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**BEST INTEREST DETERMINATION FOR REFUGEE CHILDREN:
An Annotated Bibliography of Law and Practice**

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A sense of responsibility toward the most vulnerable refugees has caused the United Nations and its predecessor, the League of Nations, to express grave concern for the plight of unaccompanied refugee children from their earliest days. Continuing in this tradition, UNHCR is currently working with its member states to negotiate a statement of principles and agreed practice for identifying and serving children at risk.

Yet despite profound statements and sincere sentiments, the international bodies have found it difficult in practice to operationalize this concern by developing procedures which can be universally enacted and providing guidance to the field staff that must make decisions about unaccompanied and separated children. UNHCR has developed and is now testing a set of guidelines to assist in determining the "Best Interest of the Child" and has requested the assistance of member states and NGOs on how best to operationalize them.

In preparing this annotated bibliography the United States Conference of Catholic Bishops/ Migration and Refugee Services (USCCB/MRS) intends to give all parties to this effort a common set of documents to work from with links to the underlying child welfare principles or laws from the United Nations, states or collections of states. Since our working group is comprised of U.S. NGO and government partners, we have given emphasis to the laws of the United States as they have evolved over time. The U.S. laws reflect and are reflected by those of other countries and international bodies and we see many themes emerging across regions and organizations. We will distribute the bibliography and individual documents via the Bridging Refugee Youth and Children's Services clearinghouse and website: www.brycs.org.

While the bibliography and annotation are extensive, we have identified three sets of guidelines, each from a different organization interested in child welfare, which we believe give participants in this effort good background for further discussion:

1. UNHCR's Draft Guidelines on Formal Determination of the Best Interests of the Child (May 2006) and Conclusion on Children at Risk (Ongoing)
2. US Child Welfare Standards: *State Child Welfare Laws, the Adoption and Safe Families Act, the Child Support Performance Incentive Act, and Title IV-B and IV-E of the Social Security Act and as amended (PL 103-432)*
3. US Immigration Law and Child Asylum Seekers: *U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. Operating Policies and Procedures Memorandum 07-*

01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children.
Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

The accompanying memo entitled “Caring and Planning for Vulnerable Children: Key Laws and Guidelines” covers each of these in more details for convenient reference.

Difficulties in identifying “Child’s Best Interest”:

The United States, other states, and the United Nations have struggled over the years with the inherent tension between immediate safety and long term durable solutions or permanent planning for children in crisis.

During an emergency situation, states or international bodies must make the best decision possible for the child’s immediate safety. However, any such decision-making body must then return to re-examine the child’s circumstances to create and implement a permanent plan. Over time, states have developed mechanisms and procedures so that decisions can be made and carried out in shorter and shorter time-frames, which is a commendable improvement. The harm to a child who does not have a permanent plan or durable solution within a very short time has been increasingly recognized as a major factor inhibiting child development. Yet the United Nations may not have the resources to then return to a child’s case after the emergency phase is over and devise a durable solution which they are able to implement within the time frame now thought to be best practice. Indeed, the difficulty of even first identifying unaccompanied and separated children in need of assistance and long term solutions is a considerable challenge.

One obstacle to achieving permanence or durable solution for refugee children is the enormous difficulty of safely locating and contacting parents of children who end up alone in the protracted crises in which UNHCR frequently operates. Individual states have struggled with similar dilemmas, and law and practice continue to evolve toward the “child’s interest” rather than parental rights. However, the difficulty of making decisions in cases in which the family’s wishes are unclear remains a major factor inhibiting short and long term planning for unaccompanied and separated children.

While these challenges persist, UNHCR and its member states must create operational guidance and common workable procedures for those whose responsibility is to make decisions on behalf of children. We hope that this collection of documents will be of help in the current effort to finalize and implement the UNHCR Guidelines on Formal Determination of the Best Interests of the Child.

Questions? Comments? Suggestions?

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**BEST INTEREST DETERMINATION FOR REFUGEE CHILDREN:
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Caring and Planning for Vulnerable Children: Key Laws and Guidelines

While the attached bibliography and annotation are extensive, USCCB/MRS has identified three sets of guidelines, each from a different organization with interest in or impact on child welfare, which we believe give participants in this effort good background for further discussion. The UNHCR, the US Child Welfare System, and US Immigration Law have all offered guidelines or created rules for making decisions about the fates of unaccompanied and separated children. An understanding of all three, and the areas of overlap and tensions between them, will help NGO and government partners to best provide input while the UNHCR draft BID Guidelines are being reviewed and formalized.

1. International Standards for identifying and serving unaccompanied and separated refugee children: UNHCR's BID Guidelines and Draft Conclusion on Children at Risk

- ***UNHCR Guidelines on Determining the Best Interests of the Child (May 2008)***

UNHCR released its *Guidelines on Determining the Best Interests of the Child* in May 2008. The BID Guidelines are intended to ensure that all relevant stakeholders (UNHCR, NGO and government staff) are informed on the BID process. The BID Guidelines further state that “UNHCR should conduct a BID no later than **two years** from the moment an unaccompanied or separated child has been identified.”^a However, efforts to find the most appropriate durable solution should be undertaken without undue delay. Thus, a BID must be processed as “early as possible in the displacement cycle.”^b For example, if resettlement is considered to be the most appropriate durable solution for a URM, “it may be wiser to give priority to those [children] closest to adulthood” who may otherwise ‘age-out.’^c

- ***Draft Executive Committee Conclusion on Children at Risk (ongoing)***

The draft Conclusion on *Children at Risk* was introduced in 2006 and is still in draft form, subject to comments by the Executive Committee. This draft Conclusion highlights the importance of strengthening the child protection framework both internationally and nationally (within each Member State) in accordance with international laws. Moreover, it calls upon States to implement the necessary programs and arrangements to ensure that the “best interests of the child” principle is upheld. In particular, the draft Conclusion requests States to refrain from “detaining children, and to do so only as a measure of last resort, while considering the best interests of the child.”^d

The draft Conclusion also recommends that UNHCR and other relevant agencies ensure that BIDs conducted in the field are ‘in tune’ with the 2006 *Guidelines on Formal Determinations of the Best Interests of the Child*. Additionally, it recommends that UNHCR and other relevant partners are conducting BIDs in order to make a decision on the most appropriate durable solution, while always considering the “best interests of the child.”^e

^a UNHCR. May 2008. *UNHCR Guidelines on Determining the Best Interests of the Child*. Available online at: <http://www.unhcr.org/protect/PROTECTION/4566b16b2.pdf>; accessed 15 October 2008. (page 33).

^b *Ibid.*, page 32.

^c *Ibid.*, page 51.

^d UNHCR Executive Committee. *Draft Conclusion on Children at Risk*. August 2007. Available online at: www.icva.org.

^e The *NGO Statement on International Protection: Children at Risk*, delivered at the March 2007 38th UNHCR Standing Committee Meeting can be accessed on the ICVA website at: www.icva.ch/doc00000071.html. Additional NGO statements can also be found on the ICVA website.

- ***Best Interests of the Child Information Sheet (June 2007)***

UNHCR released a two-pager on the “best interests of the child” in June 2007. This information sheet defines a BID; when to make a BID; the criteria used in order to make a decision; and final steps towards making the BID decision.^f The purpose of the two-pager is to ensure that all relevant parties are ‘in sync’ with the BID process.

2. The US Child Welfare System and the “Best Interests of the Child”: State Child Welfare Laws, the Adoption and Safe Families Act, the Child Support Performance Incentive Act, and Title IV-B and IV-E of the Social Security Act and as amended (PL 103-432)

Prior to the 1960s, children in the US were placed with their parent with no regard to the “best interests of the child.” Courts placed children with a parent^g regardless of whether the parent could properly take care of the child.^h The 1960s and 70s, however, ushered in new thinking with respect to child protection and custodial decisions in the U.S. No longer was the practice of the “tender doctrine” being used, which favored the mother as the primary care-giver of a child. This change in policy was attributed to increased pressure from fathers’ interest groups, which forced courts to award custodial decisions regardless of the gender of child’s parent.ⁱ

Due to this new rationale, many states enacted Child Custody laws. While exact wording differs from state-to-state, the premise is focused on the “best interests of the child.” For example, the Michigan^j *Child Custody Act of 1970* takes into account the following factors when considering the best interests of the child:^k

- The capacity and disposition of the parties involved to provide the child with food, clothing, medical care...recognized and permitted under the laws of this state in place of medical care, and other material needs;
- The moral fitness of the parties involved;
- The mental and physical health of the parties involved;
- The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference;
- The home, school, and community record of the child.

The above ‘best interest’ factors have not changed over time. Courts *must* now adhere to the best interests of the child in order to make a determination on custody/placement of a child or terminating parental rights. Key factors that are taken into consideration when determining the best interest of the child:^l

^f UNHCR. *Best Interests Determination Children - Protection and Care Information Sheet*. June 2007. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46a076922>; accessed 25 August 2007.

^g The child welfare system used to operate under the assumption that children were best raised by their biological parents. This rationale could only be applied if parents wanted to change. “If change does not occur, it is attributed to a lack of...resources, not to the parents’ lack of willingness or ability to change.” (Gelles)

^h Gelles, Richard, PhD. “Children’s rights in the American Child Welfare System.” *Protecting Children: The Rights of Children*. American Humane Association 16.2 (2000): 4-9. (page 7)

ⁱ Babcock, Ginna M., and Rebecca J. Eriksson. “Men and family law: From patriarchy to Partnership.” *Families and Law*. Ed. Lisa J. McIntyre and Marvin B. Sussman. Binghamton, NY: The Haworth Press, Inc., 1995. 31-54. (page 46)

^j The author chose Michigan’s *Child Custody Act of 1970* for purposes of this study. Every State has its own child welfare laws. A summary of state laws regarding the best interests of the child is available online at: www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

^k This list is not exhaustive and additional factors are listed on the Michigan website. Legislative Council, State of Michigan. *Child Custody Act of 1970*. Available online at: www.legislature.mi.gov; accessed on 24 July 2007.

^l U.S. Department of Health and Human Services’ Administration for Children and Families, Child Welfare Information Gateway. 2005. *Determining the Best Interests of the Child: Summary of State Laws*. Available online at:

- The age and sex of the child;
- The mental and physical health of the child as well as his/her parent[s];
- The lifestyle and social factors of the parents;
- The emotional ties between the parents and the child;
- The ability of parents to provide the child with food, shelter, clothing, and medical care;
- The child's established ties to school, home, community, and religious institutions;
- The child's preference.

Internal to the U.S. is the effort to develop a permanent plan for the child. The permanent plan is somewhat comparable to a durable solution, the term used by UNHCR.^m Amendments specific to a permanent plan were made to the *Adoption and Safe Families Act* and the *Child Support Performance Incentive Act*, which shortened the timeframe of a “permanency” hearing from 18 months to 12 months.ⁿ Additionally, the amendments stated that a specific permanency plan must be determined during the permanency hearings.^o

Of significant interest to those agencies providing care for unaccompanied refugee children, the above laws as well as *Title IV-B and IV-E of the Social Security Act* and as amended (PL 103-432) make specific provision that for unaccompanied refugee minors there is compelling reason NOT to terminate parental rights in order to comply with mandated permanent plan.^p Thus, the regulation governing states within the United States recognizes that unaccompanied refugee minors will not be subject to the provisions mandating termination of parental rights and early adoption.

3. US Immigration Law and Child Asylum Seekers: ^a U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

Child Asylum-seekers

In 2007 The USDOJ Executive Office for Immigration Review issued new and final *Operating Policies and Procedures Memorandum 07-01^q* updating their 1998 and 2004 guidelines.

The 1998 *INS Guidelines for Children's Asylum Claims* provided Asylum Corps officers with background and guidance on adjudicating children's asylum claims, but did not delve into the “best interests of the child” principle. The INS is merely mandated to create a “child-appropriate” court environment and to implement “child-friendly” interviewing techniques/procedures “to ensure that the applicant feels

www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm; accessed on 25 July 2007; accessed 24 July 2007.

^m National Council of Juvenile and Family Court Judges. October 1999. *Key Principles for Permanency Planning for Children*. Available online at: <http://www.ncjfcj.org/content/blogcategory/365/434/>; accessed 13 August 2007.

ⁿ U.S. Department of Health and Human Services' Administration for Children and Families. July 1998. *Program Instruction*. Available online at: www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/1998/pi9813.htm; accessed 14 August 2007.

^o Ibid.

^p Federal Register, Volume 65, No. 16. /January 25, 2000 Part II, department of Health and Human Services, Administration for Children and Families. Section 1356.21 (i) (2) (ii) (C)

^q U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

comfortable and free to discuss the claim.”^f Additionally, while the Guidelines state that “it is generally in the child’s best interest for Asylum Officers to allow a trusted adult to attend an asylum interview with the child asylum applicant,” the adult may not interfere with the asylum interview process or coach the UAC.^g Thus, it is up to the UAC to provide his/her claim without any sort of guidance or counsel from a court-appointed attorney, “trusted” adult, or guardian ad litem.^h Moreover, while the Guidelines reiterate that “the internationally recognized ‘best interests of the child’ principle is a useful measure for determining interview procedures for child asylum seekers...it does not play a role in determining substantive eligibility under the U.S. refugee definition.”^u

The U.S. Department of Justice’s Executive Office for Immigration Review released *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*.^v This replaces the OPPM 04-07 Interim guidelines.^w

Specific reference to the principle of Best Interest of the Child in the 2007 document continues the 2004 statement that U.S. asylum law does not allow the Child’s Best Interest to be a determining factor in adjudicating an asylum claim.^y

The concept of “best interest of the child” does not negate the statute or the regulatory delegation of the Attorney General’s authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge’s discretion in taking steps to ensure that a “child-appropriate” hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.

The 2007 Guidelines are similar to the 2004 Interim Guidelines and to those released in 1998. They emphasize the creation of a more child-friendly court environment to ensure that the child’s claim is fairly heard and require the adoption of child-friendly standards for hearings and training of all immigration judges.

Yet, the 2007 Guidelines also point out that despite the Immigration and Naturalization Act’s (INA) prevention of “immigration judges to appoint a legal representative or a guardian ad litem...Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent needs a legal representative [including a guardian ad litem].”^x The 2007 Guidelines further acknowledge that a legal representative or guardian ad litem “have the potential to increase a child’s understanding of the proceedings and to improve the child’s communication with his or legal representative.”^y Some advocates have advocated for the importance of a guardian ad litem as they are able to assist UACs in the following:

^f Darymple, Joyce Koo. “Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors.” *Third World Law Journal*, Boston College Winter (2006). Also available from the Lexis Nexis database.

^g CNN.com. 21 April 2000. *INS Guidelines for Children’s Asylum Claims*. Available online at: <http://archives.cnn.com/2000/US/04/21/INS.ruling/index.html>; accessed on 27 July 2007.

^h A *guardian ad litem* is a person who has legal authority to care for the personal interests and property of another. Courts frequently appoint guardian ad litem in divorce or custody cases in order to represent the best interests of minor children.

^u *Ibid.*

^v U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

^w U.S. Department of Justice Executive Office for Immigration Review. 16 September 2004. *Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf; accessed on 27 July 2007.

^x *Ibid.*

^y *Ibid.*

learning the child's views; helping develop the child's awareness of the available options; and acting as the child's spokesperson/representative throughout immigration proceedings.^z

^z Young, Wendy. "Refugee Children at Risk." *Human Rights Magazine* (Winter 2001). Available online at: www.abanet.org/irr/hr/winter01/young.html; accessed on 27 July 2007.

BEST INTEREST DETERMINATION FOR REFUGEE CHILDREN:
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Full Bibliography

Introduction

This backgrounder has been developed to serve as reference material on the “best interest of the child” principle. It aims to provide an overview of the international standards that relate to unaccompanied refugee minors (URMs), as well as to provide information on unaccompanied minors in the USA, Canada and the UK.

UNHCR Conclusions and Reports on the “Best Interest of the Child”

The UN High Commissioner for Refugees (UNHCR) has always placed children, including URMs and separated children, as a top priority. Over the years, UNHCR’s Executive Committee has devoted discussions and entire conclusions solely on the issues affecting URMs. This has resulted in training materials and guidelines relating to the “best interest of the child.”

Note on Refugee Children (9 July 1987)

The *Note on Refugee Children* was presented to the Executive Committee on 9 July 1987 by UNHCR High Commissioner Jean-Pierre Hocké (1986-1989). In this Note, Hocké emphasized that the “best interests of the child” as well as the principle of family unity were the paramount principles guiding all action affecting refugee children. He underscored: “All action concerning refugee children, whether by UNHCR or governmental or non-governmental agencies, and whether directed towards protection, emergency relief...or durable solutions, should be governed by the principle of the best interests of the child.”^{aa} Moreover, he acknowledged that persons making decisions on behalf of refugee children be “qualified and sensitive to their needs.”^{bb}

While the *Note on Refugee Children* stressed the importance of family unity, it also acknowledged the use of durable solutions when family reunification or tracing was not possible. Additionally, it took into account the significance of durable solutions, particularly when family reunification was not in the “best interest of the child.” Thus, the Note called for a thorough assessment of each URM case, keeping in mind that “the best durable solution for an unaccompanied refugee child will depend...on the particular circumstances of his or her case...voluntary repatriation should at all times be...actively pursued whenever appropriate...where this is not possible, local integration or resettlement should be envisaged.”^{cc}

Additionally, the Note called for the identification of URMs at the earliest stage, so as to meet their needs as well as to assess each respective case:

their needs should be assessed by qualified personnel and placement facilities provided...Efforts to trace parents or families should be undertaken immediately. Decisions on durable solutions for unaccompanied refugee children should be taken by competent expert bodies with appropriate participation of the child.^{dd}

^{aa} UNHCR. *Note on Refugee Children*. 9 July 1987. (EC/SCP/46). Available online at: www.unhcr.org/excom/EXCOM/3ae68ccc18.html; accessed 2 August 2007.

^{bb} *Ibid.*, para. 13.

^{cc} *Ibid.*, para. 30.

^{dd} *Ibid.*, para. 60.

Executive Committee Conclusion on Refugee Children (12 October 1987)

On 12 October 1987 UNHCR's Executive Committee devoted a Conclusion entirely to refugee children. This significant Conclusion was a direct result of the High Commissioner's *Note on Refugee Children*, presented to ExCom on 9 July 1987. This Conclusion was instrumental, as it highlighted both the "best interest of the child" principle as well as the use of resettlement as an appropriate durable solution for URM's.

The Conclusion reiterated that children must be the first to receive protection and relief, and "stressed that all action taken on behalf of refugee children must be guided by the principle of the best interests of the child as well as by the principle of family unity."^{ee} In addition, the Executive Committee "encouraged States to participate in the 'Twenty or More' Plan^{ff} providing for the resettlement of disabled children."^{gg} Most importantly, the Executive Committee called upon UNHCR to develop guidelines in cooperation with NGOs and other UN agencies to improve the "international protection, physical security, well-being and normal psychological development of refugee children."^{hh}

Executive Committee Conclusion on Refugee Children (13 October 1989)

The Executive Committee reiterated the importance of refugee children in the 13 October 1989 Conclusion on *Refugee Children*. In this Conclusion, the Executive Committee requested that UNHCR ensure "that the needs of refugee children are given particular attention through regularly assessing resources and requirements in each refugee situation" and for UNHCR to recognize the link between education and durable solutions.ⁱⁱ The Executive Committee further requested "UNHCR to develop training materials to improve the capacity...of field personnel in addressing protection and assistance need of refugee children."^{jj}

Information Note on Refugee Children: UNHCR's Efforts to Address Some Persistent Protection Problems (6 May 1993)

The *Information Note on Refugee Children: UNHCR's Efforts to Address Some Persistent Protection Problems* was presented to the Executive Committee on 6 May 1993 by UNHCR High Commissioner Sadako Ogata (1990-2000). This Note was intended to inform the Executive Committee of the steps UNHCR had taken to address the needs of refugee children. Ogata stressed the importance of "avoiding any form of detention of children, including refugee asylum-seeker children," while also criticizing Member States of the continuing practice of keeping children in detention.^{kk}

Ogata reported that UNHCR was working in collaboration with NGOs to assess URM cases in order to determine the most appropriate durable solution. Yet, she also highlighted several obstacles in the process and reiterated UNHCR's commitment to develop policies and procedures to improve the protection of URM's.

UNHCR Policy on Refugee Children (6 August 1993)

^{ee} UNHCR Executive Committee. *Refugee Children*. 12 October 1987. No. 47 (XXXVIII)—1987. Available online at: www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c432c; accessed on 8 August 2007. [section (d)]

^{ff} No other information could be found relating to the "Twenty or More" plan.

^{gg} *Ibid.*, section (l).

^{hh} *Ibid.*, section (u).

ⁱⁱ UNHCR Executive Committee. *Refugee Children*. 13 October 1989. No. 59 (XL) - 1989. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c4398>; accessed 9 August 2007.

^{jj} *Ibid.*, section (j).

^{kk} UNHCR. *Information Note on Refugee Children: UNHCR's Efforts to Address Some Persistent Problems*. 6 May 1993. EC/1993/SCP/CRP.4. Available online at: www.unhcr.org/excom/EXCOM/3ae68cd14.html; accessed 24 July 2007. [B (4)]

UNHCR issued its *Policy on Refugee Children* on 6 August 1993. Complementing the above *Information Note on Refugee Children*, it restated UNHCR’s commitment to ensure the protection of refugee children and to identify appropriate durable solutions related “to the immediate and long-term developmental needs of refugee children.”^{ll} Moreover, it reaffirmed the need to utilize the “best interests of the child” as the primary consideration regarding all actions related to refugee children. It also highlighted the protection of refugee children at risk from detention and the enforcement of national laws/legislation in support of refugee children, in accordance to international laws and standards.

The Policy especially highlighted URM’s, stating that they should be of “particular focus of protection and care” to UNHCR.^{mmm} It further called for UNHCR staff to identify and ensure “special protection and care of unaccompanied children in every refugee situation.”ⁿⁿⁿ

Refugee Children: Guidelines on Protection and Care (1994)

In 1994, UNHCR issued *Refugee Children: Guidelines on Protection and Care*. These guidelines improved upon the 1988 Guidelines on Protection and Care of Refugee Children, implemented shortly after the 1987 *Conclusion on Refugee Children*.^{ooo} The 1994 Guidelines serve as a resource for UNHCR field staff as well as NGO staff. UNHCR High Commissioner Ogata emphasized the need for government colleagues and counterparts to access the Guidelines in order to ensure adequate care and protection of refugee children, particularly URM’s.

In the context of refugee status determinations (RSD), the Guidelines emphasize the effects of a prolonged stay in a camp setting (or a protracted urban refugee situation) on the URM. It specifically calls upon UNHCR staff to expedite any decisions related to RSD or a Best Interest Determination (BID). It also requests UNHCR staff to search for URM’s and to designate a responsible agency to assist in the immediate needs and long-term care of the URM’s.^{ppp}

Further, it suggests that URM’s should be “represented by an adult whose task it would be to promote a decision that will be in the child’s best interests.”^{qqq} The Guidelines recommend that a legal representative or a guardian be appointed (by the government of the country of asylum) “immediately to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.”^{rrr} Moreover, “An unaccompanied child should have a legal guardian with respect to any legal proceedings and may need a legal guardian to advocate for the child’s interests or to make decisions on behalf of the child...”^{sss}

Concerning detention, the Guidelines reiterate UNHCR’s objection to the detention of refugee children. It states, “because detention can be very harmful to refugee children, ‘it must be used only as a measure of last resort and for the shortest appropriate period of time’ (CRC art. 37(b)).”^{ttt} The Guidelines further emphasize: “If refugee children are detained in airports, immigration holding centers or prisons, they must not be held in prison-like conditions...Protection and assistance should make sure international standards are complied with whenever children are in detention.”^{uuu}

^{ll} UNHCR. 6 August 1993. *UNHCR Policy on Refugee Children*. Geneva, Switzerland: UNHCR. (page 5)

^{mmm} *Ibid.*

ⁿⁿⁿ *Ibid.*, page 6.

^{ooo} The author was unable to locate resources relating to the 1988 Guidelines of Protection and Care of Refugee Children.

^{ppp} *Ibid.*

^{qqq} UNHCR. 1994. *Refugee Children: Guidelines on Protection and Care*. Geneva, Switzerland: UNHCR. [Chapter 8, I (d)]

^{rrr} *Ibid.*, Chapter 8, I.

^{sss} *Ibid.*, Chapter 10, I.

^{ttt} *Ibid.*, Chapter 7, IV.

^{uuu} *Ibid.*

On the return of URM, the Guidelines note that, in the event a URM is denied refugee status or asylum, the “best interests” of the URM should be considered. Therefore, a URM can only be returned to their country of origin if a parent is located in his/her country of origin and is willing to take care of the child, or if another relative or government agency has agreed to take care of the URM upon arrival in his/her country of origin.^{vv}

In the context of resettlement, the Guidelines point out the use of resettlement as a durable solution only after local integration and repatriation are found to be impossible. In this regard, resettlement is only to be considered for URM, belonging to the following categories:^{ww} (1) family reunification; (2) physical safety; and (3) disabled children.

Implementation of UNHCR’s Policy and Guidelines on Refugee Children (20 September 1995)

Following the release of UNHCR’s *Refugee Children: Guidelines on Protection and Care*, UNHCR High Commissioner Ogata provided the *Implementation of UNHCR’s Policy and Guidelines on Refugee Children* to the Executive Committee on 20 September 1995. While UNHCR emphasized the importance of tracing, family reunification and repatriation efforts as priorities for URM, the Note also included efforts on resettlement. The Note informed the Executive Committee of UNHCR’s deployment of a child specialist in order to promote the “best interests” of Haitian URM. Consequently, Haitian URM were paroled into the United States from Guantanamo Center.^{xx}

Finally, the Note restated UNHCR’s disappointment of the continued detention of refugee children.

Unaccompanied Children Priority Actions Handbook for UNICEF/UNHCR Field Staff (1996)

UNHCR in collaboration with the UN Children’s Fund (UNICEF), created the *Unaccompanied Children Priority Actions Handbook for UNICEF/UNHCR Field Staff* in 1996. UNHCR is the lead agency in assisting URM with their needs and rights, particularly in the context of identifying the most appropriate durable solution. UNICEF on the other hand, is the lead agency in assisting URM with services such as: relief, education, health and rehabilitation. Therefore, UNHCR and UNICEF drafted the handbook with the aim of educating field staff on the basic principles of child protection along with standardized actions. The priority action checklist includes:^{yy}

- Coordination;
- Field-based management;
- Emergency assessment, identification and registration;
- Prevention of separation;
- Evacuation;
- Documentation, tracing and reunification;
- Care and placement;
- Community services and psychosocial assistance;
- Repatriation;
- Protection.

^{vv} Ibid., Chapter 10, IV.

^{ww} Ibid., Chapter 11, III.

^{xx} UNHCR. *Implementation of UNHCR’s Policy and Guidelines on Refugee Children*. 20 September 1995. EC/SC.2/78. Available online at: www.unhcr.org/excom/EXCOM/3ae68bf60.html; accessed 24 July 2007.

^{yy} UNHCR/UNICEF. 1996. *Unaccompanied Children Priority Actions Handbook for UNICEF/UNHCR Field Staff*. Geneva, Switzerland: United Nations.

The basic principles guiding all actions by UNHCR and UNICEF field staff, as follows: (1) “best interests of the child”; (2) assistance; (3) care; (4) family unity; (5) protection; (6) reunification; (7) continuity of relationships; (8) evacuation; and (9) international standards.

Guidelines on Policies and Procedures in Dealing with Unaccompanied Seeking Asylum (February 1997)

UNHCR released its *Guidelines on Policies and Procedures in Dealing with Unaccompanied Seeking Asylum* in February 1997, under the principle of the “best interests of the child.” The 1997 Guidelines highlight the special care and protection needed for URM.

In the context of RSD, the 1997 Guidelines reiterate UNHCR’s position—that refugee children seeking asylum should not be kept in detention. If there are no other options, States must adhere to Article 37 (b) of the CRC, whereby detention is to be used as the last resort and for the shortest amount of time. “All efforts must be made to have them released from detention, and placed in appropriate accommodation.”^{zz}

On the RSD procedures for URM, UNHCR restated the need for an adult representative to assist the URM in his/her “best interests.” Additionally, URM should be granted access to a qualified legal representative.

Concerning durable solutions, the 1997 Guidelines emphasize swift implementation of resettlement only if it is in the “best interest of the child” and “generally on the ground of family reunification.”^{aaa} Furthermore, resettlement is to be used only when local integration and repatriation is not feasible. Should repatriation be considered the most appropriate durable solution, the return will not be carried out unless a parent, suitable care-giver, government agency or child-welfare agency has agreed to provide the URM with appropriate protection and care.^{bbb}

Report of the Secretary-General on the Assistance to Unaccompanied Refugee Minors (7 August 1997)

On 7 August 1997 UN Secretary-General Kofi Annan (1997-2007) delivered a report on the *Assistance to Unaccompanied Refugee Minors* to the General Assembly. The “best interest of the child” standard was highlighted in the context of repatriation. Moreover, the Report further stated that UNHCR was preparing a “framework to guide its staff in identifying the best interests of refugee minors.”^{ccc}

Executive Committee Conclusion on Refugee Children and Adolescents (17 October 1997)

The Executive Committee, on 17 October 1997, issued a Conclusion on *Refugee Children and Adolescents*. While it promoted the CRC, it also called upon States to “respect and observe rights and principles that are in accordance with international human rights and humanitarian law that are of particular relevance to international refugee protection.”^{ddd} Moreover, it called for the particular care including protection assistance and tracing for URM.

Separated Children in Europe Programme Statement of Good Practice (October 2000)

^{zz} Ibid., 7.7.

^{aaa} Ibid., 10.11.

^{bbb} Ibid., 10.12.

^{ccc} UNHCR. *Assistance to Unaccompanied Refugee Minors: A Report of the Secretary-General*. 7 August 1997.

A/52/273. Available online at: www.un.org/documents/ga/docs/52/plenary/a52-273.htm; accessed 10 August 2007.

^{ddd} UNHCR Executive Committee. *Refugee Children and Adolescents*. 17 October 197. No. 84 (XLVIII)-1997.

Available online at: www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid+3ae68c68c; accessed 9 August 2007.

The *Separated Children in Europe Programme* (SCE) is a joint initiative of UNHCR and International Save the Children. SCE released its *Statement of Good Practice* in October 2000, reinforcing Article 3 of the CRC: “In all actions concerning children...the best interests of children shall be the primary consideration.”^{eee} Further, it reaffirms the need for a guardian or advisor to advise and protect URM or separated children. The responsibilities of a guardian or advisor as outlined in the *Statement of Good Practice*:^{fff}

- To ensure that all decisions are taken in the child’s best interest;
- To ensure that a child has suitable legal representation to deal with his/her immigration status or asylum claim;
- To contribute to a durable solution in the child’s best interests;
- To advocate on the child’s behalf (when necessary);
- To consult and advise the child;
- To provide a link between child welfare organizations and the child to ensure appropriate care and services.

Concerning the detention of children, the Statement reiterates the stance against the detention of minors: “Separated children should never be detained for reasons related to their immigration status. This includes detention at the border...in international zones, in detention centers, in prisons...”^{ggg}

In the context of asylum procedures, the Statement recommends that asylum officers undergo specialized training on interviewing children, to ensure a child-friendly interviewing environment. Further, it states that “Children should always be accompanied at each interview by their legal representative and, where the child so desires, by a significant adult (social worker, relative, etc.)”^{hhh}

Additionally, the Statement reinforces durable solutions to be seen only in the “best interest of the child.” Article 12.2 provides great detail on return to the country of origin and emphasizes that return can only be anticipated when it is in the “best interest of the child” and only after a careful assessment is conducted on the situation of the child in his/her country of origin, i.e. the child’s parents, relatives or government agency have agreed to provide care and protection immediately upon return. The Statement further recommends that appropriate authorities or agencies should monitor the well-being of the child post return to his/her country of origin.

Resettlement is highlighted in the context of family reunification, only if found to be in the “best interests of the child.”

Refugees Magazine on Children (2001)

UNHCR dedicated its *Refugees* (volume 1: number 122) magazine on the plight of children. Not only did the issue feature statistics on children-at-risk, it highlighted asylum procedures for URM and refugee children in detention. The magazine recognized the lack of accountability with respect to international laws and standards: “While on paper, children’s rights are nearly universally recognized, they still face numerous forms of persecution...Although UNHCR asks governments not to imprison asylum seeking children, many governments do so.”ⁱⁱⁱ Additionally, despite UNHCR’s 1997 *Guidelines on Policies and*

^{eee} Separated Children in Europe Programme. October 2000. *Statement of Good Practice*. Available online at: www.separated-children-europe-programme.org/separated_children/good_practice/SGP_3ed_front.pdf; accessed 13 August 2007.

^{fff} Ibid., page 7.

^{ggg} Ibid., page 8.

^{hhh} Ibid., page 11.

ⁱⁱⁱ Kumin, Judith. “David vs Goliath.” *Refugees* 1, no. 122 (2001): 11-15.

Procedures in Dealing with Unaccompanied Seeking Asylum requesting governments to ensure appointed guardians for URM, hardly any Member States adhere to this recommendation, except for Sweden, Norway and the Netherlands.^{jjj}

Action for the Rights of the Child (August 2001)

UNHCR and the Save the Children Alliance created the *Action for the Rights of the Child* in 1997 in response to the UN study conducted on the Impact of Armed Conflict on Children (Graca Machel study).^{kkk} The goal of ARC is to enhance the capacity of UNHCR field and NGO staff, as well as government counterparts, in protecting and caring for refugee children, including URM, from the “emergency through the durable solutions phase.”^{lll}

As ARC is committed to providing resource materials to field practitioners on the issues of child protection, ARC developed resource packs on the following topics: international legal standards; voluntary repatriation; resettlement; situation analysis; separated children; and child and adolescent development.^{mmm} ARC looks at resettlement and voluntary repatriation with an eye toward the “best interests of the child.”

Report of the Secretary-General on the Protection and Assistance to Unaccompanied and Separated Children (7 September 2001)

UN Secretary-General Kofi Annan presented a *Report on the Protection and Assistance to Unaccompanied and Separated Children* to the General Assembly at its fifty-sixth session on 7 September 2001. Although the Report does not mention the “best interest of the child,” it highlights the protection concerns of URM, particularly on tracing; family reunification; and increased collaboration with other UN agencies, NGOs and government counterparts.ⁿⁿⁿ

Meeting Rights and Protection Needs of Refugee Children: An Independent Evaluation of the Impact of UNHCR's Activities (May 2002)

UNHCR's Evaluation and Policy Analysis Unit released its report entitled *Meeting Rights and Protection Needs of Refugee Children: An Independent Evaluation of the Impact of UNHCR's Activities* in May 2002. This was in an effort to discern whether field offices were in compliance with UNHCR guidelines and policies. The Best Interest Determination (BID) process was briefly mentioned in the context of “the complexity of factors to weigh in determining [the] ‘best interest’.”^{ooo} In particular, the complexities of assisting separated children and URM, who are living with host country foster families. The Report underscored “the need for quality protection and community services staff as well as ensuring that specialist staff, partners and experts” were made available to assist in the BID process for URM and separated children.

^{jjj} All separated children are appointed a guardian in Sweden, the Netherlands and Norway; however, due to an increased number of URM/separated children arrivals, hardly any cases will receive individualized attention.

^{kkk} Machel, Graca. 1996. *The UN Study on the Impact of Armed Conflict on Children*. Available online at: <http://www.unicef.org/graca/>.

^{lll} Action for the Rights of the Child. August 2001. *Backgrounder/brochure*. Geneva, Switzerland: Action for the Rights of the Child. Additional information can be found at: <http://www.savethechildren.net/arc/what.html>.

^{mmm} ARC resource packs can be accessed and downloaded on the ARC website:

<http://www.savethechildren.net/arc/files/main.html>.

ⁿⁿⁿ UNHCR. *Protection and Assistance to Unaccompanied and Separated Refugee Children: Report of the Secretary-General*. 7 September 2001. A/56/333. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3be124486>; accessed 10 August 2007.

^{ooo} UNHCR. May 2002. *Meeting the Rights and Protection Needs of Refugee Children: An Independent Evaluation of the Impact of UNHCR's Activities*. Geneva, Switzerland: UNHCR.

Additionally, the Report commended the BIDs for Sudanese URM in Kakuma refugee camp, Kenya. It points out that resettlement had traditionally not been seen as being in the “best interest of the child”, but that resettlement should be better utilized as a durable solution in the future, particularly for URM living in a protracted situation.

***Report of the Secretary-General on the Assistance to Unaccompanied Refugee Minors
(20 August 2003)***

UN Secretary-General Annan provided a *Report on Assistance to Unaccompanied Refugee Minors* to the General Assembly on 20 August 2003. This Report highlighted the need for increased collaboration between UNHCR, UNICEF and other NGOs to immediately identify separated children/URMs, and to conduct tracing and family reunification, only if the latter are in the “best interests of the child.”^{ppp}

Moreover, the Secretary-General touched upon the December 2002 BID procedures for Sudanese URM in refugee camps located in western Ethiopia. He acknowledged the identification of resettlement as the most appropriate durable solution for the Sudanese URM in these refugee camps and restated the need to properly assess each URM cases in order to discern the best interests of that child.^{qqq}

***Inter-Agency Guiding Principles on Unaccompanied and Separated Children
(January 2004)***

The January 2004 *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* was a collaborative effort by UNHCR, the International Rescue Committee (IRC), the International Committee of the Red Cross (ICRC), Save the Children/UK and World Vision International.^{rrr} The purpose of these Guidelines was to “ensure that all actions and decisions taken concerning separated children are anchored in a protection framework and respect the principles of family unity and the best interests of the child.”^{sss}

The Guidelines stress that return of URM should only be considered when “family reunification could be arranged; or when, having consulted the responsible authorities in the country of origin, an adult caregiver...has agreed and is able to provide immediate care and protection upon arrival.”^{ttt} Moreover, “the decision on the return of the child to the country of origin for family reunification should be based on the best interests of the child.”^{uuu} Resettlement is to be used “only if the child cannot be suitably cared for in the country of origin.”^{vvv}

***General Assembly Resolution on the Assistance to Unaccompanied Refugee Minors
(24 February 2004)***

The General Assembly adopted the *Resolution on Assistance to Unaccompanied Refugee Minors* on 24 February 2004. While this Resolution does not mention the “best interest of the child” standard, it reaffirmed the need for UNHCR to increase collaboration in “rapid identification, immediate registration

^{ppp} UNHCR. *Assistance to Unaccompanied Refugee Minors: Report of the Secretary-General*. 20 August 2003. A/58/299. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f9651594>; accessed 10 August 2007. (page 6)

^{qqq} Ibid., page 7-8.

^{rrr} This Interagency Guidelines expounded upon the 2001 *Guiding Principles on Unaccompanied and Separated Children: Interagency Standards and Policies*.

^{sss} ICRC. January 2004. *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*. Geneva, Switzerland: ICRC.

^{ttt} Ibid., page 61.

^{uuu} Ibid., page 62.

^{vvv} Ibid.

and documentation and tracing of family.”^{www} Furthermore, it called upon Governments, UN organizations and NGOs to mobilize resources “commensurate with the needs of unaccompanied refugee minors and for their reunification with their families.”^{xxx}

***Action for the Rights of the Child – Foundations: Separated Children (1 December 2004)
Report of the Secretary-General on the Assistance to Unaccompanied Refugee Minors
(24 August 2005)***

On 24 August 2005 Secretary-General Kofi Annan provided a report to the General Assembly on *the Assistance to Unaccompanied Refugee Minors*. In this report, he emphasized the collaboration between UNHCR and UNICEF in registering URMs; tracing their family members and identifying the most appropriate durable solutions.^{yyy} It was noted that the core principle leading all efforts for URMs was eventual family reunification. However, this was only considered when in the “best interest of the child.”

Annan reiterated the importance of the use of BID assessments in order to identify the most appropriate durable solution for URMs. He further highlighted UNHCR’s work on developing BID guidelines for UNHCR field and NGO staff as well as government counterparts. “These Guidelines will assist staff and partners when called upon to make a ‘best interests’ decision for a child and will ensure a thorough assessment and consistent approach at the field level.”^{zzz}

UNHCR Guidelines on Determining the Best Interests of the Child (May 2008)

UNHCR released its *Guidelines on Determining the Best Interests of the Child* in May 2008. The BID Guidelines are intended to ensure that all relevant stakeholders (UNHCR, NGO and government staff) are informed on the BID process. The BID Guidelines further state that “UNHCR should conduct a BID no later than **two years** from the moment an unaccompanied or separated child has been identified.”^{aaaa} However, efforts to find the most appropriate durable solution should be undertaken without undue delay. Thus, a BID must be processed as “early as possible in the displacement cycle.”^{bbbb} For example, if resettlement is considered to be the most appropriate durable solution for a URM, “it may be wiser to give priority to those [children] closest to adulthood” who may otherwise ‘age-out.’^{cccc}

Draft Executive Committee Conclusion on Children at Risk (ongoing)

The draft Conclusion on *Children at Risk* was introduced in 2006 and is still in draft form, subject to comments by the Executive Committee. This draft Conclusion highlights the importance of strengthening the child protection framework both internationally and nationally (within each Member State) in accordance with international laws. Moreover, it calls upon States to implement the necessary programs and arrangements to ensure that the “best interests of the child” principle is upheld. In particular, the draft

^{www} UN General Assembly. *Resolution adopted by the General Assembly on the Assistance to unaccompanied refugee minors*. 22 February 2000. A/RES/54/145. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b00f1a2c>; accessed 10 August 2007.

^{xxx} *Ibid.*, page 2.

^{yyy} UNHCR. *Assistance to Unaccompanied Refugee Minors: Report of the Secretary-General*. 24 August 2005. A/60/300. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=43bce4782>; accessed 10 August 2007.

^{zzz} *Ibid.*, paragraph 22.

^{aaaa} UNHCR. May 2008. *UNHCR Guidelines on Determining the Best Interests of the Child*. Available online at: <http://www.unhcr.org/protect/PROTECTION/4566b16b2.pdf>; accessed 15 October 2008. (page 33).

^{bbbb} *Ibid.*, page 32.

^{cccc} *Ibid.*, page 51.

Conclusion requests States to refrain from “detaining children, and to do so only as a measure of last resort, while considering the best interests of the child.”^{dddd}

The draft Conclusion also recommends that UNHCR and other relevant agencies ensure that BIDs conducted in the field are ‘in tune’ with the 2006 *Guidelines on Formal Determinations of the Best Interests of the Child*. Additionally, that UNHCR and other relevant partners are conducting BIDs in order to make a decision on the most appropriate durable solution, while always considering the “best interests of the child.”^{eeee}

Best Interests of the Child Information Sheet (June 2007)

UNHCR released a two-pager on the “best interests of the child” in June 2007. This information sheet defines a BID; when to make a BID; the criteria used in order to make a decision; and final steps towards making the BID decision.^{ffff} The purpose of the two-pager is to ensure that all relevant parties are ‘in sync’ with the BID process.

Child's Best Interests in Domestic Child Welfare and Immigration Systems in the USA

Child Welfare System and the “Best Interests of the Child”

In the past, children were placed with their parent with no regard to the “best interests of the child.” Courts placed children with a parent^{gggg} regardless of whether the parent could properly take care of the child.^{hhhh} The 1960s and 70s however, ushered in new thinking with respect to child protection and custodial decisions in the U.S. No longer was the practice of the “tender doctrine” being used, which favored the mother as the primary care-giver of a child. This change in policy can be attributed to increased pressure from fathers’ interest groups, which forced courts to award custodial decisions regardless of the gender of child’s parent.ⁱⁱⁱⁱ

Due to this new rationale, many states enacted Child Custody laws. While exact wording differs from state-to-state, the premise is focused on the “best interests of the child.” For example, the Michigan^{jjjj} *Child Custody Act of 1970* takes into account the following factors when considering the best interests of the child:^{kkkk}

^{dddd} UNHCR Executive Committee. *Draft Conclusion on Children at Risk*. August 2007. Available online at: www.icva.org.

^{eeee} The *NGO Statement on International Protection: Children at Risk*, delivered at the March 2007 38th UNHCR Standing Committee Meeting can be accessed on the ICVA website at: www.icva.ch/doc00000071.html. Additional NGO statements can also be found on the ICVA website.

^{ffff} UNHCR. *Best Interests Determination Children - Protection and Care Information Sheet*. June 2007. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46a076922>; accessed 25 August 2007.

^{gggg} The child welfare system used to operate under the assumption that children were best raised by their biological parents. This rationale could only be applied if parents wanted to change. “If change does not occur, it is attributed to a lack of...resources, not to the parents’ lack of willingness or ability to change.” (Gelles)

^{hhhh} Gelles, Richard, PhD. “Children’s rights in the American Child Welfare System.” *Protecting Children: The Rights of Children*. American Humane Association 16.2 (2000): 4-9. (page 7)

ⁱⁱⁱⁱ Babcock, Ginna M., and Rebecca J. Eriksson. “Men and family law: From patriarchy to Partnership.” *Families and Law*. Ed. Lisa J. McIntyre and Marvin B. Sussman. Binghamton, NY: The Haworth Press, Inc., 1995. 31-54. (page 46)

^{jjjj} The author chose Michigan’s *Child Custody Act of 1970* for purposes of this study. Every State has its own child welfare laws. A summary of state laws regarding the best interests of the child is available online at:

www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm.

^{kkkk} This list is not exhaustive and additional factors are listed on the Michigan website. Legislative Council, State of Michigan. *Child Custody Act of 1970*. Available online at: www.legislature.mi.gov; accessed on 24 July 2007.

- The capacity and disposition of the parties involved to provide the child with food, clothing, medical care...recognized and permitted under the laws of this state in place of medical care, and other material needs;
- The moral fitness of the parties involved;
- The mental and physical health of the parties involved;
- The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference;
- The home, school, and community record of the child.

The above ‘best interest’ factors have not changed over time. Courts *must* now adhere to the best interests of the child in order to make a determination on custody/placement of a child or terminating parental rights. Key factors that are taken into consideration when determining the best interest of the child:^{llll}

- The age and sex of the child;
- The mental and physical health of the child as well as his/her parent[s];
- The lifestyle and social factors of the parents;
- The emotional ties between the parents and the child;
- The ability of parents to provide the child with food, shelter, clothing, and medical care;
- The child’s established ties to school, home, community, and religious institutions;
- The child’s preference.

Central to the U.S. is the effort to develop a permanent plan for the child. The permanent plan is somewhat comparable to a durable solution, the term used by UNHCR.^{mmmmm} Amendments specific to a permanent plan were made to the *Adoption and Safe Families Act* and the *Child Support Performance Incentive Act*, which shortened the timeframe of a “permanency” hearing from 18 months to 12 months.ⁿⁿⁿⁿ Additionally, the amendments stated that a specific permanency plan must be determined during the permanency hearings.^{oooo}

Of significant interest to those agencies providing care for unaccompanied refugee children, the above laws as well as *Title IV-B and IV-E of the Social Security Act* and as amended (PL 103-432) make specific provision that for unaccompanied refugee minors there is compelling reason NOT to terminate parental rights in order to comply with mandated permanent plan.^{pppp} Thus, the regulation governing states within the United States recognizes that unaccompanied refugee minors will not be subject to the provisions mandating termination of parental rights and early adoption.

Unaccompanied Refugee Minors Program^{qqqq}

The U.S. Department of Health and Human Services’ Administration for Children and Families’ Office of Refugee Resettlement (HHS/ACF/ORR) administers the *Unaccompanied Refugee Minors Program*. This

^{llll} U.S. Department of Health and Human Services’ Administration for Children and Families, Child Welfare Information Gateway. 2005. *Determining the Best Interests of the Child: Summary of State Laws*. Available online at: www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm; accessed on 25 July 2007; accessed 24 July 2007.

^{mmmmm} National Council of Juvenile and Family Court Judges. October 1999. *Key Principles for Permanency Planning for Children*. Available online at: <http://www.ncjfcj.org/content/blogcategory/365/434/>; accessed 13 August 2007.

ⁿⁿⁿⁿ U.S. Department of Health and Human Services’ Administration for Children and Families. July 1998. *Program Instruction*. Available online at: www.acf.hhs.gov/programs/cb/laws_policies/policy/pi/1998/pi9813.htm; accessed 14 August 2007.

^{oooo} Ibid.

^{pppp} Federal Register, Volume 65, No. 16. /January 25, 2000 Part II, department of Health and Human Services, Administration for Children and Families. Section 1356.21 (i) (2) (ii) (C)

^{qqqq} Additional information and resources on the Bridging Refugee Youth and Children’s Services (BRYCS) website at: www.brycs.org.

program was created in the 1980s as a means to address the needs of thousands of unaccompanied refugee minors (URMs) from Southeast Asia. The programs now serve children from all parts of the globe including children who are determined to be asylees and trafficking victims within the United States.

The *Unaccompanied Refugee Minors Program* ensures that refugee children benefiting from resettlement (who do not have parents or guardians) receive services to which they are entitled. Upon arrival to the U.S., URMs fitting the following criteria are eligible for services under the Program:^{rrrr}

- Refugees (URM status confirmed overseas);
- Entrants (reclassified to URM status post-arrival);
- Asylees (reclassified to URM status post asylum grant);
- Victims of trafficking.^{ssss}

Two lead refugee agencies assist ORR with this program: Lutheran Immigration and Refugee Service (LIRS) and Migration and Refugee Services/United States Conference of Catholic Bishops (MRS/USCCB).^{tttt} The two agencies, along with their local affiliate network, ensure that foster care, as well as the following services, is provided to URMs: “a legal authority...designated to act in place of the child’s unavailable parent(s)...reunification of minors with their parents, or other appropriate adult relatives...English language training; career planning; health/metal health needs; socialization skills/adjustment training...”^{uuuu}

Unaccompanied Alien Minors Program^{vvvv}

Each year thousands of unaccompanied alien children (UAC) enter the U.S. at illegal border crossings or at ports of entry. These children are sometimes fleeing dire situations including fear of persecution, forced child labor, female genital mutilation, forced child marriages, forced recruitment of child soldiers or sexual servitude.^{wwww} A UAC defined in the *Homeland Security Act of 2002* is “a person under 18, without a parent or legal guardian in the United States or without a parent or legal guardian in the United States who is able to provide care and physical custody.”^{xxxx}

^{rrrr} U.S. Department of Health and Human Services’ Administration for Children and Families, Office of Refugee Resettlement. 2002. *The Unaccompanied Refugee Minors Program*. Available online at: www.acf.hhs.gov/programs/orr/programs/urm.htm; accessed on 25 July 2007.

^{ssss} Additional information on trafficked victims can be found on the MRS/USCCB website at: <http://www.usccb.org/mrs/traffickingweb2.shtml> AND *Barriers to Service Trafficking Victims* (by Julianne Duncan), remarks prepared for Senior Policy Operating Group on Trafficking in Persons—available online at: www.usccb.org/mrs/SPOGTiP020906Duncan.pdf.

^{tttt} Additional information can be found on the LIRS and MRS/USCCB websites: <http://www.lirs.org/What/touch/children.htm> AND <http://www.usccb.org/mrs/cshome.shtml>.

^{uuuu} Ibid.

^{vvvv} Senator Dianne Feinstein (D-CA) introduced the *Unaccompanied Alien Child Protection Act of 2005* (UACPA—S. 1129) on 24 January 2005. The UACPA passed the Senate by Unanimous Consent on 22 December 2005 and was referred to the House Subcommittee on Immigration, Border Security, and Claims on 6 February 2006, where it is now pending. The Act focuses on the “best interests” of UAMs. Additional information on the Act can be found on: <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN00119:@@L&summ2=m&#summary>.

^{wwww} Women’s Commission for Refugee Women and Children. *Unaccompanied Alien Children and Family Detention*. http://www.womenscommission.org/projects/detention/unacc_new.php; accessed 15 August 2007.

^{xxxx} U.S. Department of Justice Executive Office for Immigration Review. 16 September 2004. *Interim Operating Policies and Procedures Memorandum 04-07: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm04/04-07.pdf; accessed on 26 July 2007.

The *Homeland Security Act of 2002* transferred the care and physical custody of all responsibility for detained alien children from the former Immigration and Naturalization Service (INS) to ORR.^{yyyy} ORR's *Unaccompanied Alien Children* program provides the following services to UACs:^{zzzz}

- Coordinating and implementing the care and placement of UAC who are in Federal custody by reason of their immigration status;
- Overseeing the infrastructure and personnel of facilities in which UAC reside;
- Reuniting UAC with guardians and/or sponsors, when appropriate;
- Conducting investigations and inspections of facilities and other entities in which UAC reside.

Child Asylum-seekers

In 2007 The USDOJ Executive Office for Immigration Review issued new and final *Operating Policies and Procedures Memorandum 07-01*^{aaaaa} updating their 1998 and 2004 guidelines.

The 1998 *INS Guidelines for Children's Asylum Claims* provided Asylum Corps officers with background and guidance on adjudicating children's asylum claims, but did not delve into the "best interests of the child" principle. The INS is merely mandated to create a "child-appropriate" court environment and to implement "child-friendly" interviewing techniques/procedures "to ensure that the applicant feels comfortable and free to discuss the claim."^{bbbb} Additionally, while the Guidelines state that "it is generally in the child's best interest for Asylum Officers to allow a trusted adult to attend an asylum interview with the child asylum applicant," the adult may not interfere with the asylum interview process or coach the UAC.^{cccc} Thus, it is up to the UAC to provide his/her claim without any sort of guidance or counsel from a court-appointed attorney, "trusted" adult, or guardian ad litem.^{dddd} Moreover, while the Guidelines reiterate that "the internationally recognized 'best interests of the child' principle is a useful measure for determining interview procedures for child asylum seekers...it does not play a role in determining substantive eligibility under the U.S. refugee definition."^{eeee}

The U.S. Department of Justice's Executive Office for Immigration Review released *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*.^{aaaaa} This replaces the OPPM 04-07 Interim guidelines.^{xxxx}

^{yyyy} In the past, UASC were taken into custody by INS officers, often intercepted at the ports of entry or illegal border crossings. They were then held in harsh conditions in "jail-like" facilities, often detained with American juvenile delinquents. A 2006 U.S. study on UASC conducted by Jacqueline Bhabha and Susan Schmidt, found that the percentage of UASC held in detention centers co-mingling with juvenile delinquents had reduced more than 30 percent.

^{zzzz} Bhabha, Jacqueline and Susan Schmidt. June 2006. *Seeking asylum alone in the United States*. Cambridge, MA: University Committee on Human Rights Studies, Harvard University.

^{aaaaa} U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

^{bbbb} Darymple, Joyce Koo. "Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors." *Third World Law Journal*. Boston College Winter (2006). Also available from the Lexis Nexis database.

^{cccc} CNN.com. 21 April 2000. *INS Guidelines for Children's Asylum Claims*. Available online at: <http://archives.cnn.com/2000/US/04/21/INS.ruling/index.html>; accessed on 27 July 2007.

^{dddd} A *guardian ad litem* is a person who has legal authority to care for the personal interests and property of another. Courts frequently appoint guardian ad litem in divorce or custody cases in order to represent the best interests of minor children.

^{eeee} Ibid.

Specific reference to the principle of Best Interest of the Child in the 2007 document continues the 2004 statement that U.S. asylum law does not allow the Child's Best Interest to be a determining factor in adjudicating an asylum claim.^{ffff}

The concept of "best interest of the child" does not negate the statute or the regulatory delegation of the Attorney General's authority, and cannot provide a basis for providing relief not sanctioned by law. Rather, this concept is a factor that relates to the immigration judge's discretion in taking steps to ensure that a "child-appropriate" hearing environment is established, allowing a child to discuss freely the elements and details of his or her claim.

The 2007 Guidelines are similar to the 2004 Interim Guidelines and to those released in 1998. They emphasize the creation of a more child-friendly court environment to ensure that the child's claim is fairly heard and require the adoption of child-friendly standards for hearings and training of all immigration judges.

Yet, the 2007 Guidelines also point out that despite the Immigration and Naturalization Act's (INA) prevention of "immigration judges to appoint a legal representative or a guardian ad litem...Immigration judges should encourage the use of appropriate pro bono resources whenever a child respondent needs a legal representative [including a guardian ad litem]."^{ggggg} The 2007 Guidelines further acknowledge that a legal representative or guardian ad litem "have the potential to increase a child's understanding of the proceedings and to improve the child's communication with his or legal representative."^{hhhhh} Some advocates have advocated for the importance of a guardian ad litem as they are able to assist UACs in the following: learning the child's views; helping develop the child's awareness of the available options; and acting as the child's spokesperson/representative throughout immigration proceedings.ⁱⁱⁱⁱ

Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) is the only immigration provision that takes into account the "best interests of the child" principle. SIJS assists certain undocumented children who are in the state juvenile system obtain legal immigration status. The following criteria are used in order to apply for SIJS:ⁱⁱⁱⁱ

- Dependency, delinquency or other juvenile court proceedings;
- The applicant must have been "deemed eligible for long-term foster-care";
- The court or some administrative agency must rule that it is not in the "best interests of the child" to return to his/her country of origin;
- The court must make it clear that its findings and orders are based on abuse, neglect or abandonment of the child;
- The juvenile court judge should sign an order making the above findings;
- Applicant must be under 21 and unmarried.^{kkkk}

^{ffff} U.S. Department of Justice Executive Office for Immigration Review. 22 May 2007. *Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children*. Available online at: www.usdoj.gov/eoir/efoia/ocij/oppm07/07-01.pdf; accessed on 22 January 2008.

^{ggggg} Ibid.

^{hhhhh} Ibid.

ⁱⁱⁱⁱ Young, Wendy. "Refugee Children at Risk." *Human Rights Magazine* (Winter 2001). Available online at: www.abanet.org/irr/hr/winter01/young.html; accessed on 27 July 2007.

^{jjjj} Immigrant Legal Resource Center. August 2001. *Special Immigrant Juvenile Status for Children in the Dependency System*. San Francisco, CA: Immigrant Legal Resource Center.

^{kkkk} Additional information on SIJS can be found on the following websites: Immigrant Legal Resource Center at: <http://www.ilrc.org/sijs.php> AND Bhabha and Schmidt. *Seeking asylum alone in the United States* (chapters 3-4).

Child's Best Interests in Domestic Child Welfare and Immigration Systems in Canada

As Canada is a Federation of Provinces, each province has its own independent child welfare system.ⁱⁱⁱⁱ While Canada does not possess national legislation specific to unaccompanied minors, the *Immigration and Refugee Protection Act* contains key provisions for children. In addition, the Canadian Immigration and Refugee Board (IRB) issued *Guidelines on Child Refugee Claimants* referencing unaccompanied minors.

Immigration and Refugee Protection Act (28 June 2002)

The *Immigration and Refugee Protection Act (IRPA)* was entered into force on 28 June 2002, replacing the *Immigration Act*. While the Act contains numerous references to children, there is no specific reference to URMs. Yet, it does contain key protection provisions for children. On detention, the Act states the same as in the CRC: “a minor child shall be detained only as a measure of last resort, taking into account the other applicable ground and criteria including the best interests of the child.”^{mmmmmm} Additionally, the Act includes the following provisions concerning children in detention:ⁿⁿⁿⁿⁿ

- The availability of alternative arrangements with child protection services or child welfare agencies for the care and protection of minors;
- The type of detention facility and conditions of detention;
- The availability of services in the detention facility for children, including education, counseling and recreation.

Furthermore, the Act requires a legal representative be appointed for all persons under 18 years, who is subject to immigration proceedings before the Immigration and Refugee Board:

The requirements for being a Designated Representative are: (1) to be 18 years of age or older; (2) to understand the nature of the proceedings; (3) to be willing and able to act in the best interests of the child; (4) not to have interests that conflict with those of the child.^{ooooo}

Child Asylum-seekers^{ppppp}

Guidelines on Child Refugee Claimants (30 September 1996)

The IRB is an “independent quasi-judicial administrative tribunal created by the Parliament to hear refugee status claims, appeals, investigations and reviews of detention orders.”^{qqqqq} The IRB issued its *Guidelines on Child Refugee Claimants* on 30 September 1996 to address the “specific procedural issue of the designation of a representative and the more general procedural issue of the steps to be followed in

ⁱⁱⁱⁱ As Canada is a Federation of Provinces, each province has its own independent child welfare system; there is no uniform law for comparison. Thus, the author chose to solely on immigration specific laws relating to minors in Canada (each State in the United States also has its own child welfare system; however, for purposes of this study, the author after an initial review of various state child welfare laws, chose Michigan as the representative state).

^{mmmmmm} International Bureau for Children’s Rights. March 2004. *Best Practice Statement: Separated Children in Canada*. Montreal: International Bureau for Children’s Rights.

ⁿⁿⁿⁿⁿ Ibid., page 47.

^{ooooo} Ibid.

^{ppppp} Additional information can be found on the Canadian Council for Refugees (CCR) website at:

<http://www.ccrweb.ca/eng/engfront/frontpage.htm>.

^{qqqqq} Ibid., page 48.

processing claims by unaccompanied children.”^{rrrrr} These guidelines also state that primary consideration should be focused on the “best interests of the child,” taking into account his/her cultural background, previous experiences, age and gender.

While the Guidelines include criteria for a designated representative to assist the URM in all immigration proceedings, it explicitly states that “In addition to the designated representative, the child has the right to be represented by legal or other counsel.”^{sssss} The criteria mirrors those outlined in the IRPA and also go into detail on the duties of the designated representative. The designated representative is to conduct the following:^{ttttt}

- To retain counsel and to instruct counsel or to assist the child in instructing counsel;
- To make other decisions with respect to the proceedings or to help the child in making these decisions;
- To inform the child of the various stages of the proceedings;
- To assist in obtaining evidence of the claim;
- To act in the best interests of the child.

The Guidelines also highlight the importance of URM cases which “warrant special attention in the process of determining their claims of refugee status.”^{uuuuu} In particular, the Guidelines include the following procedures with respect to the “best interests of the child” standard:^{vvvvv}

- The claims of URM’s should be identified as soon as possible;
- The Convention Refugee Determination Division (CRDD) panel and the Refugee Claim Officer should be immediately assigned to the claim and should retain responsibility for the claim until completion;
- The claim should be given scheduling and processing priority because it is in the “best interests of the child” to have their claim processing as quickly as possible;
- A designated representative should be appointed as soon as possible following the assignment of the panel to the claim;^{wwwww}
- The panel should consider the age and mental development of the child; the capacity of the child to recall past events and the time that has elapsed since the events; and the capacity of the child to communicate his/her past experiences.

Moreover, when assessing evidence, the CRDD is to give weight to the URM’s oral testimony, bearing in mind that the minor may not be able to provide accurate details about their claim, or whether they are unable to express their claim due to fear and/or trauma.

While the purpose of the Guidelines is to inform a decision based on the “best interests of the child” standard, there is no timeframe for decision.

Child's Best Interests in Domestic Child Welfare and Immigration Systems in the UK

The UK has a number of provisions highlighting the protection needs of children.

^{rrrrr} Immigration and Refugee Board of Canada. 1996. *Child Refugee Claimants Procedural and Evidentiary Issues: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act*. Available online at: www.irb-cisr.gc.ca/en/references/policy/guidelines/child_e.htm; accessed 9 August 2007.

^{sssss} Ibid. A (I).

^{ttttt} Ibid., A (II).

^{uuuuu} Ibid., A (III).

^{vvvvv} Ibid.

^{wwwww} It is important to note that the designated representative is only called after the claim is presented to the panel and not prior in the refugee process. This limits the child’s ability to prepare their claim.

Children Act of 1989

The Parliament introduced the *Children Act of 1989* on 16 November 1989. The Act calls upon the court to keep the child's welfare as the paramount consideration regarding the child's upbringing as well as the administration of the child's property.^{xxxxx} The Act further calls upon the court to appoint a guardian, if the child has no parents or relatives to take care of him. Concerning unaccompanied child asylum seekers, they are assisted by Local Authority Social Service Departments (LASSD).^{yyyyy}

Children Act of 2004

The Parliament updated the *Children Act of 1989* on 15 November 2004. While the "best interests of the child" principle is not explicitly highlighted, Section 13 of the 2004 Act improves upon the LASSD and creates Local Safeguarding Children Boards (LSCB) to promote the welfare and of children in a geographic area.^{zzzzz} Moreover, the LSCB are to "ascertain the child's wishes and feelings regarding the action to be taken with respect to him [or her]...give due consideration (having regard to his age and understanding) to such wishes and feelings of the child."^{aaaaaaa}

The Local Safeguarding Children Boards Regulations 2006

The Parliament issued *Local Safeguarding Children Boards Regulations* on 16 January 2006, which highlighted the functions of LSCB. It calls upon the LSCB to establish procedures and policies to promote the welfare of children, specifically:^{bbbbbb}

- Training of persons who work with children or in services affecting the safety and welfare of children;
- Recruitment and supervision of persons who work with children;
- Safety and welfare of children who are privately fostered;
- Cooperation with neighboring children's services authorities.

National Service Framework for Children (30 September 2005)

The *National Service Framework for Children* was developed on 30 September 2005. The Framework was first developed for Wales, with the intention of expansion into national standards.

"The development of the Children's NSF began in September 2002 with the aim of improving quality and equity of service delivery through the setting of national standards."^{cccccc} The Framework was created as a collaborative effort between health and social service providers, with an aim for "all children and young people [to] achieve optimum health and well being and are supported in achieving their potential."^{dddddd}

^{xxxxx} Acts of Parliament. *Children Act of 1989*. 16 November 1989. Available online at:

http://www.opsi.gov.uk/acts/acts1989/Ukpga_19890041_en_1.htm; accessed 13 August 2007.

^{yyyyy} Home Office Border and Immigration Agency. 10 September 2004. *Implementation of Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers*. Available online at: <http://www.ind.homeoffice.gov.uk/6353/6356/17715/closedconsultationscouncild3.pdf>; accessed 13 August 2007.

^{zzzzz} Acts of Parliament. *Children Act of 2004*. 15 November 2004. Available online at:

<http://www.opsi.gov.uk/acts/acts2004/40031--f.htm#53>; accessed on 13 August 2007.

^{aaaaaaa} *Ibid.*

^{bbbbbb} Acts of Parliament. *The Local Safeguarding Children Boards Regulations 2006*. 16 January 2006. Available online at: <http://www.opsi.gov.uk/SI/si2006/20060090.htm>; accessed 13 August 2006.

^{cccccc} National Service Frameworks. *Children's-National Service Frameworks*. 30 September 2005. Available online at: <http://www.wales.nhs.uk/sites3/home.cfm?orgid=441&redirect=yes>; accessed 13 August 2007.

^{dddddd} *Ibid.*

Child Asylum-seekers^{eeeeee}

New Asylum Model

The Home Office updated its asylum procedures and first released its *New Asylum Model* (NAM) on May 2005 and updated it again in May and June 2006. The aim of NAM was to “introduce a faster, more tightly managed asylum process with an emphasis on rapid integration or removal.”^{fffff} The NAM features new proposals for unaccompanied minors seeking asylum, specifically:^{gggggg}

- Children over 12 will be interviewed about their asylum claim;
- Unaccompanied minors seeking asylum will be given a designated Case Owner trained to work with minors. The Case Owner will see the case throughout the whole process—from the time the child claims asylum to the end of the process;
- Ensuring frequent and regular contact between the unaccompanied minor seeking asylum and the Case Owner.

Concerning the timeframe for the unaccompanied minor asylum procedures, the child will be expected to attend his/her first reporting event 10 days after claiming asylum.^{hhhhh} The purpose of this event is to introduce the child to his/her Case Owner and to have the asylum procedure explained. The child is also offered assistance in finding legal representation, if needed. While legal representation is not required by law, it is recommended that in addition to Case Owners, Unaccompanied minors are also assisted with legal representatives, who can provide pro-bono services. Under NAM, the Home Office is required to make decisions on children’s asylum claims within 35 working days. If rejected, the child asylum-seeker will have the opportunity to appeal the decision. In this situation, a decision on appeal can take up to 155 days.ⁱⁱⁱⁱⁱⁱ

Refugee Council’s Children’s Panel

The Refugee Council’s Children’s Panel was created with the aim of assisting children in applying for asylum in the UK. The Refugee Council works closely with the Home Office in this regard. “The Home Office should refer an unaccompanied asylum-seeking child or young person to the Panel within 24 hours of the young asylum seeker lodging an application.”ⁱⁱⁱⁱⁱⁱ

International Laws and Standards

The League of Nations in 1924, adopted a declaration focused solely on children’s rights. This instrumental declaration paved the way for future international and regional instruments related to the rights of refugee children.

Geneva Declaration of the Rights of the Child (26 September 1924)

^{eeeeee} Additional information on asylum-seekers in the UK can be found on the London Asylum Seeker Consortium at: <http://westminster.gov.uk/communityandliving/ethniccommunities/asylumseekers/aboutus.cfm>.

^{fffff} Refugee Council. August 2007. *The New Asylum Model*. Available online at:

www.refugeecouncil.org.uk/policy/briefings/2007/nam.htm; accessed 14 August 2007.

^{gggggg} Refugee Council. Spring 2007. *Asylum Process for Unaccompanied Children*. Available online at:

<http://www.refugeecouncil.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=8BBA39D6-FFA2-47AA-A5D7-2C885BD0E201&mode=link&guid=a6ca754b12cc47aa81a9f261bcde7492>; accessed 13 August 2007.

^{hhhhh} Ibid.

ⁱⁱⁱⁱⁱⁱ Refugee Council. August 2007. *The New Asylum Model*. Available online at:

www.refugeecouncil.org.uk/policy/briefings/2007/nam.htm; accessed 14 August 2007.

^{jjjjj} Refugee Council. Spring 2007. *Asylum Process for Unaccompanied Children*. Available online at:

<http://www.refugeecouncil.org.uk/OneStopCMS/Core/CrawlerResourceServer.aspx?resource=8BBA39D6-FFA2-47AA-A5D7-2C885BD0E201&mode=link&guid=a6ca754b12cc47aa81a9f261bcde7492>; accessed 13 August 2007.

The *Geneva Declaration of the Rights of the Child* was adopted by the League of Nations on 26 September 1924. The Declaration recognizes that “the child must be the first to receive relief in times of distress” and that the “orphan or waif must be sheltered and succored.”^{kkkkkk}

United Nations Declaration of the Rights of the Child (20 November 1959)

The UN *Declaration of the Rights of the Child* was adopted by the UN General Assembly on 20 November 1959. This Declaration complemented the 1924 Geneva Declaration and provided additional details relating to children’s rights.^{lililil}

Principle 2: The child shall enjoy special protection, and shall be given opportunities by law to enable him/her to develop physically, mentally, morally and socially in a healthy and normal manner and in conditions of freedom and dignity. The enactment of national laws/legislation shall have the “best interests of the child” as the paramount consideration.

Principle 6: Society and the public authorities have to extend particular care to children without a family and to those without adequate means of support.

Principle 7: The best interests of the child shall be the guiding principle for his/her care and education.

Principle 8: The child shall in all circumstances be amongst the first to receive relief and protection.

Convention on the Rights of the Child (20 November 1989)

The Convention on the Rights of the Child (CRC)^{mmmmmm} was introduced on 20 November 1989 and recognized children’s rights as fundamental human rights. The Convention acknowledged that human rights are inherent to all human beings irrespective of age. General principles highlighted in the CRC specific to refugee or unaccompanied children:ⁿⁿⁿⁿⁿⁿ

Article 3 – The best interests of children shall be the primary consideration in all actions concerning children, whether undertaken by private or public social welfare institutions, courts of law or administrative/legislative bodies.

Article 6 – States shall ensure to the maximum extent possible, the survival and development of the child.

Article 11 – States shall take measures to combat the illicit transfer and non-return of children abroad.

Article 12 – States shall assure the views of the child be due weight in accordance with the child’s age and level of maturity.

^{kkkkkk} League of Nations. *Geneva Declaration of the Rights of the Child*. 26 September 1924. Available online at: http://www.unicef.org/vietnam/01_-_Declaration_of_Geneva_1924.PDF; accessed on 7 August 2007.

^{lililil} UN General Assembly. *Declaration of the Rights of the Child 1386 (XIV)*. 20 November 1959. Available online at: www.unhcr.org/html/menu3/b/25.htm; accessed on 7 August 2007.

^{mmmmmm} The United States signed the CRC in February 1995, but has yet to ratify the Convention.

ⁿⁿⁿⁿⁿⁿ UN General Assembly. *Convention on the Rights of the Child*. 20 November 1989. Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b38f0>; accessed on 26 July 2007.

The child shall be provided the right to be heard in any judicial and administrative proceedings affecting the child, or through a representative, in a manner consistent with national law.

Article 20 – A child temporarily deprived of his/her family environment, or in whose best interest cannot be allowed to stay in that environment, shall be entitled to special protection provided by the State.

State parties shall in accordance with their national laws; ensure alternative care for such a child.

Article 22 – States must take measures to ensure that children who are seeking refugee status or is considered a refugee according to international or national law, receive protection and humanitarian assistance so that they can enjoy their rights as set out in the Convention and other applicable human rights instruments.

Article 37(b) – No child shall be deprived of his/her liberty. The arrest and or detention of the child shall be in conformity to national laws and shall be used only as a measure of last resort in the shortest period of time.

(d) Every child deprived of his/her liberty shall have access to legal assistance and the right to challenge the legality of the deprivation of his/her liberty before a court or impartial authority.

Regional Instruments

American Convention on Human Rights (22 November 1969)

The *American Convention on Human Rights* was adopted on 22 November 1969 in San Jose, Costa Rica by the Organization of American States (OAS).^{ooooo} The “best interests of the child” was highlighted in Article 17 in the context of family dissolution: “In the case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.”^{ppppp} While the American Convention did not specifically focus on unaccompanied minors, Article 19 highlighted the rights of the child. It states that every minor has “the right to the measures of protection required by his condition as a minor on the part of his family, society and the state.”^{qqqqq}

African Charter on the Rights and Welfare of the Child (July 1990)

The *African Charter on the Rights and Welfare of the Child* was adopted by the Assembly of Heads of State and the Organization of African Unity (OAU—now called the African Union) in July 1990. It is important to point out that the African Charter mirrors the CRC in making the “best interest of the child” the primary consideration in all actions concerning children.^{rrrrr} Article 20 further states that parents or persons responsible for the child should “ensure that the best interests of the child are their basic concern at all times.”^{sssss}

With respect to refugee unaccompanied children (URM):^{ttttt}

^{ooooo} The U.S. signed the Convention; however, have yet to ratify it. Canada has not yet signed the Convention.

Additional information can be found on the OAS website: <http://www.oas.org/juridico/english/Sigs/b-32.html>.

^{ppppp} Inter-American Specialized Conference. *American Convention on Human Rights*. 22 November 1969. Available online at: <http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm>; accessed 13 August 2007.

^{qqqqq} Ibid.

^{rrrrr} See Article 4 on the Best Interests of the Child—African Charter on the Rights and Welfare of the Child.

^{sssss} Organization of African Unity, *African Charter on the Rights and Welfare of the Child*, 11 July

1990. CAB/LEG/24.9/49 (1990). Available online at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b38c18>; accessed on 25 July 2007.

^{ttttt} Ibid.

Article 23: States Parties to the present Charter shall take all appropriate measures to ensure that a child seeking refugee status or who is considered a refugee by all applicable international standards, whether unaccompanied or accompanied by parents, close relatives or guardians, receive appropriate protection and humanitarian assistance. When no parents or legal guardians can be found, the child shall be accorded the same protection as any child.

Article 25: States Parties shall ensure that the child who is parentless, or who is temporarily or permanently deprived of his family, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative care, including foster care placement, or placement in suitable institutions responsible for the care of separated or unaccompanied children.

Although the African Charter is specific to African nations, the fact that the OAU recognized that best interests of the child is paramount to all actions affecting children, coupled with alternative care for separated or unaccompanied children.

European Union Laws and Standards

Council Resolution on Minimum Guarantees for Asylum Procedures (20 June 1995)

The Council of the European Union (EU) introduced the *Resolution on Minimum Guarantees for Asylum Procedures* on 20 June 1995.^{uuuuuu} This Resolution called for increased measures for States to adhere towards URMs. In particular, “provision must be made for unaccompanied minors seeking asylum to be represented by a specifically appointed adult or institution...during the interview, unaccompanied minors maybe be accompanied by that adult or representative of the institution. These persons are to protect the child’s interests.”^{vvvvvv} The Resolution further requires an assessment of the child’s mental state in order to determine the child’s best interests.

European Convention on the Exercise of Children’s Rights (25 January 1996)

The Council of Europe introduced the *European Convention on the Exercise of Children’s Rights* on 25 January 1996.^{wwwww} While it does not specifically mention URMs, it focuses on the “best interests of the child” as a whole. The Preamble requires Member States of the Council of Europe to promote the best interests of the child and that due weight be given to the views of the child.^{xxxxxx} Key recommendations relating to the “best interests of the child”:^{yyyyyy}

Chapter I - Article 1: The object of the current Convention is in the best interests of children, to promote their rights, by ensuring that children are themselves or through other persons, informed and allowed to participate in proceedings affecting them before a judicial authority.

^{uuuuuu} The *Resolution on Minimum Guarantees for Asylum Procedures* was adopted on 19 September 1996.

^{vvvvvv} Council of the European Union. *Council Resolution on Minimum Guarantees for Asylum procedures*. 20 June 1995. Available online at:

http://www.refugeelawreader.org/444/Council_Resolution_of_20_June_1995_on_Minimum_Guarantees_for_Asylum_Procedures.pdf; accessed on 6 August 2007.

^{wwwww} The *European Convention on the Exercise of Children’s Rights* was adopted on 1 July 2000.

^{xxxxxx} Council of Europe. *European Convention on the Exercise of Children’s Rights*. 25 January 1996. Available online at: <http://conventions.coe.int/Treaty/en/Treaties/Word/160.doc>; accessed on 6 August 2007.

^{yyyyyy} Ibid.

Chapter II – Article 3: A child shall be granted, and shall be entitled to request the following rights: (1) to receive all relevant information; (2) to be consulted and express his/her views; and (3) to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Article 4: The child shall have the right to apply, in person or through other persons, for a special representative in proceedings before a judicial authority affecting the child.

Article 5: Children have the right to be assisted by an appropriate person of their choice in order to help them express their views, and the right to appoint their own representative. Children also have the right to apply for the appointment of a lawyer.

Article 6: In proceedings affecting a child, the judicial authority (before taking a decision) shall: (1) consider whether it has sufficient information in order to take a decision based on the best interests of the child and, where necessary, obtain further information; (2) consult the child in person or if necessary, through other persons, in a manner appropriate to his/her best interests; and (3) give due weight to the views expressed by the child.

Article 9: Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the authority to appoint a separate representative or a lawyer to represent the child.

***European Parliament Resolution on Measures to Protect Minors in the European Union
(20 January 1997)***

The European Parliament issued the *Resolution on Measures to Protect Minors in the European Union* on 20 January 1997. The European Parliament called upon EU nations to strengthen their national legislation and to conform to the recommendations outlined in the Resolution. Key findings:^{zzzzzz}

- Whereas the protection of minors means all coordinated social activity geared to the normal development of young people and the promotion of their abilities;
- Whereas the protection of children’s human rights in relation to adults needs to be extended and more precisely defined, in order to meet children’s needs;
- Whereas the special protection scheme for minors applying for asylum and refuge should be set up under rules governing the guarantees provided by Member States’ immigration and asylum procedures;
- Whereas a child temporarily or permanently removed from its family environment is entitled to the special protection and support of the State, which must safeguard other ways of caring for that child;
- Calls on the Member States to take into account the UNHCR recommendations on unaccompanied children seeking asylum;
- Urges Member States to admit URM’s to their territory with a view of reuniting them with their families and to ensure that they receive the same care as the States’ own children;
- Calls on Member States to step up efforts to ensure that children in care are looked after by specially trained personnel.

While the “best interest” principle is not highlighted in this Resolution, it calls upon Member States to consider UNHCR’s recommendations unaccompanied children seeking asylum, and to set up a protection scheme for all minors seeking asylum and refuge.

^{zzzzzz} European Parliament. *Resolution on Measures to Protect Minors in the European Union A4-0393/96*. 20 January 1997. Available online at: www.minori.it/cd/cd_lucca_2003/6/6.2.2_en.pdf; accessed on 30 July 2007.

***Council Resolution on Unaccompanied Minors who are Nationals of Third Countries
(26 June 1997)***

The Council of the EU introduced the *Council Resolution on Unaccompanied Minors who are Nationals of Third Countries* on 26 June 1997. This Resolution was meant to complement the *Resolution on Minimum Guarantees for Asylum Procedures*, introduced on 20 June 1995. This Resolution further recognizes the vulnerable situation of unaccompanied minors and requests Members States to abide by the following:^{aaaaaaa}

Article 2: Unaccompanied minors, who must remain at the border until a decision has been taken on their admission, should receive all necessary support and care to satisfy their basic needs.

Article 3: Unaccompanied minors, irrespective of their legal status, should be entitled to the necessary protection and care as outlined in national law or legislation.

For the purposes of applying the Resolution, Member States should provide for the necessary representation of the minor by: (1) legal guardianship; and (2) representation by an institution or national organization in charge of the care and well-being of children. When a guardian is appointed for an unaccompanied minor, the guardian should in accordance to national law, ensure that the minor's needs are duly met.

Article 4: Every unaccompanied minor should have the right to apply for asylum. Member States may reserve the right to require that a minor under a certain age cannot apply for asylum until he/she has the assistance of a legal guardian or a specifically appointed adult representative.

Member States should treat the processing of asylum applications by unaccompanied minors as urgent and expedient as possible.

Member States should place unaccompanied minors with adult relatives; with a foster family; or in a reception center with special provisions for minors.^{bbbbbb}

During any minor's asylum interview, they may be accompanied by a legal guardian, legal assistant or specially appointed adult representative. The asylum interview should be conducted by officers with the necessary experience or training. When an asylum application from an unaccompanied minor is examined, allowance should be made for the minor's age, maturity and mental development, and for the fact that he/she may have limited knowledge of the conditions in his/her country of origin.

Article 5: Where an unaccompanied minor is not allowed to stay in a Member State, the respective Member State may only return the minor to his/her country of origin or to a third country prepared to accept him/her—adequate reception and care must be made available. As long as return under these conditions is not possible, Member States should make it possible for the minor to stay in their territory.

Where appropriate, international organizations and NGOs, make ascertain the availability of reception and care facilities in the minor's country of origin or third country. A minor may not be

^{aaaaaaa} Council of the European Union. *Council Resolution on Unaccompanied Minors who are Nationals of Third Countries 97/C/221/03*. 26 June 1997. Available online at: www.childnoneurope.org/activities/unaccompanied/b/pdf/B%201.1.4.pdf; accessed on 31 July 2007.

^{bbbbbb} Despite that the *Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries* define minors as persons below the age of 18, the Resolution also states in Article 4, that minors who are 16 years and above, could be placed in accommodations centers for adult asylum seekers.

returned to a third country where the return would be contrary to the 1951 Geneva Convention or the Convention against Torture and other Cruel, Inhuman or Degrading Punishment, or the Convention on the Rights of the Child.

Council Directive on Laying Down Minimum Standards for the Reception of Asylum Seekers (27 January 2003)

The Council of the EU introduced *Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers* on 27 January 2003. This directive, while un-binding, is instrumental as it encouraged Member States to adopt uniform minimum standards for the reception of asylum seekers.

The Directive required Member States to keep the “best interests of the child” as the primary consideration when implementing provisions and legislation relating to minors. Furthermore, it called upon Member States to conduct the following:^{ccccc}

Article 19: Member States shall take measures to ensure the necessary representation of unaccompanied minors by legal guardianship or (where necessary) representation by an organization involved in the care and well-being of minors;

URMs who apply for asylum shall, from the moment they are admitted to the territory, be placed with (1) adult relatives; (2) with a foster family; (3) in accommodation centers with special provisions for minors; and (4) in other accommodations suitable for minors.^{ddddd}

As far as possible, siblings will be placed together, according to the best interests of the minor concerned. Changes of the residence of the minor shall be kept to a minimum.

Those working with minors shall have undergone appropriate training and shall be bound by the principle of confidentiality.

Opinion of the European Union Committee of the Regions on the Situation of Unaccompanied Minors in the Migration Process—the Role and Suggestions of Regional and Local Authorities (12 October 2006)

The EU’s Committee of the Regions issued an *Opinion on the Situation the Situation of Unaccompanied Minors in the Migration Process—the Role and Suggestions of Regional and Local Authorities* on 12 October 2006.^{ccccc} This Opinion emphasized that the protection of unaccompanied minors and young asylum seekers must be a priority for the European Union and for local and regional authorities of Member States. In particular, the EU’s Committee of the Regions highlighted their disappointment to “the forced return of unaccompanied minors and trafficking victims, without any explicit or binding reference to...the European Convention for the Protection of Human Rights and Fundamental Freedoms or the Convention of Children’s Rights of 1989.”^{ffffff} Additionally, the Opinion considered “it essential to

^{ccccc} Council of the European Union. *Council Directive 2003/9/EC Laying Down Minimum Standards for the Reception of Asylum Seekers*. 27 January 2003. Available online at: http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_031/l_03120030206en00180025.pdf; accessed on 1 August 2007.

^{ddddd} Despite that the *Council Resolution of 26 June 1997 on Unaccompanied Minors who are Nationals of Third Countries* define minors as persons below the age of 18, who arrive on a territory of a Member State unaccompanied by an adult or legal guardian, the Directive states that minors who are 16 years and above, could be placed in accommodations centers for adult asylum seekers.

^{eeeeee} This Opinion was adopted at its 66th plenary session, held on 12 October 2006.

^{ffffff} European Union Committee of the Regions. *Opinion on the Situation of Unaccompanied Minors in the Migration Process—the Role and Suggestions of Regional and Local Authorities*. 12 October 2006. Available online at: www.cor.europa.eu/cms/pages/documents/const/en/Avis/CdR%20136-2006.pdf; accessed on 1 August 2007. (page 6)

provide local and regional services, with specialized staff, to meet the particular needs of unaccompanied minors...and to carry out checks to combat the abuse of rights and fraud to which child protection systems are subjected to...’’^{ggggggg}

Furthermore, the Committee of the Regions found current legislation (in certain Member States) on the asylum process for unaccompanied minor asylum seekers to be insufficient and called for measures to offset any deficiencies. Specially, the Opinion raised the “absence of procedures in appointing a guardian, fully versed in asylum issues...[and] the absence of measures aimed at preventing discrimination and social exclusion, with particular regard to the detention of minors under the juvenile justice system.”^{hhhhhhh} The Opinion also emphasized that legal and political programs relating to unaccompanied minors should always be in the best interests of the child, including “measures geared to avoiding the removal of minors from their family and cultural environment, and ensuring maximum protection for minors when they have to leave their countries of origin because of their ideas or beliefs.”ⁱⁱⁱⁱⁱⁱⁱ

As indicated above, the Committee of the Regions recommended more uniform national laws or legal standards pertaining to unaccompanied minors. Therefore, they encouraged EU legislation that would recognize the status of unaccompanied minors and their fundamental rights. Specifically, the new legislation would aim to cover the following: (1) specific measures for determining the age and identity of an unaccompanied minor; (2) practical measures to prevent the abuse of rights and fraudulent use of the law; (3) specific terms and procedures in appointing a guardian; (4) preference for the fostering process; (5) the procedure for family tracing; (6) provisions on assisted return, only when in the best interest of the minor and always following consultation of the family, taking into account any international conventions on the protection of minors; (7) the involvement of the communities and families of origin: and (8) consultation with the minor on all matters and guaranteeing the public prosecutor’s involvement in the defense of his/her best interests.^{jjjjjjj}

The Committee of the Regions also recommended a biennial European Conference of Unaccompanied Minors and similar conferences to be held at the national and local levels with attendance from NGOs, IGOs and immigrant associations, to fully address the needs and issues of unaccompanied minors. Finally, the Committee sought to ensure full financing “by national and European authorities of resources for the reception and integration of unaccompanied minors.”^{kkkkkkk}

^{ggggggg} Ibid.
^{hhhhhhh} Ibid., page 7.
ⁱⁱⁱⁱⁱⁱⁱ Ibid.
^{jjjjjjj} Ibid., page 8.
^{kkkkkkk} Ibid., page 10.

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