

**INTERNATIONAL ASSOCIATION OF REFUGEE LAW JUDGES
2011 WORLD CONFERENCE,
BLED, SLOVENIA**

**VULNERABLE PERSONS WORKING GROUP
WORKSHOP DISCUSSION PAPER**

The best interests of children seeking refugee protection and their right to be heard

The first part of this paper considers the place of “best interests” as set out in Article 3 of the 1989 United Nations Convention on the Rights of the Child, (UNCRC) for children seeking asylum, in their own right or as dependants of an adult claim.

The second part¹ will consider the participatory rights of the child to be heard and their views taken into account in all decisions affecting them as set out in Article 12 UNCRC and in particular how these relate to refugee decision making procedures.

Part 1 – the best interests of the child

“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” – Article 3(1) UNCRC

This discussion paper looks firstly at the situation of children seeking protection as refugees under the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol and how the rights and obligations contained in the United Nations Convention on the Rights of the Child impact upon refugee status determination. More specifically it explores the legal position of the best interests of the child and other relevant child rights and how these rights are to be considered and promoted in the context of judicial decisions about children’s refugee status.

In doing so this paper acknowledges that there is a plurality of legal systems in which IARLJ members apply their judicial expertise and that the incorporation and interpretation of international treaty obligations and the rights of the child vary and are developing in different ways in diverse legal and cultural contexts.

There is neither space nor time here to perform a detailed analysis or comparative study of these different approaches, nor does the paper seek to promote the approach of any particular jurisdiction. It does though identifies key principles and significant developments in case law and good practice wherever these have been developed and draws attention to what the author respectfully suggests may be helpful sources and texts to assist in the better understanding and implementation of children’s rights, both procedurally and in the substantive consideration of children’s refugee claims.

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The main questions posed in Part 1 of this paper for the Vulnerable Persons Working Group Workshop to consider at Conference are:-

Does the asylum seeking child require a special approach to the determination of his/her refugee status?

And if so:-

To what extent do the best interests of the child require procedural safeguards in refugee status determination?

To what extent does the assessment of persecution and risk of harm on return require a substantive consideration by decision-makers and judges of the rights of children established by the UNCRC?

Every year an estimated 18.2 million children² are 'of concern' to the UN High Commissioner for Refugees (UNHCR), displaced as a result of armed conflicts, political upheaval, oppressive regimes and their policies and practices. The majority of these children (and their families) are to be found in refugee and internal displacement camps, in situations of statelessness or as returnees. Children in such situations do not normally have access to government provided child welfare and protection infrastructures and UNHCR. These children will invariably have suffered separation, loss and bereavement, psychological and developmental trauma, physical injury and ill-health as a result of their displacement.

Whether or not there is a state willing and able to exercise responsibility for refugee children's protection and welfare, all these children first need to be made secure and safe from persecution and other forms of harm. They also need to be supported and cared for as children, offered health care, education, rehabilitation and reintegration, reunited with their families and given the opportunity to maximise their full developmental potential.

These are basic moral and humanitarian concerns for us all but they are also binding international legal obligations on all states whether they have ratified the Refugee Convention or not. At the time of writing, 47 more states have ratified the UNCRC than have ratified the Refugee Convention.

Although earlier international instruments³ had started to recognise states' duties towards children, the UNCRC was the first instrument to fully establish the principle that children are autonomous persons and rights holders as well as being the object of special measures of protection on account of their lack of legal, mental and physical capacity.

The UNCRC was adopted by the General Assembly of the United Nations as an international treaty in 1989 and despite its own relative infancy, with very few exceptions⁴ and diminishing reservations⁵ it has

² See UNHCR website at <http://www.unhcr.org/pages/49c3646c1e8.html> (accessed 02.08.2011)

³ E.g the 1924 and 1959 Declaration of the Rights of the Child

⁴ Only Somalia and the USA have not yet ratified the CRC

⁵ i.e UK and Germany have recently removed their immigration control reservations (2008 and 2010 respectively)

proved to be the most rapidly and universally signed and ratified of international instruments, “*unique in the history of a human rights treaty*”⁶.

As Professor James Hathaway has said, “*universal human rights law might also be set by a treaty of genuinely universal reach*” and that “*the Charter of the United Nations [is] thus far the only treaty that may establish human rights obligations that bind all members of the international community...[the UNCRC] enjoys comparably broad accession*”.⁷

Despite the fact that the U.S.A. along with Somalia has yet to ratify the UNCRC, a U.S. District Court has held⁸ that “*non-ratification did not eliminate the impact of the CRC on US law*” and that signing it evidenced “*an intention that it will not act contrary to the principles embodied in the treaty*”⁹. Professor Geraldine Van Bueren has described the principle of a child’s best interests as “*a fundamental legal principle of interpretation developed from the compassionate, self-imposed limitation on adult power*”¹⁰.

The UNCRC and particularly the best interests principle is manifested in the domestic legislation of an increasing number of individual states¹¹, as is encouraged by the implementation duties set out in Article 4 of the UNCRC. It is also found in regional inter-governmental human rights instruments across the world, for example the African Charter on the Rights and Welfare of the Child¹², The European Charter of Fundamental Rights¹³, The League of Arab States Revised Arab Charter on Human Rights¹⁴, The American Convention on Human Rights¹⁵ The South Asian Association for Regional Cooperation Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia,¹⁶ The Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms¹⁷

From this briefest of overviews one can discern that there is a near global consensus that the best interests of the child are of primary consideration in state decision making, irrespective of the legal code, cultural differences and interpretations of those duties. The African Charter most interestingly

⁶ Prof. Savitri Goonesekere – Protecting the World’s Children p I UICEF, Cambridge University Press ed. 2008

⁷ p33 fn 60 The Rights of Refugees Under International Law - James C. Hathaway Cambridge University Press 2005

⁸ Beharry v Reno 183 F Supp 2d 584 (EDNY 2002) – see Jane MacAdam p176 et seq– Complementary Protection in International Refugee Law, Oxford University Press 2007

⁹ Ibid MacAdam p193

¹⁰ G Van Bueren, Child Rights in Europe (2007) Council of Europe Publishing p30 cited at at page 182 of The Rights of the Child, Law and Practice, Alistair MacDonald 2011 Family Law, Jordan Publishing.

¹¹ For example -

¹² Article 4

¹³ Article 24

¹⁴ Article 33 (3) – for English language translation see 12 Int'l Hum. Rts. Rep. 893 (2005)

¹⁵ Article 17(4)

¹⁶ Article III (4) - <http://www.saarc-sec.org/userfiles/conv-children.pdf> (accessed 03.08.2011)

¹⁷ Article 17 (although this speaks of “the right to such special protective measures as the child’s particular situation requires”)

discourages traditional, customary and cultural practices towards children that are contrary to its principles¹⁸ and treats the best interests of the child as *the* not a primary consideration¹⁹.

Arguably the UNCRC and in particular the principle of 'best interests' has now attained such universality that it amounts to what has been described as "*instant customary international law*" if not *ius cogens*²⁰.

What this means in practice, for children in general and specifically in relation to children seeking international protection as refugees is a harder concept to define and amplify.

UNHCR as an internationally mandated refugee agency recognises that, "*the role of child rights in the protection of refugee children is inherent to the Office's protection work. UNHCR explicitly recognizes the 1989 UN Convention on the Rights of the Child (CRC) as providing the normative framework for its work with refugee children*".²¹

The work of the United Nations High Commissioner for Refugees (UNHCR) is vital in protecting children as refugees and in meeting their best interests as children where states do not or cannot fulfil those duties. UNHCR has led the field internationally in developing good practice in providing for the immediate protection and welfare needs of refugee children and developing tools for assessing and meeting their best interests.

The "UNHCR Guidelines on Determining the Best Interests of the Child"²² is an indispensable tool in this most challenging of contexts and has served to assist UNHCR field workers in making complex decisions about the welfare of children, dealing with immediate child protection and welfare issues and longer term decisions about family reunion, resettlement and repatriation, child development and rehabilitation but this guidance does not easily translate into states' systems where the individual state rather than UNHCR carries out refugee status determination and has statutory services and agencies that provide child protection and welfare. The next stage of UNHCR's work on best interests is currently underway but not yet complete, in the development of best interests guidance that reflects the situation of child refugees in "industrialised" states as well as in displacement camps. This new guidance is anticipated to be published in 2012.

Children also find their way, through many varied routes, alone or with family members, to countries that have individuated refugee status determination processes and access to judicial appeals procedures and where there are statutory child protection and welfare agencies responsible for the care of children.

It is in this latter context that the remainder of this paper is focussed, that is, situations where receiving states have formal status determination processes and provision for judicial or quasi-judicial appeals and also where states provide (to varying degrees) access to statutory child welfare and protection services.

¹⁸ Article 1(3) of the Charter states that, "*Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged*"

¹⁹ Article 4 African Charter – see below for discussion of "a" and "the" primary consideration in Article 3(1) UNCRC

²⁰ See Geraldine Van Bueren – The International Law on the Rights of the Child (1998) Martinus Nijhoff p53 et seq

²¹ UNHCR's Policy on Refugee Children, 1993, paragraph 17.

²² May 2008 revision - Available at <http://www.unhcr.org/4566b16b2.pdf> (accessed 3 .08.2011)

The UNCRC identifies all persons under 18 as children (Article 1²³). It emphasises and enshrines for children existing core human rights values (non-discrimination, survival, prohibition of harm, identity, dignity,) recognised personal development rights (e.g. to play and to education) and sets forth specific child welfare provisions (e.g. in relation to state child care arrangements, family unity, adoption). It also recognised the particular vulnerabilities of children in relation to conflict and exploitation (prohibition of child conscription, forced labour, sexual exploitation), rehabilitation and reintegration measures (Article 39)

Significantly, where the drafters of the Refugee Convention did not, the UNCRC specifically identified the need to recognise and protect children as refugees (Article 22).

The UNCRC sets out a number of fundamental principles governing both the implementation and interpretation of the treaty and as the foundation for all policies, practices and decisions of states affecting both the individual child and children generally, whether directly or indirectly. These are

Article 2 – prohibition of discrimination on any grounds.

Article 3 – the best interests of the child as a primary consideration.

Article 6 – the right to survival and development to the maximum extent possible

Article 12 – the right of the child to be heard and their wishes and feelings considered.

As UNICEF's Implementation Handbook for the CRC²⁴ reminds us,

"The Convention is indivisible and its articles interdependent. Article 3(1) has been identified by the Committee on the Rights of the Child as a general principle of relevance to implementation of the whole Convention. Article 3(2) provides States with a general obligation to ensure necessary protection and care for the child's well-being."

Despite the lack of child specific obligations in the 1951 Refugee Convention, the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees²⁵ and its child specific international protection guidelines²⁶ set out the ways in which refugee status determination needs to take account of the special situation of children. This is applicable not just in terms of procedural accommodations²⁷ but necessarily part of the substantive consideration of children's claims especially those aspects of the determination based on child specific forms of persecution, the identification of children as a particular social group, the reasonableness of internal relocation and the risk of harm to children on return to their countries of origin.

²³ Unless a lower age of majority is provided by national law.

²⁴ p45, 3rd edition September 2007 - Hodgkin and Newell

²⁵ HCR/IP/4/Eng/REV.1, 1979 (Re-edited, January 1992) e.g. paras 213 – 219 (unaccompanied children)

²⁶ Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, HCR/GIP/09/08, December 2009

²⁷ See IARLJ Vulnerable Persons Working Group draft procedural accommodations - chapter IV children

The primacy of the child's best interests

The weight to be given to “Best Interests” as a principle, particularly in relation to the interests of states in maintaining effective border controls has been addressed both by academics and courts internationally. The most critical issue in this respect has been the consideration of the use of “ a primary” not “the primary” in the wording of Article 3 UNCRC, permitting, as it has been argued, a balancing exercise to be carried out between the rights of the child and other competing state interests.

Interestingly the African Charter establishes the highest and most unambiguous value of the best interests of the child by using the words “ *the primary*” not “ *a*”. The Charter was adopted after the UNCRC²⁸ and can be read as having been intended to create a higher duty than the CRC for its ratifying states.

Professor Philip Alston in 1991²⁹ concluded from the travaux préparatoires to the UNCRC that the use of the indefinite article “*a*” was intended to provide flexibility only in “ *extreme*” cases. The much cited example being that of the conflicting interests arising where there is a danger to both the life of a mother and unborn child during childbirth. In terms of less extreme competing considerations, the Committee on the Rights of the Child has commented that “State’s concerns about immigration control should not override best interests considerations”³⁰ Crucially, Alston argues that “*the formulation adopted would seem to impose a burden of proof on those seeking to achieve such a non-child-centred result to demonstrate that, under the circumstances, other feasible and acceptable alternatives do not exist.*”³¹

Professors Guy Goodwin-Gill and Jane MacAdam have both argued that the UNCRC “[*may*] call for a total realignment of protection, away from the formalities of 1951-style refugee states towards a complete welfare approach” and that “*it is vital to view the rights of child asylum seekers not only in the context of the Refugee Convention but also in the specific framework of the [UN]CRC*”³²

Indeed Hathaway also recognises, (when considering discriminatory treatment of refugees vis a vis nationals) that the Refugee Convention may not be able to provide the same level of protection afforded by other international treaties, when he says, “ *refugees who invoke [Article 2 of the Covenant on Civil and Political Rights (ICCPR)] protection can effectively avoid the lower standard of treatment prescribed by the Refugee Convention*”³³ The same holds firm with provisions of the UNCRC that may be more favourable for the protection of refugee children not least the non-discrimination provisions under Article 2 UNCRC and other special protection measures incorporated into the UNCRC from the ICCPR and the Covenant on Economic, Social And Cultural Rights (ICESCR) provisions.

²⁸ OAU Doc. CAB/LEG/24.9/49 (1990) in force from Nov 29 1999

²⁹ P Alston The Legal Framework of the Convention on the Rights of the Child (1991) at p.9

³⁰ CRC General Comment Number 6 at para 86

³¹ P Alston The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights International Journal of Law and the Family 8, (1994), 1-25 at p 13

³² See MacAdam supra at pp 181 and 196

³³ J Hathaway, The Rights of Refugees under International Law, p249

The judicial approach to the primacy of best interests has been developing for a number of years, Australia and then Canada having led the way, firstly the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995)³⁴ finding that children's interests had to be considered even where the child is not the subject of the decision but is affected indirectly, then the landmark judgment of the Canadian Supreme Court in *Baker v Canada* (1999)³⁵ establishing the importance of best interests when considering the deportation of a parent. Other Canadian and Australian cases added to the jurisprudence (*Wu and Wan*, 2001)³⁶, according substantial weight to the child's best interests and explored the extent to which other cumulative considerations might outweigh those interests.

These cases have been frequently cited in judgments internationally including the most recent United Kingdom Supreme Court judgment in the case of *ZH (Tanzania) v Secretary of State for the Home Department*³⁷ in which the primacy of best interests was considered in the context of a family expulsion case contrary to Article 8 of the European Convention on Human Rights (ECHR). In that case the court considered that the child's best interests:-

*"... must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."*³⁸

The European Court of Human Rights has on many occasions considered the best interests of the child as an integral aspect of determining family expulsion and freedom of movement cases³⁹ but has also recently considered the best interests of unaccompanied asylum seeking children unlawfully detained by the Greek authorities, in the case of *Rahimi v Greece*⁴⁰. The Court attached decisive importance to the fact that the Greek authorities had not examined whether the detention was in the applicant's best interests under Article 3 UNCRF in finding that there had been a violation of Article 3 of the European Convention on Human Rights saying that:-

*"La Cour note sur ce point que l'article 3 de la Convention relative aux droits de l'enfant du 20 novembre 1989 dispose que l'intérêt supérieur de l'enfant doit être une considération primordiale, entre autres, des autorités administratives dans toutes les décisions qui les concernent... elle a déjà admis qu'il existe actuellement un large consensus – y compris en droit international – autour de l'idée que dans toutes les décisions concernant des enfants, leur intérêt supérieur doit primer"*⁴¹

³⁴ [1995] 183 CLR 273 (HCA)

³⁵ [1999] 2 SCR 817

³⁶ [2001]FCT 1274 and [2001]FCA 568 respectively – all above cases cited, courtesy of MacAdam pp176 -181

³⁷ [2011] UKSC 4

³⁸ *Ibid* Lord Kerr at para 46

³⁹ E.g *Uner v Netherlands*, *Masloz v Austria*, *Neulinger v Switzerland* etc. see www.echr.coe.int

⁴⁰ *Affaire Rahimi c Grece* Requete no 8687/08 ECtHR

⁴¹ *Ibid* para 108

In Africa courts have recently contemplated the importance of the child's best interests in the wider sense— In Malawi, in a 2009 international adoption case⁴² the Supreme Court held that the out of country placement for adoption of a baby girl was permitted as a last resort only if it was in the best interests of the child under both the UNCRC and the African Charter. In Kenya in 2009 the Court of Appeal held in a child abduction case⁴³ that there had been “ *...no attempt to explore [] the best interests of the child*” contrary to the domestic children's law of Kenya which incorporates both the UNCRC and the African Charter.

In India, in April 2011 the Supreme Court of India, in *Andolan v Union of India and Others*⁴⁴ accepted submissions from the Solicitor-General that as “*India has ratified the UN Convention on the Rights of the Child in 1992 [which] prescribes standards to be adhered by all state parties in securing the best interest of the child*” and held that “*in the wake of serious violations and abuse of children...forcefully detained in circuses...in order to implement the fundamental right of the children [to education] under Article 21A [of the Indian Constitution] it is imperative that the Central Government...prohibit[s] the employment of children in circuses. Further the respondents are directed to frame a proper scheme of rehabilitation of rescued children from circuses.*”

Given the universality of the UNCRC, the development of a truly global jurisprudence is now apparent and becoming more readily available through projects such as the World Legal Information Database⁴⁵

The meaning and content of “best interests”

The UK Supreme Court held in *ZH (Tanzania) v SSHD*⁴⁶ that “best interests” broadly speaking means “well-being”, adopting the definition used by UNHCR in its own Guidelines on Determining the Best Interests of the Child⁴⁷. The UNICEF Implementation Handbook approach is based on its “indivisibility” principle, making the extent of realization of a child's UNCRC rights an essential element of a best interests consideration. This gives the UNICEF approach arguably a more personal development, participatory and equality focused approach than a purely welfare-based approach which the “well-being” definition might suggest. It is nonetheless consistent to include the realization of a child's wider rights as an essential part of their overall “well-being” and to reconcile the two approaches. It is therefore helpful to utilize what has been said about the meaning of “well-being” in the context of understanding the best interests of refugee children.

The UNHCR Guidelines⁴⁸ detail a range of specific factors that help to determine a child's best interests.

⁴² MSCA Adoption appeal no. 28 of 2009 <http://www.malawilii.org/mw/cases/MWSC/2009/1.pdf> (accessed 04.08.2011)

⁴³ A.O.G. v S.A.J. & another Civil Appeal No. 188 of 2009 [2011] eKLR at para 45

⁴⁴ [2011] INSC 403

⁴⁵ <http://www.worldlii.org/>

⁴⁶ Hale J - [2011]UKSC04 at page 13

⁴⁷ May 2008 at para 1.1 p14

⁴⁸ *Ibid* p14

Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences. Its interpretation and application must conform with the CRC and other international legal norms, as well as with the guidance provided by the Committee on the Rights of the Child in its 2005 General Comment No. 6⁴⁹ on the treatment of unaccompanied and separated children outside their country of origin... and in accordance with Article 41 of the UNCRC the higher standard must always apply⁵⁰. These include⁵¹:-

safe environment:

- exposure or likely exposure to severe harm usually outweighs other factors
- safety in the geographical location/household under consideration
- availability of life-saving medical treatment for sick children
- past harm (frequency, patterns, trends)
- ability to monitor whether root causes of past harm still persist.

family and close relationships:

- quality and duration of the relationship and degree of attachment of the child to: siblings, other family members, other adults or children in the cultural community, any potential care-giver
- potential effect of separation from family or change in care-givers on the child
- capacity of current and potential future care-givers to care for the child

development and identity needs:

- the child's cultural and community network continuity in the child's ethnic, religious, cultural and linguistic background, specific considerations based on age, sex, ability and other characteristics of the child
- particular physical or emotional needs
- physical and mental health considerations
- educational needs
- prospects for successful transition to adulthood, (employment, marriage, own family).

Relationship between Article 1 A (2) of the 1951 Refugee Convention and UNCRC

UNHCR's own policies, guidance and ExComs⁵² on the application of the UNCRC and the General Comments of the UN Committee on the Rights of the Child⁵³, require consideration and application of the duties imposed on states by the whole of the UNCRC as part of the substantive assessment of the refugee claim, whether of an individual child claimant or a child dependant of an adult claimant.

⁴⁹ see www2.ohchr.org/english/bodies/crc/comments.htm –

⁵⁰ Ibid p15

⁵¹ Ibid annex 9 pp 96 and 97

⁵² ExCom, Conclusion on Children at Risk, 5 Oct. 2007, No. 107 (LVIII) - 2007

⁵³ see www2.ohchr.org/english/bodies/crc/comments.htm

All the UNCRC Committee's General Comments give authoritative interpretation and content to the articles of the UNCRC and should be considered (not just General Comment 6) when assessing the extent children's rights and of general protection measures available in the child's country of origin as well as a best interests assessment of the individual refugee child. For example GC8 - *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, GC7a - *Implementing child rights in early childhood*, GC9 - *The rights of children with disabilities*, GC3 - *HIV/AIDS and the rights of the child*, GC11 - *Indigenous children and their rights under the Convention*, GC13 - *The right of the child to freedom from all forms of violence*

These considerations should be based on not just the core principles of the UNCRC - best interests, non-discrimination, survival and freedom from harm but on an assessment of the extent to which a child is able to realise the full extent of their rights under that convention. This requires the receiving state to consider the protection claim in light of the objective evidence as to the country of origin's ability and willingness to secure to that child, their rights and protections under the UNCRC in the context of the individual child's professionally assessed welfare needs.

The UNHCR Guidelines on International Protection No. 8: Child Asylum Claims⁵⁴ are vitally important in identifying persecutory activities that amount to child specific persecution and the circumstances in which children may be persecuted as a particular social group:-

*"Alongside age, factors such as **rights specific to children**, a child's stage of development, knowledge and/or memory of conditions in the country of origin, and vulnerability, also need to be considered to ensure an appropriate application of the eligibility criteria for refugee status."*⁵⁵

*"other identity-based, economic and social characteristics of the child, such as family background, class, caste, health, education and income level, may increase the risk of harm, influence the type of persecutory conduct inflicted on the child and exacerbate the effect of the harm on the child. For example, children who are homeless, abandoned or otherwise without parental care may be at increased risk of sexual abuse and exploitation or of being recruited or used by an armed force/group or criminal gang."*⁵⁶

*"Children's socio-economic needs are often more compelling than those of adults, particularly due to their dependency on adults and unique developmental needs. Deprivation of economic, social and cultural rights, thus, may be as relevant to the assessment of a child's claim as that of civil and political rights... The violation of one right often may expose the child to other abuses; for example, a denial of the right to education or an adequate standard of living may lead to a heightened risk of other forms of harm, including violence and abuse"*⁵⁷

On the well-foundedness of a child's fear of persecution, *"The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how*

⁵⁴ HCR/GIP/09/08 22 December 2009

⁵⁵ Ibid para 4

⁵⁶ Ibid para 13

⁵⁷ Ibid para 14

the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child"⁵⁸ ... and "An accurate assessment requires both an up-to-date analysis and knowledge of child-specific circumstances in the country of origin, including of existing child protection services."

Specialist Refugee Tribunals have applied these substantive considerations in their judgments. For example,

In a 2003 case before the Canadian Immigration and Refugee Board (in the case of X (re))⁵⁹ the IRB decided that two Chinese children who had sought recognition as refugees with their mother in Canada following the imprisonment of their father for political activity were prevented from attending school in China and this was sufficient for them to be recognised as refugees. The Court cited UNCRC, Art 28 inter alia to identify the right to education as constituting part of a child's welfare.

In an unreported case of the United Kingdom's Upper Tribunal, the court found that *'applying a rights based analysis to the totality of the evidence ... using the 1989 CRC as the appropriate interpretive tool in order to give meaning to the content of this child's well-being ... it is not in his best interests to return ... because he is a refugee.'*⁶⁰

Procedurally, the assessment of children's evidence and access to determination processes must be sensitive to their needs and judicial procedures developed that are in accordance with the individual child's best interests, in a way that enables the child to give best evidence, to avoid retraumatisation through inappropriate examination and challenge and considered in a way which understands a child's maturity and capacity to recall events, their perceptions of harm and understanding of risk.

"Although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied.¹⁴² If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt."⁶¹

UNHCR's Refugee Handbook provides that:-

[a child] not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests⁶²

Where the minor has not reached a sufficient degree of maturity to make it possible to establish well-founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors.⁶³

⁵⁸ Ibid para 10

⁵⁹ X (Re), 2003 CanLII 55292 (IRB), 12 March 2003

⁶⁰ FM (Afghanistan) v Secretary of State for the Home Department UTIAC – AA/01079/2010 dated 27.2.11.

⁶¹ Guidelines on International Protection No. 8: Child Asylum Claims para 73

⁶² UNHCR Handbook at para 214

⁶³ Para 215

General Comment Number 6 of the UNCRC is reflected in the UNHCR Guidance and in particular, part IV on children's access to asylum procedures and procedural safeguards and support measures⁶⁴ should be considered by all judges engaged in status determination appeals.

These issues are dealt with in detail in Part 2 of the paper which now explores the UNCRC Article 12 rights of the child to be heard but as can be seen from the international guidance, procedural safeguards designed to meet the best interests of the child in the decision making process and in the court room cannot be treated as a wholly separate or merely procedural consideration as these are fundamental to eliciting, understanding and applying the evidence necessary to a substantive decision on refugee protection built on the principles of the Convention on the Rights of the Child.

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⁶⁴ GC 6 Part IV paras 66 - 78

Part 2

Article 12: The Child's Right to be Heard

Article 12 of the 1989 United Nations Convention on the Rights of the Child (UNCRC) provides:

"1. 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.

*2. 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."*⁶⁵

The UN Committee on the Rights of the Child (hereafter referred to as 'the UN Committee'), in Comment No 12 of 1st July 2009, has heralded Article 12 as:

*"...a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 assures, to every child 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 age and maturity."*⁶⁶

The first section of this paper dealt with Article 3 of the UNCRC, which is obviously closely tied to Article 12. The complementary nature of the relationship between these two Articles was made explicit by the UN Committee, again in Comment No 12, in which it stated:

*"...one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives."*⁶⁷

Professor Trevor Buck describes Article 12 as a pragmatic focal point for examining children's rights, getting as it does to the heart of children's participation rights and obliging state parties to "assure to

⁶⁵ United Nations Convention on the Rights of the Child 1989 (adopted by UN General Assembly resolution 44/25 of 20 November 1989 and entered into force 2 September 1990) 1577 UNTS 3.

⁶⁶ Committee on the Rights of the Child, Fifty-first session Geneva, 25 May-12 June 2009, CRC/C/GC/12 20 July 2009, Introduction, paragraph 1.

⁶⁷ *Ibid*, paragraph 74.

the child who is capable of forming his or her own views a right to express views about matters affecting him or her”, including in any judicial or administrative proceedings.⁶⁸

Similarly, Gerison Lansdown, an international child’s rights consultant, describes Article 12 as being at the core of recognising children as subjects, and rights holders, which insists on the “visibility” of children in their own right.⁶⁹

At this juncture it is important to consider in more depth the component sections comprising Article 12.

It speaks of a child *capable of forming his or her own views*. The assumption here is that all children are capable of forming a view, however young. There is no lower age limit imposed on the exercise of the right to participate. Although age and disability may make it difficult for certain children to articulate their views through speech, communication can also occur through a plethora of alternative means including play, writing, poetry, art, technology and signing. Article 12 is not simply reserved for those who can verbalise, see for example, the UN Committee’s General Comment No. 7 (2005) Implementing child rights in early childhood, which states children “make choices and communicate their feelings, ideas and wishes in numerous ways, long before they are able to communicate through the conventions of spoken or written language.”⁷⁰ Accordingly, measures must be put in place to enable such children to communicate.

Further, Article 12 states that once their views are formed, children have the right to *express their views freely*. There is no suggestion here that children should be required to give their views. The right not to participate must also be respected. A child may not be willing or interested in expressing his or her views. However, to enable children to express their views, it is necessary for adults to create the opportunities and so Article 12 obliges adults in their capacity as parents, carers or professionals to ensure that children are empowered and encouraged to contribute their views on all matters of relevant concern.

Article 12 stipulates that a child has the right to express his or her views in *all matters affecting the child*. The right to be heard applies to all actions and decisions that impact children’s lives from the family, school, local communities and public services to wider governmental policy. Of particular importance here of course, are the legal procedures, specifically in the field of asylum and refugee decision making processes.

Article 12 confers an active responsibility onto adults in that it demands the views of the child *be given due weight*. Article 12 goes beyond the child’s right to be listened to, but that what is said must also be taken seriously. Children’s views must be given due weight and should inform decisions that are made about them. However, this provision does not confer fully autonomous, decision-making capacity on a

⁶⁸ Buck, T, *International Child Law*, 2nd ed, 2011, Routledge, p.33.

⁶⁹ Lansdown, G, *Promoting Children’s Participation in Democratic Decision-making*, 2001, UNICEF Innocenti Insight, p.1.

⁷⁰ CRC/C/GC/7/Rev.1, Para 14.

child. No entitlement to have a decision followed exists by virtue of Article 12. It simply demands that a child's views receive appropriate consideration.

Finally, Article 12 makes reference to giving weight to the views expressed *in accordance with the age and maturity of the child*. How seriously a child's views are taken, what weight should be attached to those views, will depend on the level of comprehension of the issues involved. Understanding and therefore, capacity, will be affected by a variety of factors including the nature and complexity of the decision, the child's social environment and level of adult support as well personal life experiences.

Having provided this background to, and emphasised the importance of Article 12, its role in the asylum and refugee determination processes must now be considered, and an assessment made of whether or not children are free to express their views and be listened to throughout the decision making.

The UN Committee, in the aforementioned Comment No 12, were critical of what it regarded to be 'tokenistic' measures, and of instances in which legislative measures had been introduced but these had not filtered through and translated into practice.⁷¹ Comment No 12 highlighted immigration and asylum proceedings and noted at paragraph 123 that a child seeking asylum must have the opportunity to present her or his reasons leading to the asylum claim.

Paragraph 124 continues by noting what should be in place for children going through the asylum process, as follows:

- All relevant information, in their own language, on their entitlements, the services available, including means of communication, and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings;
- A guardian or adviser should be appointed, free of charge;
- Effective family tracing and relevant information about the situation in their country of origin to determine their best interests;
- Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs;
- Attention to ensure that stateless children are included in decision-making processes within the territories where they reside.

Also important here is the UN Committee's previous Comment No 6, 2005, on Treatment of Unaccompanied and Separated Children outside their Country of Origin:

"Pursuant to article 12 of the Convention, in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12 (1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of

⁷¹ See, for example, paragraphs 4, 5, 8, 76 and 132.

origin (arts. 13, 17 and 22 (2)). In guardianship, care and accommodation arrangements, and legal representation, children's views should also be taken into account. Such information must be provided in a manner that is appropriate to the maturity and level of understanding of each child. As participation is dependent on reliable communication, where necessary, interpreters should be made available at all stages of the procedure."⁷²

Also cognisance must be given to Comment No 10, 2007, Children's Rights in Juvenile Justice,⁷³ at paragraph 43 which notes, "Article 12 (2) of CRC requires that a child be provided with the opportunity to be heard in any judicial or 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." It also requires that judgements need to be expressed in a way that children can understand.⁷⁴

General Comment No. 11 (2009) Indigenous children and their rights under the Convention,⁷⁵ at paragraph 38, notes:

"With regards to the individual indigenous child, the State party has the obligation to respect the child's right to express his or her view in all matters affecting him or her, directly or through a representative, and give due weight to this opinion in accordance with the age and maturity of the child. The obligation is to be respected in any judicial or administrative proceeding. Taking into account the obstacles which prevent indigenous children from exercising this right, the State party should provide an environment that encourages the free opinion of the child. The right to be heard includes the right to representation, culturally appropriate interpretation and also the right not to express one's opinion."

As well as the General Comments of the UN Committee on the Rights of the Child, there is a plethora of documentation, one of the most recent being the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice and their explanatory memorandum.⁷⁶ These include provisions such as:

Participation:

1. The right of all children to be informed about their rights, to be given appropriate ways to access justice and to be consulted and heard in proceedings involving or affecting them should be respected. This includes giving due weight to the children's views bearing in mind their

⁷² CRC/GC/2005/6, paragraph 25.

⁷³ CRC/C/GC/10.

⁷⁴ *Ibid*, paragraph 47.

⁷⁵ CRC/C/GC/11.

⁷⁶ These Guidelines were adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies. All quotations sourced from the Guidelines and Explanatory memorandum - version edited 31 May 2011.

maturity and any communication difficulties they may have in order to make this participation meaningful.

2. Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case.⁷⁷

Protection from Discrimination:

1. The rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), association with a national minority, property, birth, sexual orientation, gender identity or other status.
2. Specific protection and assistance may need to be granted to more vulnerable children, such as migrant children, refugee and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.⁷⁸

The Canadian Immigration and Refugee Board (IRB) has also published its *Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*,⁷⁹ which, among other guidance, clearly lays down seven principles for eliciting evidence in children's cases. Underpinned by Article 12, the aim is to allow a child claimant the right to be heard in regard to his or her refugee claim, in the same manner an adult claimant is afforded that right.⁸⁰ Guidance is also given for the assessing of a child's evidence which, again in accordance with Article 12, makes reference to a child's capacity to accurately recall and express his or her experiences, while giving cognisance to the child's age, gender, cultural background and other relevant factors, e.g. signs of post-traumatic stress disorder or fear.⁸¹

Likewise in the UK, the Immigration Law Practitioners' Association has recently published its Guidelines, *Working with Refugee Children: Current Issues in Best Practice*, including a chapter dedicated to the implementation of, and adherence to, Article 12,⁸² providing measures to be in place to allow children to be heard and have their views considered throughout their asylum claims. As the author states, such measures are required to "ensure that we [as legal representatives] do all that we can to make the voice

⁷⁷ *Ibid*, p.4.

⁷⁸ *Ibid*, p.5.

⁷⁹ *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act Guideline 3 Child Refugee Claimants: Procedural and Evidentiary Issues*, Immigration and Refugee Board Ottawa, Canada. In effect: September 30, 1996.

⁸⁰ *Ibid*, Section B(I) Eliciting the Evidence.

⁸¹ *Ibid*, Section B(II) Assessing the Evidence.

⁸² Kaur, K, Voice of the Child, in Woodall, L (ed), *Working with Refugee Children: Current Issues in Best Practice*, ILPA, 2011, pp.39-64.

of the child heard throughout the whole of the asylum process with the interdependent principles of best interests informing our conduct.”⁸³

As mentioned in the first part of this paper, there has been the recent case of *ZH (Tanzania) v. Secretary of State for the Home Department*.⁸⁴ This decision also touches on the importance of Article 12 in that while it was acknowledged that the best interests of the child must be a primary consideration, this “immediately raises the question of how these are to be discovered. An important part of this is discovering the child’s own views.”⁸⁵ The judgement goes on to consider how this is best carried out and considers options such as having separate legal representation and for “the immigration authorities [to] be prepared at least to consider hearing directly from a child who wishes to express a view and is old enough to do so. While their interests may be the same as their parents’ this should not be taken for granted in every case.”⁸⁶

So, in light of existing guidance, comments and case law, what the IARLJ needs to consider is the efficacy of drawing up of guidelines relating to vulnerable witnesses, aimed at refugee status decision makers. In doing so the following questions need to be addressed:

- What safeguards and measures need to be in place to ensure children have the platform and tools to express their views in accordance with Article 12?
- What guidance and/or training do decision makers need in relation to children appearing before them, generally, and on the implementation of Article 12 specifically?
- What existing tools could, or should, serve as a blueprint?
 - The Canadian IRB as it is succinct and user-friendly?
 - The CoE’s Guidelines on child friendly justice?
 - ILPA’s?
 - The VPWG draft procedural guidelines?
- Are there instances of the child’s voice being heard within other branches of law, e.g. family courts, from the various IARLJ jurisdictions from which lessons could be learned?

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⁸³ *Ibid*, p. 64.

⁸⁴ *ZH (Tanzania) v. Secretary of State for the Home Department*, [2011] UKSC 4

⁸⁵ *Ibid*, paragraph 34.

⁸⁶ *Ibid*, paragraph 37.