted that protecting the right to express opinions freely requires a combination of strategies to ensure that all children, without exception, have the opportunity to express their points of view. A child or group of children should not be seen to dominate "the process of debate" as it is a common occurrence.¹⁸⁰ Refugee children in schools, who represent a smaller percentage of students, should, therefore, be afforded the opportunity to be heard, especially since they may have different intersecting interests that need to be protected.

Smith raises essential questions regarding children's participation in New Zealand. These relate to the extent to which children are afforded the opportunity to be heard in the national curriculum. She notes that while educational goals and guidelines are outlined in the curriculum, it is not clear how

¹⁷⁴ Sonya Gaches "Sharing their Ideas with the World: The Views and Voices of Young Children" (2023) 21(1) *Journal of Early Childhood Research* 46; and CRC *General Comment No 12 (2009): The Right of the Child to be Heard*, above n 170, at [5].

¹⁷⁵ Alison Struthers "Breaking Down Boundaries: Voice and Participation in English Primary Education" (2016) 24(2) *The International Journal of Children's Rights* 434 at 439.

¹⁷⁶ Michael Freeman "Children's Education: A Test Case for Best Interests and Autonomy" in Ronald Davie and David Galloway (eds) *Listening to Children in Education* (David Fulton, London, 1996) at 37.

¹⁷⁷ Noelia Ceballos and others "Small Voices Bring Big Messages. Experiences of Student Voice and Inclusion in Spanish Schools" in Jenna Gillett-Swan and Nina Thelander *Children's Rights from International Educational Perspectives* (Springer Cham, Switzerland, 2021) 159 at 160.

¹⁷⁸ At 170.

¹⁷⁹ Pauline Harns and Harry Manatakis *Children as Citizens: Engaging with the Child's Voice in Educational Settings* (Routledge, London, 2013) at 8.

¹⁸⁰ Ceballos and others, above n 177, at 160.

the child's perspective is taken into account.¹⁸¹ While this is the case, New Zealand's Early Childhood Curriculum - Te Whāriki, makes reference to children's rights and explains how children's participation rights can be incorporated into a curriculum. It states that services are aimed at recognising children rights and enabling participation of all children, including those needing additional learning support.¹⁸² Therefore this can play a key role in ensuring that refugee children's rights are realised.

Data collection is also essential in realising the child's right to express their opinion and have those opinions heard in all matters affecting them. In this context, the CRC notes that data to be collected include the number of child and youth organisations or associations, the number of members that represent schools with independent student councils, and children who have been heard in judicial and administrative proceedings, including information on their age.¹⁸³ In New Zealand, this information is not available. As such, it is difficult to determine whether refugee children's right to express their opinion and have those opinions heard in all matters affecting them is in fact realised.

The CRC has noted that the realisation of the right of the child to express their views also requires those responsible for hearing the child and the child's parents or guardian to inform the child of the matters, options, and possible decisions to be taken. The child is to be also informed about the conditions that will be in place when asked to express their views.¹⁸⁴ States parties have an obligation under this right to ensure that the child is provided with all necessary information and advice to make a decision that is in her or his best interests.¹⁸⁵ As such, the best interests of the child need to be determined based on the views of the child.¹⁸⁶ This highlights the interdependence of arts 12 and 3. It has been noted that art 12 is the method of assessing a child's best interests, and art 3 cannot be applied correctly if the components of article 12 are not respected.¹⁸⁷ Another obligation arising from art 12 is for the views of the child to be given due weight in accordance with the child's age and maturity. Merely listening to the child is not sufficient to meet this obligation. The views of the child are to be seriously considered when the child can form their own views.¹⁸⁸ It has been emphasised

¹⁸¹ Anne Smith "Children and Young People's Participation Rights in Education" (2007) 15(1) *The International Journal of Children's Rights* 147 at 155.

¹⁸² Ministry of Education *Te Whāriki* (2017).

¹⁸³ *CRC Treaty-Specific Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1 (b), of the Convention on the Rights of the Child* UN Doc CRC/C/58/Rev.3 (3 March 2015) at annexe [7].

¹⁸⁴ *CRC General Comment No 12 (2009): The Right of the Child to be Heard*, above n 170, at [25].

¹⁸⁵ At [16].

¹⁸⁶ Lansdown and Vaghri, above n 153, at 43.

¹⁸⁷ Laura Lundy, John Tobin and Aisling Parkes "Article 12 The Right to Respect for the Views of the Child" in John Tobin *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 413.

¹⁸⁸ *CRC General Comment No 12 (2009): The Right of the Child to be Heard*, above n 170, at [28].

that the requirement for “serious consideration” means that children’s views cannot be “dismissed or overlooked” when deciding on matters affecting them.¹⁸⁹

Children’s views are to be respected as this is an international legal obligation ensuring the realisation of other rights and not just good practice in teaching. To ensure that children’s right to be heard in educational settings is realised, Laura Lundy argues that teachers should know art 12 of the UNCROC and the legal implications that arise. She emphasises that its scope includes decision-making in educational settings.¹⁹⁰ Alison Struthers argues that it is only when teachers are trained in human rights education within their teacher training that they are empowered to facilitate practices, such as active participation and pupil voice, in their classrooms and schools.¹⁹¹ If this is the case, the right to education for refugee children can be better realised.

7.5 *Right to Survival and Development*

Article 6 of the UNCROC provides for the right to life, survival, and development.¹⁹² The focus will be on the development aspect of the right as a guide on the extent to which the right to education for refugee children is realised. Several international instruments provide for the right to development.¹⁹³ It involves affording the child, through laws, the opportunities and facilities to enable the development of their entire being.¹⁹⁴ The fulfilment of other children’s rights has also been linked to the child’s development.¹⁹⁵ As such, it is fundamental to the implementation of all rights set out in the UNCROC.¹⁹⁶

Although the right to development is part of the UNCROC’s Guiding Principles, Noam Peleg highlights that the CRC has not provided a concrete interpretation of it.¹⁹⁷ This, therefore, results in

¹⁸⁹ Lundy, Tobin and Parkes, above n 187, at 411.

¹⁹⁰ Laura Lundy “‘Voice’ is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child” (2007) 33(6) *British Educational Research Journal* 927 at 930.

¹⁹¹ Struthers, above n 175, at 465.

¹⁹² Article 6 provides for the right to life, development, and survival. The right to life and survival includes an obligation to fulfil a child’s right to life and create the conditions necessary to ensure a life of dignity. See Noam Peleg and John Tobin “Article 6 The Right to Life, Survival and Development” in John Tobin *The UN Convention on the Rights of the Child A Commentary* (Oxford University Press, Oxford, 2019) at 223.

¹⁹³ Article 29(1) of the UDHR refers to “the free and full development of [an individual’s] personality.” Article 12(2)(a) of the ICESCR speaks of “the healthy development of the child” in the context of the recognition of “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”

¹⁹⁴ Declaration of the Rights of the Child UN Doc A/RES/1386 (XIV) (20 November 1959), at principle 2.

¹⁹⁵ Douglas Hodgson “The Child’s Right to Life, Survival and Development” (1994) 2(4) *The International Journal of Children’s Rights* 369 at 385.

¹⁹⁶ Manfred Nowak “Article 6: The Right to Life, Survival and Development” in Andre Alen and others *Commentary on the United Nations Convention on the Rights of the Child* eBook ed (Martinus Nijhoff Publishers, Leiden, 2005) at 17.

¹⁹⁷ Peleg, above n 162, at 187.

state parties developing their own understanding of it.¹⁹⁸ He cautions, however, that this has the effect of duty bearers ignoring their obligation to protect and promote this right.¹⁹⁹ He notes that the CRC understands the right to development as a right that facilitates the process of a child becoming an adult. While focusing on child development, the right to development tends to be ignored as a distinct human right.²⁰⁰ The child's development has been likened to the child's best interests under the Convention. Peleg and Tobin note that, like the best interest of the child, the child's development is considered "indeterminate and/or disputed."²⁰¹ They, therefore, set out criteria to be used when determining the child's development.

The child's development is to be informed by other articles of the UNCROC; the views of a child capable of forming views on matters affecting any aspect of their development are to be given due weight depending on the child's age and level of maturity;²⁰² and parents' views and practices should be considered in determining measures appropriate for their child's development, including the education.²⁰³ In addition to this, the cultural perspective of each child should also be considered.²⁰⁴ This aligns with the aim of developing the child's cultural identity, language and values as set out in the UNCROC.²⁰⁵ This is especially relevant to refugee children due to their diverging cultural perspectives. There should be a process in place to provide an understanding of the child's development as this has the potential to be interpreted subjectively, and this may result in bias.²⁰⁶ Peleg and Tobin also suggest consideration of evidence from other disciplines on what is perceived as consistent with the personal development of the child, such as education.²⁰⁷ Most educational theories discussed in the theory chapter relate to certain aspects of development. Rousseau's theory on education postulates that children are to be allowed to develop naturally without constraints. Consequently, education is to be aimed at development in accordance with a child's natural abilities and capabilities.²⁰⁸ Dewey, on the other hand, was of the view that education is to be aimed at enabling individuals to continue their education and the continual capacity to grow.²⁰⁹

¹⁹⁸ At 94; he also notes that the right to development as a Guiding Principle carries "little weight and the focus is mainly on child development so States are not specifically required to address the state of the right", at 96.

¹⁹⁹ At 94.

²⁰⁰ At 187.

²⁰¹ Peleg and Tobin, above n 192, at 225.

²⁰² At 225.

²⁰³ At 225.

²⁰⁴ At 225.

²⁰⁵ UNCROC, above n 14, at art 29(1).

²⁰⁶ Peleg and Tobin, above n 192, at 225.

²⁰⁷ At 226.

²⁰⁸ Jean-Jacques Rousseau *Emile* (Barbara Foxley (translator), JM Dent and Sons, London, 1921) [first published as *Émile, ou De l'éducation*, 1762] at 8-10.

²⁰⁹ John Dewey *Democracy and Education* (Free Press, New York, 1916) at 100.

Peleg notes that:²¹⁰

the broad protection of child development in the Convention is a definitive expression of the impetus of international children's rights law to protect the child's transformation into an adult. This objective mirrors the prevailing sociological conception of childhood in the Anglo-American world, known as the human becomings.

As noted in Chapter Three, such a perspective interferes with or contradicts children's status as rights-holders with interests to be protected.²¹¹ It has been noted that the right to development under art 6 is limited as the CRC has made a connection between the child's right to development to early childhood and that child development as a human right is overlooked.²¹² Peleg is of the view that the CRC's interpretation of child development is based on developmental psychology and a Western perception of childhood.²¹³ Although Western conceptions of childhood are widely relied upon, this perspective has been challenged as it does not usually take into account the various cultural needs that refugee children have.²¹⁴ It is worth noting that the perception of children, particularly refugee children, is important and can affect the realisation of the right to development, which will, in turn, affect the right to education.

It is worth emphasising that the realisation of the right to education, in particular, goes hand in hand with the child's optimum development.²¹⁵ Peleg and Tobin note that the right to development stated in art 6(2) relates mainly to the child's personal development as broadly understood.²¹⁶ With regards to education, art 29(1) states that education should be directed towards the development of the child's personality, talents, and mental and physical abilities to their fullest potential.²¹⁷ While development is one of the aims of education, it is also a means of ensuring that the right to education is adequately realised. Article 29(1) also states that education should be aimed at the development of respect for human rights and fundamental freedoms.²¹⁸ It is, therefore, important for human rights, including the right to development, to be respected and incorporated in the educational process.²¹⁹

²¹⁰ Peleg, above n 162, at 187.

²¹¹ See Chapter Three at 86.

²¹² Peleg, above n 162, at 135.

²¹³ At 132

²¹⁴ Peleg, above n 162.

²¹⁵ Lansdown and Vaghri, above n 153, at 250.

²¹⁶ Peleg and Tobin, above n 192, at 223.

²¹⁷ At 223.

²¹⁸ UNCROC, above n 14, at art 29(1)(b).

²¹⁹ Tristan McCowan "Reframing the Universal Right to Education" (2010) 46(4) Comparative Education 509 at 519.

Furthermore, guaranteeing universal, quality and inclusive education will result in the development of children.²²⁰ Mano Candappa suggests that the right to education in terms of development is realised when the child's abilities are nurtured and developed (to the fullest potential) through a learning environment and curricular and pastoral support.²²¹ Pastoral support provided to refugee children has been recognised as vital in addressing the circumstances they experienced prior to being resettled.²²² A few research participants noted the importance of pastoral care for refugee children within education settings. As mentioned in Chapter Four, the optimal development of all children should be the outcome when measures are taken to realise the right to education. This includes taking into account the various stages of development of every child.²²³ When applied to the Refugee Resettlement Strategy and its current target for education, which measures the proportion of refugee school leavers receiving NCEA level two after five years or more, the measure does not account for the different stages of a child's development, as it only focuses on NCEA level two attainment.

In addition to this, development has been interpreted by the CRC to include the physical, mental, spiritual, moral, psychological and social development of the child.²²⁴ The 1986 Declaration on the Right to Development²²⁵ provides that in accordance with the right to development, everyone is entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised.²²⁶ Education provided to refugee children should be aimed at developing each aspect of their life. In discussing the right to development, the CRC emphasised the need for a commitment to provide environments that can adequately support the development of their physical, psychological, spiritual, social, emotional, cognitive, cultural, and economic capacities.²²⁷ Such a commitment should be reflected in national policies and guidelines in addition to the Education and Training Act 2020. There are currently no policies or guidelines in place that reflect targeted measures to ensure the holistic development of refugee children within the New Zealand education system. The absence of a commitment to development in education laws and policies, may result in the right to education for refugee children not being adequately realised.

²²⁰ CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence* UN Doc CRC/C/GC/20 (6 December 2016) at [68].

²²¹ Mano Candappa "The Right to Education and an Adequate Standard of Living: Refugee Children in the UK" (2000) 8(3) *The International Journal of Children's Rights* 261 at 266.

²²² At 266.

²²³ CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 220, at [1].

²²⁴ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 137, at [12].

²²⁵ Declaration on the Right to Development GA Res 41/128 (1986).

²²⁶ At art 1.

²²⁷ CRC *General Comment No 20 (2016) on the Implementation of the Rights of the Child during Adolescence*, above n 220 at [15].

Similar to other domestic legislation²²⁸ that makes reference to the child's development, the Education and Training Act 2020 sets out education and learning objectives for early childhood education, primary education, and secondary education, and these include the development of the child in various areas of their life.²²⁹ Although this is a step in the right direction, the state should adopt targeted measures to ensure the development of children who are in especially vulnerable situations.²³⁰ The education curriculum should also be designed and delivered with the aim of promoting children's optimum development.²³¹ The CRC has noted on a few occasions that personal development and vocational training of students should be the focus of school curricula.²³² The National Curriculum is aimed at developing a few competencies, which include participation and contribution.²³³ This is, however, not informed by children's rights. Therefore, the right to development may not be adequately realised as it is not aimed at addressing all aspects of development.

An examination of New Zealand's domestic laws and practices in education suggests that there are no avenues for refugee children's views to be heard and, consequently their views are not given due weight on issues affecting their development. Although this is the case, their parents also have a critical role in the development of children. While their views and culture tend to be considered when enrolling refugee children in schools, this comes with its fair share of challenges. In practice, teachers and other stakeholders who have a role in the resettlement of refugee children have noted during the interviews conducted that parents' views and practices may not always be understood due to the language barrier as well as a lack of understanding of the New Zealand education system. Although there are a few aspects contributing to realising the right to development in line with the criteria outlined earlier, the right to development may not be adequately realised as the provision for development is not informed by articles of the UNCROC.

Implementation measures to educate children (including refugees) should thus be put in place to realise the optimal development for all children.²³⁴ Targeted measures are to be adopted, especially

²²⁸ Section 5 of the Care of Children Act 2004 is an example of such, which requires that in determining the best interest of the child, a child should have continuity in his or her care, development, and upbringing.

²²⁹ Education and Training Act 2020, s 4(b).

²³⁰ Olga Byrne "Promoting A Child Rights' Based Approach to Immigration in the United States" (2018) 32 *Georgetown Immigration Law Journal* 59 at 91.

²³¹ Lansdown and Vaghri, above n 153, at 250.

²³² CRC *Concluding Observations of the Committee on the Rights of the Child: The Former Yugoslav Republic of Macedonia* UN Doc CRC/C/15/Add 118 (23 February 2000) at [45]; and CRC *Consideration of Reports Submitted by States Parties Under Article 44 of The Convention, Concluding Observations: Brazil* UN Doc CRC/C/15/Add.241 (3 November 2004) at [58].

²³³ Ministry of Education *The New Zealand Curriculum*, above n 1, at 12.

²³⁴ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, above n 137, at 4.

for children in vulnerable conditions, to ensure the development of refugee children. There is an obligation on states to outline measures taken to create a conducive environment to guarantee the survival and development of the child to the maximum extent possible.²³⁵ The 1986 Declaration provides that “States should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources including education, health services.....”²³⁶ Development should also be informed by the UNCROC, existing framework and national plans should ensure that education targets all aspects of development while educational settings actively support the holistic development of each child.

7.6 Conclusion

One of the main aims of this research is to emphasise the importance of education in the resettlement and integration of refugee children in education. While the content of the right itself has been explored in Chapter Four, this chapter sought to assess whether the right is adequately realised in New Zealand. The four Guiding Principles were explained and applied to determine the extent to which the laws, policies and programmes realise refugee children’s rights. In realising the right to education, domestic legislation should, in addition to the incorporation of international obligations, be directed at eliminating barriers impeding access.²³⁷ The four Guiding Principles are, therefore, instrumental in highlighting gaps and barriers and informing a much-needed child rights-based approach to the provision of education to refugee children.

The centrality of the Education and Training Act 2020 has been demonstrated and despite it providing for the right to education, it does not make reference to the four Guiding Principles that are instrumental in realising the right to education. The best interest of the child principle is important and ensures that the education provided is adequate to meet the needs and interests of refugee children. If the best interest of the child principle is upheld, this should be evident in laws, policies, and decisions for refugee children. This is not the case in New Zealand. It is in the best interests of refugee children to access quality education, and all decisions affecting them must uphold their interests. There are a number of barriers to the provision of the right to education to refugee children that reflect this.

²³⁵ CRC *General Guidelines Regarding the Form and Contents of Periodic Reports to be Submitted by States Parties under Article 44(1)(b) of the Convention* UN Doc CRC/C/58 (20 November 1996) at [40].

²³⁶ *Declaration on the Right to Development*, above n 225, at art 8.

²³⁷ UNESCO *A Human Rights-Based Approach to Education for All* (2007) at 52.

It is also in their best interest that refugee children have an opportunity to have a say in the education they receive. While there is provision for student representation in school boards, it is not clear whether refugee children are required to form part of such bodies. It is also not clear whether and how refugee children are consulted in the design and development of education laws and policies. This can also indicate the extent to which the non-discrimination principle is upheld. To ensure that education is provided to refugee children in a non-discriminatory manner, additional steps should be taken to ensure that refugee children have equal opportunities in education. Although the Education and Training Act applies to all children, the unique circumstances of refugee children are not taken into consideration. This may result in their right to education not being adequately realised. All educational settings should be free from discrimination.

The right to development not only serves as a means to the realisation of the right to education but also represents one of the aims of education. Consequently, the child's capabilities must be developed to ensure the effective adequate realisation of this right. Guaranteeing education also fosters children's overall development; therefore, measures aimed at realising the right to education should ensure the optimal development of refugee children. The New Zealand education system lacks specific policies or guidelines designed to promote the optimal development of refugee children. To address this gap, education should be tailored to refugee children in a manner that will facilitate their optimal development. Domestic laws and policies should underpin the need for education to be aimed at their development.

All these Guiding Principles are interdependent. For the right to education to be adequately realised, it is in the best interest of refugee children to be afforded opportunities to participate in their education and design thereof in a non-discriminatory manner to ensure that they develop to their fullest potential. Likewise, for refugee children to be free to air their views, educational settings must be free from discrimination, take into account the child's best interest and cultivate their development.

It has been well recognised that national education development plans do not tend to include refugee children and that national monitoring systems do not assess refugees' educational access and attainment. As a result, refugee children tend to be invisible and, therefore, may be disadvantaged.²³⁸ In light of the above discussion, this seems to be the case in New Zealand.

²³⁸ UNESCO *Protecting the Right to Education for Refugees*, above n 27, at 10.

8. SUMMARY AND RECOMMENDATIONS

8.1 *Introduction*

This thesis represents a comprehensive legal examination of the right to education for refugee children in New Zealand, a critical yet unexplored dimension of refugee children's rights in New Zealand. By engaging in in-depth legal analysis of this fundamental right, this research fills a significant gap in literature and provides a fundamental basis for understanding how the law can better advance the rights of refugee children in New Zealand. This investigation is of utmost importance as refugee children have particular needs and interests that do not currently form the basis of education laws and policies. This research has explored this issue, focusing on examining how the current New Zealand legal framework implements international human rights law obligations in education and how it underpins the provision of education to refugee children. Despite international commitments, it has become evident that the right to education for refugee children is not adequately realised, and this research provides a comprehensive pathway to reform.

This chapter marks the culmination of the entire research, and all the significant findings will be presented to demonstrate why the realisation of the right to education is considered inadequate. In doing so, the findings will be presented in terms of key themes that address the research question, namely the extent to which the New Zealand legal framework protects refugee children's right to education. This will be followed by crucial recommendations on how the existing legal and policy framework can be improved to ensure better realisation of the right to education for refugee children. These recommendations, if implemented, have the potential to significantly enhance the enjoyment of the right to education for refugee children in New Zealand. They can serve as a valuable blueprint for strengthening both the legal framework and practical implementation of refugee children's right to education in New Zealand. The discussion will underscore the importance of these recommendations, as they have the potential to significantly improve the realisation of other rights of refugee children in New Zealand.

8.2 *Summary of Findings*

8.2.1 Education and the Rights of Refugee Children

Education is crucial in protecting and realising children's rights, especially those of refugee children. It is not just a right but a multiplier right, enabling the enjoyment of other rights that refugee children

have.¹ Education has been appropriately linked to the successful resettlement and integration of refugee children. It has been argued that education is instrumental in empowering both refugee children and adults to survive and thrive in the countries they resettle in.² Rights to education and rights through education, such as non-discrimination and participation, can significantly enhance the resettlement and integration process of refugee children. Not only does education encourage the development of refugee children, but it also recognises their evolving capabilities.

It has been noted that the denial of education can give rise to different human rights violations beyond the right to education.³ This is because the right to education unlocks other human rights, such as the right to work, an adequate standard of living, and participation in political and public life.⁴ The right to education thus guarantees the realisation of other fundamental rights. Conversely, for the right to education to be adequately implemented, other children's rights must be realised. These include the right to non-discrimination, taking into account the best interest of the child, the right to be heard and have one's views taken into account, and the right to survival and development. This emphasises that the right to education is crucial for refugees as it can ensure that other refugee children's rights, which are often infringed upon, are upheld.

As noted, education is vital in the resettlement and integration of refugees and, therefore, refugee children have an interest in it. Not only is education an interest, but it is also a right. As such, this research is grounded in different theories that support the notion that refugee children have different intersecting education needs and interests within legal and sociocultural approaches that require protection. The interest theory of rights, enriched by insights from the sociology of childhood and sociocultural theory, all recognise refugee children as rights-holders and active social actors with different childhoods due to their culture and background, which must be taken into account when providing education. All these combined are a theoretical framework enriching the understanding and protection of the right to education for refugee children. In sum, refugee children are perceived as rights-holders by the establishment of the interest theory of rights as the foundation for the right to education. At the same time, other key actors are obligated to take steps to realise this right. The view of children as rights-holders can be understood and applied in a more practical way when childhood

¹ Klaus Beiter Deiter *The Protection of the Right to Education by International Law* (Martinus Nijhoff, Leiden, 2006) at 29.

² James Hathaway *The Rights of Refugees Under International Law* (Cambridge University Press, Cambridge, 2005) at 584.

³ Michelle Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press, Cambridge, 2007) at 215.

⁴ Katrien Beeckman "Measuring the Implementation of the Right to Education: Educational versus Human Rights Indicators" (2004) 12(1) *The International Journal of Children's Rights* 71 at 76.

is understood as a social construct with various factors that shape and construct childhood.⁵ This is particularly relevant for children experiencing complexities associated with refugee childhood. Furthermore, recognising refugee children as rights-holders necessitates a thorough examination of the obligations borne by those responsible for implementing their right to education.⁶ An intersectional approach is also essential as refugee children are characterised and identified as being children as well as refugees, among other characteristics common to children as a group. Recognising that both childhood and refugeehood of refugee children need to be accounted for in implementing their right to education is crucial. This, it is argued, will enhance the understanding and implementation of refugee children's rights, thus leading to better realisation of the right.

8.2.2 The International Legal Framework Protecting the Right to Education for Refugee Children

It has been established that the rights of refugee children, including the right to education, are captured in various international refugee, human rights, and children's rights laws.⁷ Although human rights treaties and the Refugee Convention aim to protect individuals against abuses, refugee and human rights law have been understood as two distinct branches of international law and have developed following their own sources and foundational norms and standards.⁸ As a result, the protection afforded therein differs. Despite the differences, there is great value in these areas of international law influencing each other. It has been rightly pointed out that the interpretation of the Refugee Convention should be in the context of the current international human rights framework.⁹ On the other hand, international human rights treaty bodies must use the Refugee Convention to interpret and apply provisions relating to refugees and asylum seekers.¹⁰ While there are divergent views on the categorisation of international children's rights law,¹¹ it has been recognised that it can influence broader international human rights law. Although children's rights emerged to address the unique

⁵ See Chapter Three at 97.

⁶ Tom D Campbell "The Rights of the Minor: As Person, As Child, As Juvenile, As Future Adult" (1992) 6(1) *International Journal of Law and the Family* 1 at 5.

⁷ Universal Declaration of Human Rights 217A (III) (adopted 10 December 1948) [UDHR]; International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 03 January 1976) [ICESCR]; UN General Assembly, Convention Relating to the Status of Refugees 189 UNTS 137 (opened for signature 28 July 1951, entered into force 22 April 1954) [Refugee Convention]; and United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC].

⁸ Vincent Chetail "Moving Towards an Integrated Approach of Refugee Law and Human Rights Law" in Cathryn Costello and others (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press, Oxford, 2021) at 202.

⁹ UNHCR "UNHCR Resettlement Handbook" (July 2011) <www.unhcr.org> at 14.

¹⁰ Tom Clark and François Crépeau "Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law" (1999) 17(4) *Netherlands Quarterly of Human Rights* 389.

¹¹ Nigel Cantwell "Are Children's Rights Still Human?" in Antonella Invernizzi and Jane Williams *The Human Rights of Children: From Vision to Implementation* (Routledge, Oxford, 2011) 37 at 41-48.

needs of children, they are not to be seen as secondary rights but can be interpreted as a specific application of human rights.¹² Consequently, children's rights can be influenced by and interwoven with international human rights law and, by extension, international refugee law as well.

The historical development of these three areas, particularly the drafting history of international human rights law, demonstrates the limitations in protecting the rights of refugee children. This historical context is essential as it sets the foundation for understanding the current legal framework and the need for improvements. While refugee children fall within the ambit of international human rights, they were not explicitly mentioned in the drafting of international human rights laws. As such, it has been argued that provisions for their rights were not as comprehensive as they could have been.¹³ Despite the historical context of refugee rights, international human rights as a body of law provides a robust foundation for promoting and protecting refugees' rights. International child rights law, on the other hand, sets out all rights that children have, including refugees, and specifically recognises the refugee child.¹⁴ It provides a set of rights that meets the needs and interests of refugee children. In addition, Guiding Principles are provided to ensure the realisation of all children's rights as they are interdependent. International refugee law is also important as it defines a refugee and specifically provides for the right to education for refugee children.

8.2.3 Obligations Arising from the Right to Education for Refugee Children

As discussed in Chapter Four, New Zealand has various obligations under international law as it has ratified key instruments that provide for the rights of refugee children.¹⁵ In particular, everyone has the right to education. Therefore, there is a corresponding obligation to realise the right.¹⁶ As further noted in Chapter Four, none of the treaties explicitly requires the unique needs of refugee children to be taken into account.¹⁷ It is nonetheless crucial for New Zealand to develop ways to adequately realise the right to education for refugee children in all phases of resettlement.

Under international law, the obligations imposed on states for the provision of the right to education differ depending on the level of education. Primary education should be free and compulsory for all.¹⁸ There is no mention of compulsory education in early childhood or secondary education. Secondary

¹² At 41-48.

¹³ See Chapter Two at footnotes 124 and accompanying text.

¹⁴ UNCROC, above n 7, at art 22.

¹⁵ These include the UDHR, above n 7; Refugee Convention, above n 7; ICESCR, above n 7; and UNCROC, above n 7. Other human rights treaties providing for the right to education were discussed in great detail in Chapter Four at 103-105.

¹⁶ See Chapter Four at 99.

¹⁷ See Chapter Four at 107.

¹⁸ UDHR, above n 7, at art 26(1); ICESCR, above n 7, at art 13(2); and UNCROC, above n 7, at art 28(1)(a).

education is to be generally available and accessible to all through the progressive introduction of free education.¹⁹ The state has several other obligations to realise the right to education for refugee children and for mechanisms to be developed that monitor the implementation of legislation protecting the right to education for refugee children specifically. The obligations are underpinned by the aims of education set out by international law. These include, but are not limited to, the full development of human personality and dignity,²⁰ as well as strengthening respect for human rights and fundamental freedoms.²¹ All these align with a child's rights-based approach, which forms the basis of this research. The need for education to be directed towards children's development is particularly important for refugee children, owing to their unique and at times traumatic circumstances.

The obligations arising have been presented in terms of the 4A framework by Katarina Tomasevski. There is an obligation to ensure that education is available, accessible, acceptable and adaptable.²² It is argued that these criteria are to be understood from a child rights perspective and informed by the Guiding Principles of the UNCROC for the right to education for refugee children to be adequately realised. This means that education should be made available, accessible, acceptable and adaptable to refugee children in a manner that upholds their best interests, ensuring non-discrimination, that their views are heard and taken into account, and that they are aimed at their development.

All the obligations arising from the 4A framework and the Guiding Principles of the UNCROC can be summed up by the obligation to respect, protect and fulfil the right to education for refugee children. With regard to the obligation to respect, states are to avoid measures that hinder the enjoyment of the right to education.²³ In line with this obligation, discriminatory legislation can impede access to education and should be prevented.²⁴ Access to education is one of the key ways refugees can be integrated into the host country.²⁵ The obligation thus involves eliminating any forms of discrimination and ensuring laws, policies and practices are not discriminatory. The principle of non-discrimination is particularly crucial when avoiding actions that hinder the enjoyment of the rights of

¹⁹ ICESCR, above n 7, at art 13(2)(b); and UNCROC, above n7, at art 28(1)(b).

²⁰ UNCROC, above n 7, at art 29(1)(a).

²¹ At art 29(1)(b).

²² *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski submitted in accordance with Commission on Human Rights resolution 1998/33* UN Doc E/CN.4/1999/49 (13 January 1999) at [42] – [74].

²³ *CESCR General Comment No 13: The Right to Education (Art 13 of the Covenant)* UN Doc E/C.12/1999/10 (8 December 1999) at [47].

²⁴ Christian Curtis and John Tobin “Article 28 The Right to Education” in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 1071-1072.

²⁵ *CESCR Duties of States Towards Refugees and Migrants Under the International Covenant on Economic, Social and Cultural Rights* UN Doc E/C.12/2017/1 (13 March 2017) at [6].

refugee children, as it prohibits any discrimination based on the child being a refugee.²⁶ As refugee children continue to face discrimination in accessing services such as education, states are urged to take further measures to prevent and combat discrimination against refugees.²⁷ All education-related decisions on measures and actions concerning a specific child or a group of children must also respect the best interests of the child or children.²⁸ Furthermore, states should refrain from not considering children's views in decisions that affect them. One of the ways in which the participation of refugee children can be enhanced is by removing the language barrier common among refugees.²⁹ In providing education, actions or decisions taken should not hinder the child's development, as such education policies should be adaptable to the circumstances of each refugee child.

The obligation to protect requires state parties to take preventive measures for non-interference with the enjoyment of the right to education by third parties such as other individuals, groups, private schools, educational facilities and other non-state actors through regulation and legal guarantees.³⁰ This includes guarantees against non-discrimination, ensuring that key actors take action that is in the best interest of the child and that refugee children's right to be heard is respected. In further explaining the obligation to protect the right to education, Courtis and Tobin provide examples such as protecting the accessibility of education for marginalised groups by addressing those factors, such as parental or community prejudice, that hinder or discourage the enrolment and attendance at school of these groups.³¹

In line with the obligation to fulfil, states have a duty to "facilitate" the right to education by taking positive measures to enable and assist refugee children in the enjoyment of the right to education. The obligation also entails a duty to "provide".³² In doing so, legislative, administrative, budgetary, judicial, and other appropriate measures should be adopted towards the full realisation of the right to education.³³ Such measures should be aimed at ensuring that education is available, accessible, acceptable, and adaptable, as mentioned above.³⁴ Consequently, states have an obligation to formulate, develop and apply a national policy by "methods appropriate to the circumstances" to

²⁶ Christoph Bierwirth "The Protection of Refugee and Asylum Seeking Children, The Convention on the Rights of the Child and the Work of the Committee on the Rights of the Child" (2005) 24(2) *Refugee Survey Quarterly* 98 at 102.

²⁷ CRC *Concluding Observations: Denmark* UN Doc CRC/C/15/Add.33 (15 February 1995) at [25]; and CRC *Concluding Observations: Kenya* UN Doc CRC/C/KEN/CO/2 (19 June 2007) at [60(e)].

²⁸ CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest taken as a Primary Consideration (Art 3, Para 1)* UN Doc CRC/C/GC/14 (29 May 2013) at [79].

²⁹ UNESCO *Enforcing the Right to Education of Refugees: A Policy Perspective* (Working Paper on Education Policy No 8, 2019) at 51.

³⁰ CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 23, at [47]; and UNESCO and Right to Education Initiative *Right to Education Handbook* (UNESCO, 2019) at 146.

³¹ Courtis and Tobin, above n 24, at 1072.

³² CESCR *General Comment No 13: The Right to Education (Art 13 of the Covenant)*, above n 23, at [47].

³³ UNESCO and Right to Education Initiative *Right to Education Handbook*, above n 30, at 146.

³⁴ Courtis and Tobin, above n 24, at 1072.

promote equality of opportunity and treatment in education.³⁵ There is an obligation to ensure that the standard and quality of education are the same in all public educational institutions.³⁶ States are to intensify their efforts to ensure that all refugee children have equal access to satisfactory quality primary education that considers their cultural identity and is adapted to the understanding of the host country.³⁷ In availing quality education for children, there should be well-trained teachers and other professionals in education-related settings. As such, there is a need for continuous and periodic training of officials on the rights of refugee children.³⁸ States are to actively identify individual children and groups of children whose rights may require special measures to be adequately realised, such as refugees.³⁹ There should also be mechanisms in place that enable children to express their views freely and participate in school life⁴⁰ and decisions affecting them. In addition, states are to have laws and policies in place that require the best interests of the child to be considered in terms of the UNCROC.

8.2.4 The Extent to Which New Zealand is Realising the Right to Education for Refugee Children.

While refugee children have a right to education in New Zealand, there is limited evidence that the corresponding obligations are being recognised or implemented. Historically, legislation on education did not explicitly set out children's right to education. This changed with the Education Act 1989, which established the right to primary and secondary education.⁴¹ The current main piece of legislation governing the provision of education in New Zealand is the Education and Training Act 2020. This Act also provides for the right to education. Although it does not explicitly mention refugee children (like all the previous Acts), it also applies to them. Under the Act, education is to be provided in a manner that affords students the skills, knowledge, and capability to participate in society.⁴² New Zealand's obligations can also be implied from the purpose of the Act. According to

³⁵ Convention Against Discrimination in Education 429 UNTS 93 (opened for signature 14 December 1960, entered into force 22 May 1962) [CADE], at art 4.

³⁶ At art 4.

³⁷ UNHCR Executive Committee *Conclusions on the International Protection of Refugees: No 47 (XXXVIII) Refugee Children* (1987) at [o].

³⁸ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) *Joint General Comment No 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No 22 (2017) of the Committee on the Rights of the Child 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 2017) at [18].

³⁹ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [12].

⁴⁰ CRC *General Comment No 1 (2001): The Aims of Education* UN Doc CRC/GC/2001/1 (17 April 2001) at [8]; see also UNCROC, above n 7, at art 12(1).

⁴¹ Education Act 1989, s 3.

⁴² Education and Training Act 2020, s 4(a).

the Act, education should be aimed at assisting children with attaining their educational potential, promoting their development, and enabling them to recognise the different groups and unique circumstances of each child.⁴³ Elements of a child's rights approach can also be identified in the policies that form the basis for the New Zealand education system.⁴⁴ While this is the case, international law mechanisms demonstrate that the provision of a right within domestic legislation is insufficient to realise the right to education on its own.⁴⁵

It has been observed that the Act does not clearly set out children's rights as provided in the UNCROC. While New Zealand has ratified a range of international instruments that protect the rights of refugee children, it is slow to incorporate and apply these rights in domestic education legislation and policy. There are also no formal policies guiding the realisation of the right to education. As such, the domestic legal framework underpinning the right to education can be considered lacking and requires a significant review. It has, nonetheless, been established that New Zealand has long sought to provide education that caters to children's different needs and interests.⁴⁶ Even though the education system seems to be based on principles that align with a child rights-based approach through an intersectional lens, the interpretation and application of the laws do not result in refugee children being viewed and treated entirely as rights-holders and as social actors who take part in matters affecting them. Equality of opportunity and equity were historically highlighted as some critical aspects of an ideal education system.⁴⁷ The development of the education system has thus been centred around those principles over the years. Although this is the case, there seems to be no development or legal reforms on the improvement of the realisation of the rights of refugee children. Particularly, there has been little focus on how their rights to and in education are being realised. New Zealand education laws do not explicitly identify refugee children as a group with special needs, nor provide comprehensive guidelines on how they should be protected. They are merely drafted broadly enough to allow for the interpretation of rights to include refugee children.

There is generally a good understanding of refugee children's rights, with some practices reflecting a child rights-based approach to education, even though formal policies are lacking. The quality of education for refugee children varies, and while government measures play a role, more effective action is needed. While the Education and Training Act 2020 provides for the right to education, it

⁴³ Section 5(4)(c)(ii).

⁴⁴ Chapter Five notes that bicultural policies underpin the current education system. Such policies allow the system to be flexible in considering different needs and interests in schools. See footnotes 208-209 and accompanying text.

⁴⁵ CRC *General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, n 39, at [18].

⁴⁶ See Chapter Five at 172.

⁴⁷ See Chapter Five at 173.

does not mention the four Guiding Principles, which, as shown in Chapters Four and Seven, are instrumental in realising this right and other children's rights. When applying the UNCROC Guiding Principles, New Zealand laws, policies and practices should uphold the non-discrimination principle in all matters relating to education for refugee children. The barriers highlighted in the qualitative research undertaken suggest that refugee children may not all have equal access to services and opportunities. While the Education and Training Act 2020 applies to all children, the unique circumstances of refugee children are not consistently considered. As noted in Chapter Six, there is currently no formal induction process, guide or framework for teachers on how they can support refugee children. In line with this, the qualitative research undertaken highlighted the lack of cultural awareness when working with refugee children. This can result in instances of discrimination against refugee children.

As previously noted, the best interest of the child principle has a critical role in ensuring that the needs and interests of refugee children are at the forefront when education is provided.⁴⁸ Unlike other sectoral laws relating to children in New Zealand,⁴⁹ the Education and Training Act 2020 does not explicitly require that the best interests of the child be taken into account when making decisions affecting them. As a result, it is argued that the unique circumstances of refugee children are not consistently considered. There is currently no formal process, guide or framework for teachers to use in determining the best interests of, and ultimately supporting, refugee children. From the research undertaken, it is not apparent that New Zealand laws, policies, and decisions affecting refugee children uphold the best interests of these children. While government measures are recognised and play a pivotal role in ensuring refugee children access education, there is also a common view that more effective action can be taken within the New Zealand education system.

The refugee child is to be afforded the opportunity to express their opinion and have those opinions heard in all matters affecting them. Refugee children should thus be seen as active social actors with a say in their education. However, there is no requirement in the Education and Training Act 2020 or any policies for participatory mechanisms such as student representation bodies to empower refugee children to have a say in decisions affecting them. As a result, the extent to which refugee children are involved in the formulation of education laws and policies remains unclear. In addition to this, the degree to which refugee children are engaged in the implementation of educational policies and regulations also remains unclear.

⁴⁸ See Chapter Four at 196.

⁴⁹ Care of Children Act 2004 and Oranga Tamariki Act 1989.

The last guiding principle, the right to life, survival and development, is also essential for realising the right to education for refugee children. Development is a right that refugee children have and a means of ensuring adequate realisation of the right to education. Education should thus be aimed at development in terms of art 29 of the UNCROC as expressed above. The Education and Training Act 2020 sets out education and learning objectives for early childhood education, primary education, and secondary education, and these include the child's development in various areas of their life.⁵⁰ The education curriculum should also be designed and delivered with the aim of promoting children's optimum development.⁵¹ Although this is the case, there are no formal policies or guidelines in place that reflect targeted measures to ensure the holistic development of refugee children in New Zealand.⁵²

In light of the above, it is vital that New Zealand takes action to ensure the adequate realisation of the right to education for refugee children. It has been noted that:⁵³

The fate of children's rights as a bespoke subset of human rights is, of course, the same: the translation of the promises of human rights law into reality for children is dependent not just simply or even mainly on international monitoring and review, but rather on the national actions of the governments who have ratified them.

As such, not only do refugee children have a right to education, but the state has a corresponding duty to ensure that their right is realised. The need for New Zealand to take action stems from this legal obligation.

⁵⁰ The Education and Training Act 2020 sets out education and learning objectives for early childhood education, primary education, and secondary education, and these include the development of the child in various areas of their life.

⁵¹ Gerison Lansdown and Ziba Vaghri "Article 28: The Right to Education" in Ziba Vaghri and others (eds) *Monitoring State Compliance with the UN Convention on the Rights of the Child* (Springer, Switzerland, 2022) at 250.

⁵² The Ministry of Education makes provisions for ESOL funding for migrants as well as refugees, and the Refugee Flexible Funding Pool is aimed at resourcing schools to address barriers that prevent participation and achievement of students with refugee backgrounds in mainstream schools. No further information is readily available on this. As noted in Chapter Five, there is a significant reliance on senior government officials of the Ministry of Education for support in developing policies that recognise refugee students' needs.

⁵³ Laura Lundy, Ursula Kilkelly and Bronagh Byrne "Incorporation of the United Nations Convention on the Rights of the Child in Law: A Comparative Review" (2013) 21(3) *The International Journal of Children's Rights* 442 at 443.

8.3 Recommendations

This section of the chapter addresses how the existing legal and policy framework can be improved to ensure better realisation of the rights of refugee children in education. It is quite evident from the previous chapter that although there are laws and practices to realise the right to education for refugee children in New Zealand, they do not adequately ensure the realisation of their rights. Several areas can be improved to better facilitate refugee children's enjoyment of their right to education.

Article 4 of the UNCROC expressly requires states parties to undertake "all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention". Both legal and non-legal measures have been adopted by state parties to ensure the realisation of the UNCROC provisions. Legal measures of implementation include direct⁵⁴ and indirect incorporation⁵⁵ of the UNCROC into the national legislation of state parties.⁵⁶ Other measures adopted to ensure adequate realisation of children's rights include the adoption of national policy, the introduction of national children's rights mechanisms, the establishment of coordinating and advocacy services and the provision of systematic children's rights training for those who work with and for children.⁵⁷ It has been noted that while state parties are required to take all appropriate measures, there are no prescribed measures for how obligations are to be implemented at the domestic level.⁵⁸ Thus, each state is responsible for determining the best way to implement its international treaty obligations.⁵⁹ The recommendations presented in this chapter can inform actions taken by New Zealand to meet its obligations. This chapter thus presents different appropriate measures and how they can enhance the enjoyment of the right to education for refugee children. When implemented, such measures can result in better resettlement and integration outcomes.

⁵⁴ Where the Convention is given the effect of national law. See Carol Robinson and others "The Translation of Articles from the United Nations Convention on the Rights of the Child into Education Legislation: The Narrowing of Article 12 as a Consequence of Translation" (2020) 31(3) *Curriculum Journal* 517 at 520.

⁵⁵ Where States Parties have taken creative approaches designed to give the Convention further effect at the national level. See Simon Hoffman and Rebecca Thorburn Stern "Incorporation of the UN Convention on the Rights of the Child in National Law" (2020) 28(1) *The International Journal of Children's Rights* 133 at 139.

⁵⁶ Robinson and others, above n 54, at 520.

⁵⁷ Ursula Kilkelly "The UN Convention on The Rights of The Child: Incremental and Transformative Approaches to Legal Implementation" (2019) 23(3) *The International Journal of Human Rights* 323 at 324.

⁵⁸ *CRC General Comment No 5 (2003): General Measures of Implementation of the Convention on the Rights of the Child*, n 39, at [26].

⁵⁹ Laura Lundy and others "The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries" (UNICEF, 2018) at 18.

8.3.1 Explicit Incorporation of Children’s Rights in Domestic Legislation

The incorporation of children’s rights in domestic legislation is considered useful and impactful for various reasons, and its connection with enforcement has been noted. It has been recognised as one of the ways to raise awareness and the profile of children and children’s rights.⁶⁰ Where there is incorporation, children are more likely to be perceived as rights-holders, which will consequently contribute to the respect for children’s rights.⁶¹ This was the case in a study on the impact of indirect incorporation, where children’s rights gained more prominence and children were empowered as rights-holders in policy development.⁶² It has been observed that there is a higher degree of implementation of children’s rights in states that have incorporated the UNCROC than in countries that have chosen not to incorporate it.⁶³ Incorporation ensures individuals (children) can seek enforcement of their rights through domestic adjudication, since treaty monitoring bodies do not possess enforcement mechanisms.⁶⁴ Failure to incorporate children’s rights into policy and legislation can result in inconsistent recognition and protection of rights, thus leading to an uncoordinated and undefined focal point.⁶⁵ This issue has been identified in Chapter Six through the qualitative research undertaken.⁶⁶

While New Zealand has ratified different international treaties, including the UNCROC, it is worth highlighting that, as a dualist state, treaties only become part of and thus have direct effect in domestic law if explicitly incorporated into New Zealand legislation.⁶⁷ As such, the UNCROC can only be given effect in domestic law through an Act of Parliament.⁶⁸ The UNCROC is not directly incorporated into New Zealand domestic law.⁶⁹ The CRC has particularly called on New Zealand to ensure that all existing domestic legislation relating to children is consistent and brought into

⁶⁰ Rebecca Thoburn Stern “Much Ado About Nothing? The Road to the Incorporation of the Convention on the Rights of the Child in Sweden” (2019) 27(2) *The International Journal of Children’s Rights* 266 at 269.

⁶¹ Lundy and others, above n 59, at 4; and Lundy, Kilkelly and Byrne, above n 53, at 453.

⁶² Simon Hoffman and Sean O’Neill *The Impact of Legal Integration of the UN Convention on the Rights of the Child in Wales* (Cardiff, Equality and Human Rights Commission, 2018) at 8.

⁶³ Lundy, Kilkelly and Byrne, above n 53, at 446.

⁶⁴ Hoffman and Stern, above n 55, at 138.

⁶⁵ Human Rights Commission “Human Rights in New Zealand 2010” <www.hrc.co.nz> at 245.

⁶⁶ Some participants noted that there are no shared processes across schools in dealing with refugee children. See Chapter Six at footnote 61 and accompanying text.

⁶⁷ Ann Hertogen and Anna Hood (eds) *International Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021) at 20.

⁶⁸ Lundy, Kilkelly and Byrne, above n 53, at 445.

⁶⁹ Nicola Leete “Realising Children’s Rights Under the United Nations Convention on the Rights of the Child in Aotearoa New Zealand’s Education System: Promises, Progress and Priorities” (2024) 26 *International Journal of Law and Education* 18 at 20.

compliance with the UNCROC.⁷⁰ More recently, the CRC has urged New Zealand to fully incorporate the UNCROC into domestic law.⁷¹

Since children's rights are interdependent,⁷² the right to education for refugee children can be better realised if this recommendation is followed. It is crucial that domestic laws align with the principles and provisions of the UNCROC, as these laws have a direct impact on the implementation of children's rights.⁷³ In addition to protecting refugee children's rights, it has been noted that provisions of the UNCROC, especially the four Guiding Principles, are instrumental in promoting and protecting their social and emotional well-being.⁷⁴

Recommendation one

The United Nations Convention on the Rights of the Child should be fully incorporated into New Zealand's domestic law through the enactment of an Act of Parliament.

8.3.2 Incorporation of the UNCROC in Education Legislation

While incorporating the UNCROC in domestic legislation is essential, the CRC has also emphasised that it is crucial that all relevant sectoral laws, such as education, consistently reflect the principles and standards of the UNCROC.⁷⁵ This will, in turn, enhance the protection and promotion of the integrity of children as rights-holders as noted above. Sectoral incorporation, which forms part of indirect incorporation, is instrumental as it ensures legal cohesion and that children's rights are entrenched comprehensively. It further supports the UNCROC framework.⁷⁶ It can also deliver effective, targeted implementation of specific rights in the UNCROC.⁷⁷ As demonstrated in this research, the right to education can be better realised through a child rights approach, and this entails an application of the four Guiding Principles of the UNCROC. It has been acknowledged that sectoral

⁷⁰ CRC *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: New Zealand* UN Doc CRC/C/NZL/CO/3–4 (11 April 2011) at [11].

⁷¹ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand* UN Doc CRC/C/NZL/CO/6 (28 February 2023) at [7].

⁷² CESCR *General Comment No 11: Plans of Action for Primary Education (Art 14 of the Covenant)* UN Doc E/1992/23 10 May (1999) at [2].

⁷³ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [20].

⁷⁴ Leah A Ndimurwimo and Moyla ND Vundamina "The Protection of Refugee Children in Africa: Post-Convention on the Rights of the Child" (2021) 27(1) *Fundamina: A Journal of Legal History* 33 at 49.

⁷⁵ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [22].

⁷⁶ Kasey McCall-Smith "To Incorporate the CRC or Not – Is This Really the Question" (2019) 23(3) *The International Journal of Human Rights* 425 at 436.

⁷⁷ At 435.

laws are more effective when they operate within a shared framework approach, which inherently comes with the UNCROC.⁷⁸

Although there was support for the incorporation of children's rights in the proposed Education and Training Act 2020,⁷⁹ this is yet to be done. As highlighted in this research, New Zealand education legislation does not explicitly provide for the rights of children, including refugees, in education. Such legislation is subject to the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, and neither addresses children's rights in any detail.⁸⁰ This further justifies the importance of the first recommendation that the UNCROC be incorporated into domestic law in general. In addition to this, domestic education legislation does not explicitly identify refugee children as a group requiring additional support, nor provide guidelines on how their needs and interests should be protected. While this is the case, recognising refugee children plays a vital role in ensuring there are more targeted efforts to meet the need for reconceptualising refugee education and recognising diverse learning contexts.⁸¹ Recognising refugee children is vital since recently resettled refugee children have different educational and psychosocial needs.⁸²

Incorporating children's rights in domestic education laws can help fill this gap. It is argued that incorporating the UNCROC into New Zealand education legislation will result in the recognition of the rights that refugee children have. In determining the optimum ways of incorporating (indirect and sectoral) the UNCROC into domestic (education) laws to ensure "entrenchment" of individual rights, it has been recognised that there should be an express reference to the treaty itself instead of merely selecting terms.⁸³

Ursula Kilkelly points out that when the provisions of the UNCROC are translated into the domestic legal framework, different personnel working with children can "own" these provisions.⁸⁴ Teachers and other professionals will know how to provide education for refugee children in a manner that respects their rights. Domestic law must also specify entitlements in sufficient detail to enable effective remedies for non-compliance.⁸⁵ Incorporating children's rights into education legislation will also address concerns raised by the CRC on education in New Zealand, particularly the need for

⁷⁸ At 436.

⁷⁹ IHC "Submission on the Education and Training Bill" (14 February 2020) at 5.

⁸⁰ Laura Lundy and others, above n 59, at 83.

⁸¹ Lutine de Wal Pastoor "Reconceptualising Refugee Education: Exploring the Diverse Learning Contexts of Unaccompanied Young Refugees upon Resettlement" (2017) 28(2) *Intercultural Education* 143 at 145.

⁸² At 144.

⁸³ McCall-Smith, above n 76, at 435.

⁸⁴ Kilkelly, above 57, at 324.

⁸⁵ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [25].

action to address racism, discrimination, and inequalities in education.⁸⁶ Although there was no specific mention of refugees when such concerns were raised, Chapter Six highlights that refugee children continue to face some racism and inequalities in education as evidenced by the interviews conducted for this research.⁸⁷ This buttresses the great need for New Zealand education laws to explicitly incorporate the UNCROC, including its Guiding Principles. Doing so ensures that there is a national yardstick for law and policymakers, as well as other personnel working with children (in education).⁸⁸

Therefore it is argued that the UNCROC should be explicitly incorporated into the Education and Training Act 2020, as well as other domestic laws and policies that govern the provision of education to refugee children. In addition to the Act, education regulations and any guidelines that set out standards, procedures, and principles regarding education for refugee children must also incorporate the UNCROC. In translating the Guiding Principles into domestic education laws, there should be reference to education being aimed at ensuring that all children enjoy their rights without discrimination and that they develop in a manner that will enable them to enjoy their rights. Further, their best interests must govern all decisions and matters affecting them and should be informed by their views. This has been championed as a way to guarantee the implementation of the UNCROC.⁸⁹

Recommendation two

The UNCROC should be incorporated into domestic education laws. In doing so, the purpose of the Education and Training Act 2020 should be amended to include the aim of upholding the rights of children set out in the UNCROC, particularly the four Guiding Principles.

8.3.3 A Child Rights-Based Refugee Resettlement Strategy

The CRC has noted that a comprehensive rights-based national strategy for children rooted in the Convention framework is required for state parties to promote and respect children's rights.⁹⁰ It emphasised that such a strategy will be effective if it relates to the circumstances of all children and

⁸⁶ *Report of the Working Group on the Universal Periodic Review, New Zealand* UN Doc A/HRC/12/8 (4 June 2009) at [27], [33], [39], [40], [47] and [60].

⁸⁷ One participant noted that they have heard of racist statements made to refugee children in some schools. There was also reference to the lack of adequate resourcing to support refugee children. Interview with Participant A (18 February 2022).

⁸⁸ Kilkelly, above n 57, at 332.

⁸⁹ At 324.

⁹⁰ *CRC General Comment No 5, General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [28].

all the rights in the UNCROC. It further noted that for a rights-based national strategy to be developed, consultation should be conducted with children and young people.⁹¹

The New Zealand Refugee Resettlement Strategy (Strategy), which has been considered a policy,⁹² sets out key areas and outcomes to be prioritised in the resettlement of refugees; one of them being education.⁹³ The Strategy as a whole does not increase the profile of children and their rights. While all the outcomes affect children to varying degrees, some success indicators and measures are adult-centred.⁹⁴ Health and education are the only outcomes that directly relate to children. It is worth noting that both outcomes have very narrow indicators.⁹⁵ This approach in the Strategy arguably does not reflect children being viewed as rights-holders and active social actors. Instead, it views them as “becomings,” that is, adults in the making and not as human beings in their own right. As noted in Chapter Three, this view interferes with children’s status as rights-holders with interests to be protected.⁹⁶

The outcomes and success indicators in the Strategy do not adequately reflect how well refugee children resettle in New Zealand. As highlighted in Chapter Five, the educational outcome is measured against the proportion of secondary school refugee students attaining NCEA level two for at least five years. The same goal is applicable to all New Zealand students. This may result in refugee children, the success indicators in other age groups, and those who have not met the set standard within the timeframe all being overlooked.⁹⁷ This research has demonstrated the importance and broadness of education, which is crucial for adequate resettlement and integration as well as the overall realisation of other rights. As such, the Strategy should emphasise the importance of education in realising other children’s rights and the overall resettlement of refugee children. From a child rights-based approach, some of the aims that education should be directed at include the development of the child’s abilities to their fullest potential, developing respect for human rights and fundamental and respect for the child’s cultural identity, language and values.⁹⁸ The existing education component

⁹¹ At [29].

⁹² Jody L McBrien and Maria Hayward “Refugee-Background Students in New Zealand and the United States: Roots and Results of Educational Policies and Practices” (2022) 6(2) *Journal of Global Education and Research* 133 at 144.

⁹³ Other outcomes include participation and inclusion, health and wellbeing, housing and employment and self-sufficiency. See Immigration New Zealand *Refugee Resettlement Strategy* <www.immigration.govt.nz>.

⁹⁴ The success indicator for housing is the decreased proportion of refugees receiving housing assistance after two years and five years in New Zealand, for self-sufficiency the success indicator is increased proportion in paid employment. It is worth pointing that there is no success indicator for participation. See Immigration New Zealand *Refugee Resettlement Strategy: Success Indicators and Measures* (2023) <www.immigration.govt.nz>.

⁹⁵ The success indicator for health is the proportion of quota refugee children receiving age-appropriate vaccination (within 6 and 12 months of arrival). See Immigration New Zealand *Refugee Resettlement Strategy: Success Indicators and Measures* (2023) <www.immigration.govt.nz>.

⁹⁶ Chapter Three at 84.

⁹⁷ See Chapter Four at footnote 291-300 and accompanying text.

⁹⁸ UNCROC, above n 7, at art 29.

falls short of highlighting the full extent and importance of education. It is therefore crucial that the Strategy is revised to highlight and broaden the educational goal for the resettlement of refugee children.

The current Strategy is also not well placed to reflect whether refugee children's rights are promoted and respected adequately. The Strategy should be revised to align with principles of the UNCROC to ensure refugee children have equal access to education without discrimination, that their views are heard, that their best interests are a primary consideration, and that education is directed towards their development. While a revised refugee resettlement strategy is crucial, a child-specific Refugee Resettlement Strategy informed by child rights can adequately fill this gap.

Recommendation three

The education component under the Refugee Resettlement Strategy should include a statement on the centrality of education and children's rights. The education outcome should be amended to incorporate the aims set out in art 29, and the success indicator revised, to reflect the application of the four Guiding Principles, of the UNCROC. This will ensure that the resettlement of refugee children is adequately monitored, and this can help identify children's rights violations that may otherwise not be apparent during resettlement.

Recommendation four

A refugee child resettlement strategy should be established, and outcomes and success indicators should be based on the UNCROC. As children's rights are interdependent, a strategy that prioritises and focuses on refugee children's rights will ensure the right to education is adequately realised.

8.3.4 Establishment of a Refugee Education Policy

One of the non-legal measures adopted by states parties to ensure implementation of the UNCROC is the adoption of a national policy. As noted earlier, New Zealand has been commended for taking measures that ensure the realisation of human rights through the establishment of policies, one of them being the provision of English language support in schools for refugee background and migrant students.⁹⁹ However, it is worth highlighting that there is currently no formal education policy that specifically guides or underpins action or support for refugees in the New Zealand education system.

⁹⁹ CERD *Concluding Observations on the Combined Twenty-First and Twenty-Second Periodic Reports of New Zealand* UN Doc CERD/C/NZL/CO/21-22 (22 September 2017) at [4(d)].

As a result, it has been argued that the absence of a refugee-specific policy proves the invisibility of refugees and their lack of recognition as a distinct focus within national educational policy.¹⁰⁰

Thus, a Refugee Resettlement Strategy informed by children’s rights, including the right to education as recommended above, provides a good foundation for entrenching refugee children and their rights in education policy. Such a policy should be informed by the aims of education as set out in the UNCROC. This has been recommended by the CRC, which noted that states must “take the necessary steps to formally incorporate these principles into their education policies and legislation at all levels”.¹⁰¹

There are some statutory documents that set priorities for promoting children’s rights that can inform education policy in New Zealand. The Statement of National Education and Learning Priorities (NELP) and the Tertiary Education Strategy (TES)¹⁰² are issued in terms of the Education and Training Act 2020.¹⁰³ They outline education priorities to ensure that all students succeed and that their well-being is met. These somewhat address the rights set out in the UNCROC. The priorities include ensuring that schools are safe, inclusive, and free from racism, discrimination, and bullying, as well as partnering with families and communities to ensure that education responds to the needs of all learners and upholds their identities. Other priorities that reflect consideration of children’s rights are that barriers to education should be reduced for all learners, including Māori, Pacific, disabled and those with learning support needs.¹⁰⁴ Although such documents exist,¹⁰⁵ there is no explicit recognition and inclusion of refugee children. A refugee-specific education policy is therefore necessary. While the NELP is instrumental in highlighting children’s rights to a certain degree, the Education and Training Bill (No 2) 2025 has sought to remove the issuance of a NELP for early childhood education, primary education, and secondary education from the Act. The Bill further sought to remove related references, such as education and learning objectives for all levels of education, from the Act and secondary legislation made under the Act.¹⁰⁶ The removal of the NELP eliminates a framework that contributes to upholding children’s rights, potentially leading to educational approaches that do not prioritise the needs and interests of refugee children. This underscores the need for a refugee-specific education policy.

¹⁰⁰ Charlotte Chadderton and Anke Wischmann “Education Policy and Refugees in England and Germany: Racist Nativism and the Reproduction of White Supremacy” (2025) 28(3) *Race Ethnicity and Education* 457 at 462-463.

¹⁰¹ CRC *General Comment No 1: The Aims of Education*, above n 40, at [17].

¹⁰² Ministry of Education “The Statement of National Education and Learning Priorities (NELP) and the Tertiary Education Strategy (TES)” < www.education.govt.nz >.

¹⁰³ Education and Training Act 2020, s 5(1).

¹⁰⁴ Ministry of Education “The Statement of National Education and Learning Priorities (NELP) and the Tertiary Education Strategy (TES)”, above n 102, at 1.

¹⁰⁵ At 1.

¹⁰⁶ Education and Training Amendment Bill (No 2) 2025 (140-1) at 2.

Such a policy will be instrumental in guiding the provision of education to refugees. Having a refugee education policy will ensure that teachers have a guide or framework to follow when providing education to refugee children. This is important as it will address the lack of common understanding evident in schools and the inconsistent use and application of practices for refugee children. The policy will also ensure that the resettlement and integration process meets refugees' needs and academic strengths, thereby enhancing their educational experience and outcomes.¹⁰⁷ A policy informed by children's rights should include recognition of individual different interests and needs of refugee children, explicit reference to the Guiding Principles of the UNCROC and how they should be applied. Implementation should, in this regard, be aimed at ensuring that education is inclusive and non-discriminatory, that the opinions of refugee students are heard, that their development should be the result of practices in place and that their best interests are taken into consideration. It has been noted that progressive education policies are one of the "most promising areas for impact" in refugee protection.¹⁰⁸ It has been observed that the:¹⁰⁹

absence of specific policy to support refugees suggests that both nativism (i.e. non-refugeeness) and the racialised context of policy-making dominates policy, rendering refugees virtually invisible and 'not a legitimate focus of national educational policy'

The Ministry of Education guides the support provided to refugee children in schools through a teacher's Refugee Handbook for Schools¹¹⁰ and guidance from senior advisors within the Ministry.¹¹¹ While the Handbook is not a policy, it is currently relied on to assist refugee children in schools. Some elements of the rights to and in education have been identified. However, there is no focus on the rights of refugee children.¹¹² For the Handbook to adequately achieve its intended purpose and promote the realisation of the rights of refugee children, particularly the right to education, it should explicitly incorporate the provisions of the UNCROC. The Handbook should outline the four Guiding Principles of the UNCROC and provide practical guidance on how each principle should be applied in the context of refugee children. A refugee education policy that is well embedded in children's rights can also serve as a good reference for the Refugee Handbook for Schools.

¹⁰⁷ Courtney A Brewer "An Outline for Including Refugees in Canadian Educational Policy" 2016 7(1) Canadian Journal for New Scholars in Education 133 at 140.

¹⁰⁸ Elizabeth Buckner and others "Between Policy and Practice: The Education of Syrian Refugees in Lebanon" (2018) 31(4) Journal of Refugee Studies 444 at 459.

¹⁰⁹ Chadderton and Wischmann, above n 100, at 462-463.

¹¹⁰ Ministry of Education *English for Speakers of Other Languages: Refugee Handbook for Schools* (2003).

¹¹¹ Ministry of Education "Refugee Background Students" (21 December 2020) <www.education.govt.nz>.

¹¹² See Chapter Five at 161.

Recommendation five

A refugee education policy informed by rights set out in the UNCROC should be developed.

Recommendation six

The Refugee Handbook for Schools should be amended to include an overarching aim of realising children’s rights as set out in the UNCROC when dealing with refugee children. A section on how the four Guiding Principles can be applied in practice in light of refugee children’s interests and needs in schools should be added to the Handbook.

8.3.5 Data Collection

Sufficient and reliable data on children is key to the monitoring and implementation of their rights, as it can highlight variations in the realisation of rights, including education.¹¹³ State parties are urged to have available data disaggregated by, inter alia, age, sex, disability, ethnicity, national origin, geographic location, and socio-economic background.¹¹⁴ Although adequate data is not collected, it has been noted that collecting disaggregated data is necessary to facilitate analysis of all situations, especially those of vulnerable children.¹¹⁵ It is therefore important to allow all children’s intersecting circumstances to be assessed.¹¹⁶ Consequently, relevant data should be collected and that data is to be published in a way that permits the identification and analysis of multiple and intersecting disparities and discrimination.¹¹⁷ Collecting and disaggregating data beyond gender, identity, race and ethnicity has been found to be critical for intersectional education equity.¹¹⁸ Such data should include any difference in access to education based on the different factors such as age, sex, disability, ethnicity, national origin, geographic location, and socio-economic background.¹¹⁹ The CRC also highlights that data on attendance and completion rates, dropout rates, and educational outcomes for all children should be collected and analysed.¹²⁰ The data is to be analysed to identify individual

¹¹³ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [48].

¹¹⁴ CRC *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Kingdom of the Netherlands* UN Doc CRC/C/NLD/CO/5-6 (9 March 2022) at [10-10(c)].

¹¹⁵ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 71, at [11].

¹¹⁶ CRC *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of the Kingdom of the Netherlands*, above n 114, at [10-10(c)].

¹¹⁷ OHCHR *A Human Rights-Based Approach To Data Leaving No One Behind In The 2030 Agenda For Sustainable Development* (2018) at 8.

¹¹⁸ ZW Taylor and others “Building Equitable Education Datasets for Developing Nations: Equity-Minded Data Collection and Disaggregation to Improve Schools, Districts, and Communities” (2023) 13(4) *Education Sciences* 1 at 8.

¹¹⁹ CRC *General Comment No 7 (2005): Implementing Child Rights in Early Childhood* UN Doc CRC/C/GC/7/Rev.1 (20 September 2006) at [77(g)]; and CRC *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interest Taken as a Primary Consideration (Art 3, Para 1)*, above n 28, at [52(d)] and [53(f)].

¹²⁰ UNICEF Regional Office for Europe and Central Asia *Overview of The Data-Related Recommendations of The Committee On The Rights Of The Child* (January 2024) at 11.

children and groups of children whose rights may demand special measures owing to the differences.¹²¹ Refugee children fall within this ambit. In the absence of such data, it will be challenging and almost impossible to assess how refugee children as a group and as individuals are doing. While data collection is important, art16 of the UNCROC states that the child's privacy should not be arbitrarily or unlawfully interfered with. Since data collection and processing by public institutions and other organisations can raise threats to children's privacy,¹²² it should be balanced with refugee children's right to privacy.

As shown in this research, refugee children have different intersecting interests and needs that tend to result in their rights not being adequately realised. They have been identified as a specific group of children who should be included in data collection.¹²³ UNICEF and UNHCR emphasise the importance of data in achieving better outcomes for refugee children and their families.¹²⁴ They note that for a more comprehensive and accurate understanding of the specific needs and capacities of refugee children, there should be complete, reliable and internationally comparable disaggregated data on refugee and other forcibly displaced children.¹²⁵ As such, data collection on refugee children should be improved significantly in New Zealand. Since disaggregated data is instrumental in identifying and explaining existing inequalities, this can inform more equitable use of resources and support the integration of disadvantaged refugee children within host communities.¹²⁶ In this regard, data collected should also be disaggregated by psychological support aspects to ensure appropriate refugee response programmes.¹²⁷

It is crucial to establish effective data collection systems and ensure that the data collected is evaluated and used to assess progress in implementation, identify problems, and inform policy development for children to ensure effective implementation of the UNCROC.¹²⁸ This is particularly vital to determine the extent to which the right to education for refugee children is being realised across the school sector. However, it is worth noting that there is limited data on refugee children in the education

¹²¹ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [12].

¹²² CRC *General Comment No 25 (2021) on Children's Rights in Relation to the Digital Environment* UN Doc CRC/C/GC/25 (2 March 2021) at [67].

¹²³ UNICEF Regional Office for Europe and Central Asia, above n 120, at 8.

¹²⁴ UNICEF-UNHCR *Guidance Note Responsible Disaggregation of Data on Refugee and Other Forcibly Displaced Children* (September 2023) at 5.

¹²⁵ At 6.

¹²⁶ At 6.

¹²⁷ *Report of the Special Rapporteur on the Right to Education* UN Doc A/73/262 (27 July 2018) at [128].

¹²⁸ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [48]; and CRC *Concluding Observations on the Combined Third to Fifth Periodic Reports of Slovakia* UN Doc CRC/C/SVK/CO/3-5 (20 July 2016) at [10b].

systems, as seen in other states such as Germany.¹²⁹ As indicated by the qualitative research undertaken, refugee children face challenges in their education, and it is argued that these are not as apparent due to the lack of data. It has been recognised that data on refugee children, who tend to be included in data relating to ethnic groups, is quite limited. Although this is the case, state parties have an obligation to collect and report data on outcomes for all children.¹³⁰

This research has highlighted the limited data on issues pertaining to refugee children, including in educational settings. New Zealand's official statistics do not adequately capture data on refugee children. While there is data on the number of quota refugees resettling in New Zealand, there is no breakdown on how many of the quota refugees are children. Integration is not always effective and, as such, should be evaluated. Pointing back to the Refugee Resettlement Strategy, the education component is the sole area with a specific target, while other aspects rely on general success indicators. The only target is the proportion of refugee school leavers who attain NCEA level 2 after at least five years in the New Zealand education system.¹³¹ This narrow measure does not reflect a holistic consideration of the right to education for refugees. As under recommendations three and four, the child rights-based measures and outcomes to be added to the Strategy will require enhanced data collection.

Recommendation seven

Data collected on the resettlement and education of refugee children should be comprehensive. There should be readily available official data on the breakdown of the number, age, and nationality of refugee children. This will help identify gaps in implementation and inform targeted measures needed to ensure all refugee children adequately enjoy their rights

8.3.6 Children's and Human Rights Education for Children

One of the aims of education set out in the UNCROC is “the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations”.¹³² Howe and Covell note that cultivating respect among children for human rights requires children to be taught about human rights. They explain that this involves educating children about children's rights as set out in the UNCROC as well as human rights in general set out in domestic law, human

¹²⁹ SIRIUS *Multi-Country Partnership to Enhance The Education Of Refugee And Asylum-Seeking Youth In Europe – Perae* (European Forum For Migration Studies, 2018) at 7.

¹³⁰ CRC *Concluding Observations on the Sixth Periodic Report of New Zealand*, above n 71, at [11].

¹³¹ Immigration New Zealand *Refugee Resettlement Strategy* <www.immigration.govt.nz>.

¹³² UNCROC, above n 7, at art 29(1)(b).

rights law, official policies and history.¹³³ This goes hand in hand and justifies the need for the UNCROC to be incorporated into domestic law as recommended above. In line with art 42 of the UNCROC, which provides that state parties should make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike, children's education should be geared towards promoting knowledge and respect for rights in the UNCROC.¹³⁴

Children's rights education is crucial, even more so for refugee children, as it is aimed at building rights-holders' capacity to claim their rights and duty-bearers' capacity to fulfil their obligations.¹³⁵ As shown in this research, this is vital for the rights of refugee children, including education, to be adequately realised. In addition to this, children's rights education for children plays a role in the monitoring and implementation of the UNCROC.¹³⁶ In further explaining art 42 of the UNCROC, Howe and Covell note that when children are educated on their rights, they will be able to contribute and participate in the monitoring process. Consequently, there will be more "pressure for fuller implementation" of the UNCROC.¹³⁷ It also empowers them to participate in decisions affecting them and their rights.¹³⁸ It has been shown in this research that this can enhance the realisation of the right to education for refugee children. Despite the importance of children's rights education, it has been observed that awareness of children's rights under the UNCROC is limited among children in New Zealand.¹³⁹

Having established the need to educate children on their rights, it is crucial to give children access to the UNCROC in a meaningful and helpful way to ensure that it is understood and used effectively.¹⁴⁰ As such, active and robust programs should be in place instead of passive and sporadic informational programs.¹⁴¹ This involves teaching children in schools about their rights as set out in the UNCROC and ensuring that school practices are consistent with those rights.¹⁴² This can be achieved by emphasising the need to understand human rights in schools by integrating human rights education

¹³³ Robert Brian Howe and Katherine Covell *Empowering Children: Children's Rights Education as a Pathway to Citizenship* (University of Toronto Press, Toronto, 2005) at 30.

¹³⁴ Laura Lundy and John Tobin "Article 29 The Aims of Education" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford, 2019) at 1130.

¹³⁵ UNICEF "Child Rights Education Toolkit: Rooting Child Rights in Early Childhood Education, Primary and Secondary Schools" (2014) <www.unicef.org> at 20.

¹³⁶ Howe and Covell, above n 133, at 31.

¹³⁷ At 32.

¹³⁸ At 32.

¹³⁹ Leete, above n 69, at 31.

¹⁴⁰ Nicola Taylor, Anne Smith, and Karen Nairn "Rights Important to Young People: Secondary Student and Staff Perspectives" (2001) 9 *The International Journal of Children's Rights* 137 at 154.

¹⁴¹ Howe and Covell, above n 133, at 31.

¹⁴² Katherine Covell, Robert Brian Howe and Jillian L Polegato "Children's Human Rights Education As A Counter to Social Disadvantage: A Case Study from England" (2011) 53(2) *Educational Research* 193.

into the school curriculum.¹⁴³ Children's rights education should also be provided in light of art 29 of the UNCROC, which outlines the content and values of education to be offered by the states parties. In sum, the aims set out in art 29 relate directly to the realisation of the rights of the child.¹⁴⁴ There is some reference to children's rights in the New Zealand curriculum, though not phrased from a rights perspective, as noted in Chapter Seven.¹⁴⁵

Recommendation eight

Children's rights education should be made compulsory in the Curriculum, and the recommended refugee education policy should include a requirement for refugee children to be taught about their rights. This will benefit refugee children as they will be informed of their rights and protections available to them. Consequently, they will be empowered to voice their concerns and express their interests.

8.3.7 Children's Rights Education for Teachers

Teachers play a critical role in ensuring that children are educated on their rights as required by the UNCROC.¹⁴⁶ The CRC has underscored the need for training those responsible for implementing children's rights. It notes that states have an obligation to develop training and capacity-building for all those involved in implementation, including teachers, social workers, and other professionals working with and for children.¹⁴⁷ It also notes that training should be aimed at emphasising the status of the child as a human rights-holder, enhancing knowledge and a better understanding of the UNCROC, and encouraging active respect for all its provisions.¹⁴⁸ The qualitative research suggests that recognising that refugee children have rights can enhance the realisation of the right to education.¹⁴⁹

This thesis has demonstrated that the realisation of children's rights is dependent on the extent to which the rights are implemented. As noted in Chapter Three, in terms of the interest theory of rights, children have rights if their interests are the basis for rules requiring others to behave in certain ways

¹⁴³ CRC *Concluding Observations: Federated States of Micronesia* UN Doc CRC/C/FSM/CO/2 (26 March 2019) at [61]; and Stefanie Schmahl *United Nations Convention on the Rights of the Child: Article-by-Article Commentary* (Nomos/Hart, London, 2021) at 404.

¹⁴⁴ At 402.

¹⁴⁵ Chapter Seven at footnote 13 and accompanying text.

¹⁴⁶ UNCROC, above n 7, at art 29(1) and art 42.

¹⁴⁷ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [53].

¹⁴⁸ At [53].

¹⁴⁹ See Chapter Six at 180.

with respect to their interests.¹⁵⁰ As such, the thesis is aimed at considering the obligations of those bearing the responsibility of implementing the right to education, such as policymakers, teachers, and other key personnel working with refugee children. While it has been established from the qualitative research conducted that there is an understanding that refugee children have rights, no specific training is afforded to teachers on the rights of refugee children. Concerns have been raised about key personnel working with children not being well informed on the UNCROC and a rights-based approach.¹⁵¹ As such, teacher training is required to improve the experiences of refugee children in schools, and this includes ongoing professional development and equipping teachers to understand systemic injustice, barriers and attitudes.¹⁵² Therefore, this can be achieved through children's rights education. As noted in Chapter Seven, teachers can only facilitate child rights-based practices such as active participation if human rights education is within their training.¹⁵³

The need to incorporate children's rights in New Zealand education laws and policies so that refugee children can enjoy adequate realisation of their rights has been emphasised in this research. Providing children's rights training is essential as it is closely linked to the incorporation of rights in domestic legislation. Kilkelly notes that children's rights, education, and incorporation are all interconnected and reinforce each other.¹⁵⁴ Children's rights knowledge will ensure that the Guiding Principles of the UNCROC are applied in a "rights compliant" way.¹⁵⁵ The CRC has also emphasised this point by observing that rights in the UNCROC are unlikely to be realised if key personnel working with and for children do not understand the implications of the UNCROC, nor recognise the status of children as subjects of rights.¹⁵⁶ The CRC further noted that teachers and those who work with children should receive regular, structured training. Such training is to enhance their understanding of the UNCROC and promote the active realisation of all rights set out therein.¹⁵⁷ Some research shows that the lack of adequate training for teachers on refugee matters affects their attitudes towards refugees and inhibits the domestication of refugees' right to education.¹⁵⁸

¹⁵⁰ Campbell, above n 6, at 5.

¹⁵¹ Richard Hamilton and others *Literature Review: Interventions for Refugee Children in New Zealand Schools: Models, Methods, and Best Practice* (Ministry of Education, June, 2000); and Richard Hamilton and Dennis Moore (eds) *Educational Interventions for Refugee Children* (Routledge Falmer, London and New York, 2004).

¹⁵² Hamilton and others, above n 151, at 61; and Hamilton and Moore, above n 151, at 96.

¹⁵³ Chapter Seven at footnote 191 and accompanying text.

¹⁵⁴ Kilkelly, above n 57, at 331.

¹⁵⁵ At 331.

¹⁵⁶ CRC *General Comment No 5. General Measures of Implementation of the Convention on the Rights of the Child*, above n 39, at [66].

¹⁵⁷ At [53].

¹⁵⁸ Mercy Chepkirui "Integration of Refugee Rights in Teacher Training in Kenya" (2023) 6(3) *East African Journal of Education Studies* 374 at 382; and Rachminawati and Stefanus Aditya Kebinigin "Fulfillment of the Right to Education for Child Refugees in ASEAN by Reinforcing the ASEAN Ways" (2023) 14(2) *Dialogia Iuridica* 87.

It has been highlighted that children's rights and human rights are not compulsory in teacher training in New Zealand. It has also been identified that regulations on teacher education do not explicitly refer to children's rights.¹⁵⁹ As such, New Zealand's statutory and regulatory framework governing teaching qualifications must include an aspect of children's rights.¹⁶⁰ Under the Education and Training Act 2020, the Teaching Council is responsible for identifying and disseminating best practices in teaching, fostering continued development in light of research and evidence,¹⁶¹ and approving teacher education programmes.¹⁶² There is no reference to the UNCROC or a requirement for the Council to apply its provisions. The new Education and Training Bill No 2 (2025) seeks to strengthen the role of government in the Teaching Council and initial teacher education.¹⁶³ This is an opportunity for legislation to include a requirement for the inclusion of children's rights education in teacher training. As noted earlier in the research, the lack of systemic training on children's rights lowers the yardstick for education provided to refugee children.¹⁶⁴

Recommendation nine

The Education and Training Act 2020 should be amended to include a requirement for teacher training on children's rights. This will promote the active realisation of all rights of refugee children.

Recommendation ten

Teacher training programmes should be made available to educators, focusing on the rights of refugee children and the obligations and implications of the UNCROC. The programmes should equip teachers with ways to teach about children's rights effectively.

8.4 Conclusion

This thesis has shown that the right to education for refugee children in New Zealand is not adequately realised. The findings reveal gaps between the legal framework and the implementation that result in refugee children's needs and interests not being met, thus necessitating further action. The recommendations presented are based on a child rights-based approach drawing from the principles and obligations set out in the UNCROC. These recommendations include both legal and non-legal

¹⁵⁹ Lee Jerome and others *Teaching and Learning About Child Rights: A Study of Implementation in 26 Countries* (UNICEF, 2015) at 37.

¹⁶⁰ In a study by UNICEF, Scotland was the only state where children's rights were explicitly included in teacher education. At 8.

¹⁶¹ Section 479(c).

¹⁶² Section 489(i).

¹⁶³ Education and Training Amendment Bill, above n 106, at 2.

¹⁶⁴ See Chapter Five at footnote 294-295 and accompanying text.

measures which are aimed at ensuring that the right to education for refugee children is not only based on law but adequately realised in practice.

To achieve this, it is crucial that the UNCROC is incorporated in New Zealand law and in New Zealand education laws, particularly. In addition to making changes to the legislation underpinning the provision of education, other measures should be adopted. These include revising the Refugee Resettlement Strategy to ensure that children's rights inform the monitoring outcomes for refugee children, establishing a Refugee Child Resettlement Strategy that focuses on refugee children's rights, and developing a refugee education policy informed by the UNCROC. Data collection is also instrumental in the implementation and monitoring of the right to education for refugee children. Comprehensive data can inform targeted measures needed to ensure effective enjoyment of the right to education. For this right to be adequately realised, teachers, who play a key role in its implementation, should understand what the right means and how it should be realised. Therefore, teacher training on the UNCROC is crucial as it will result in a child rights-based approach to education. Such measures, when effectively implemented, will ensure that refugee children's right to education is adequately protected and thereby enable their successful resettlement and integration in New Zealand.

9. CONCLUSION

9.1 Concluding Remarks

This thesis aimed to examine how the New Zealand legal framework protects the right to education of refugee children and to illustrate why this right is particularly important for them. It was first established that refugee children are adversely affected by forced migration. It affects their livelihood, particularly education, which is a central part of childhood. Education is also a key element of their integration into New Zealand and integration into the education system. Education as a right is crucial as it enables the realisation of other rights such as the right to work and to an adequate standard of living. The theoretical framework of this research laid a foundation for the recognition of refugee children as rights-holders, thus placing an obligation on New Zealand to realise their right to education. It further allowed for consideration of how refugee children are viewed in society, which cannot be separated from the understanding that they are rights-holders, particularly in educational settings. Establishing that refugee children have a right to education is essential, as recognising this right has broader and longer-term implications on their resettlement and integration.

The international and domestic legal frameworks on the right to education were examined. New Zealand has ratified international treaties under international human rights law, international refugee law, and international child rights law, and thus, it has an obligation to ensure that refugee children enjoy their right to education in terms of the various treaties. While this is the case, it has been demonstrated that the current domestic legislation is not sufficiently shaped to ensure the adequate realisation of the right. This is owing to the fact that none of the laws and measures in place make explicit reference to the obligations set out in the above-mentioned treaties. In addition to the doctrinal study, the perspectives of those responsible for implementing the right to education for refugee children also indicated that it is not adequately realised.

A number of issues were identified in the research that impede the right to education for refugee children. These were discussed in terms of a child rights-based approach, which was best suited to analyse all the data reviewed, collected and examined. These issues and challenges include the lack of consistent use or application of measures to ensure refugee children enjoy quality education. The absence of a structured approach and the different measures implemented by schools suggest that the quality of education provided to refugee children differs across the country. Other issues identified include language barriers, the lack of disaggregated data, and the need for funding to tailor services for refugee children.

An examination of domestic legislation, policies, and practices within the New Zealand education system revealed that there is no formal policy or clear legal framework in place to ensure that refugees' right to education is realised. In light of the above, a child rights-based approach has been championed as being well-suited to address the issues identified. This research demonstrates that a child rights-based lens provides crucial analytical tools for understanding the needs and interests of refugee children, even where there are data gaps, as is the case in New Zealand. The limited data available also shows the importance of a child rights-based analysis, as marginalised children often remain invisible because existing systems fail to adequately monitor their well-being.¹ A child rights-based approach thus provides a solid foundation for addressing such gaps. If the UNCROC, which forms the basis of a child rights approach, is incorporated into domestic legislation, then there should be a determination of what is in the best interest of the refugee child. Additionally, there should be consideration of whether refugee children are afforded the opportunity to voice their opinions regarding their education, whether the education they receive is provided in a non-discriminatory manner, and whether education cultivates their development.

All these are instrumental in indicating whether education is available, acceptable, accessible and adaptable to refugee children. This serves as a framework that ensures that the educational services and support provided to refugee children in New Zealand comply with international human and child rights treaty obligations. It also provides a basis for the development of specific and clear legal standards, as well as quality control mechanisms, for adequate realisation of the right to education of refugee children and adequate resettlement programmes. If data is readily available to assess these questions, then a better determination can be made of the extent to which the right to education for refugee children is realised in New Zealand. It is maintained that this is the best way to measure or monitor the realisation of the right. The child rights-based approach presented can serve as a foundation for future research and intervention, offering a framework that not only realises refugee children's right to education but also guides protective measures relating to the resettlement and integration of refugee children.

¹ Nina Maadad *Syrian Refugee Children in Australia and Sweden Education and Survival Among the Displaced, Dispossessed and Disrupted* (Routledge, Milton, 2019) at 2.

9.2 *Avenues for Future Research*

The research examined the legal framework, relying on those who have an obligation to realise the right to education as a source of information. These included teachers, those working with teachers, and policymakers. This provided great insights into the implementation of the right. While this was greatly useful, the CRC emphasises that, in many instances, only children themselves are able to indicate whether their rights are being fully recognised and realised. This research has also demonstrated the importance of recognising the child's right to express their opinion and have those opinions heard in all matters affecting them. Consequently, interviewing children and engaging children as researchers is an excellent way of determining the extent to which their rights are realised.² Refugee children's perspectives on children's rights is an area that should be explored.

It has been reiterated throughout the study that children's rights are indivisible and interdependent. Realising the right to education is also dependent on other rights that refugee children have. As such, it is worth exploring other economic, social, and cultural rights of refugee children in New Zealand and how they impact the right to education. Some rights of particular reference include the right to health and an adequate standard of living. This is because these rights relate to other aspects of the Refugee Resettlement Strategy, which is currently being revised.

While the focus of this thesis was on quota refugees and the legal protections and rights relating to their education in New Zealand, future research could analyse different rights of other categories of forcibly displaced people, particularly convention refugees and asylum seekers.³ This can also be carried out in other countries. Examining the extent to which legal frameworks effectively realise their rights compared to the protection afforded to quota refugees would provide valuable insights into potential gaps or inconsistencies in the system. A comparative study across different jurisdictions could also highlight best practices and inform policy improvements to ensure more comprehensive and adequate legal protections for all refugees and asylum seekers.

Future research should address the current paucity of data on refugee children. A key theme in this research was the lack of adequate data on refugee children, their education and their resettlement in

² CRC *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child* UN Doc CRC/GC/2003/5 (27 November 2003) at [50].

³ These groups have recently been added to the scope of the refugee resettlement strategy. See Cabinet Economic Development Committee "Refreshing the Refugee Resettlement and Migrant Settlement Strategies" (15 September 2023) DEV-23-MIN-0147 at 20 and annex two.

New Zealand. Comprehensive data collection is necessary to capture the full range of experiences and demographics of refugee children, as well as the various rights-based issues affecting them.

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11. APPENDIX

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THE UNIVERSITY OF
WAIKATO
Te Whare Wānanga o Waikato

Yaone Rantshilane

Claire Breen
Juliet Chevalier-Watts

Te Piringa Faculty of Law

24 June 2021

Dear Yaone

Re: **FS2021-32: The right to education and the resettlement and integration of refugee children in New Zealand: A legal perspective on the rights of refugee children**

Thank you for submitting your revised application to the ALPSS Human Research Ethics Committee. We have reviewed the final electronic version of your application and the Committee is now pleased to offer formal approval for your research activities as detailed therein.

Please contact the Committee should issues arise during your data collection, or should you wish to add further research activities or make changes to your project as it unfolds. We wish you all the best with your research. Thank you for engaging with the process of ethical review.

Kind regards

A handwritten signature in black ink, appearing to read 'Nathan Cooper'.

Nathan Cooper, Chair
Division of Arts, Law, Psychology & Social Sciences Human Research Ethics Committee